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**COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW
LL.M PROGRAM-PUBLIC INTERNATIONAL LAW STREAM**

“The Interface between African Continental Free Trade Area Agreement and East African Community dispute settlement mechanisms”

Thesis Submitted in Partial Fulfilment of Master of Laws Degree (LL.M) in Public International Law at Addis Ababa University

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Declaration

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Abstract

This thesis examines the intersection between the dispute settlement mechanisms of the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC), focusing on jurisdictional clarity, risks of forum shopping, and the need for coordination protocols. It analyzes the overlapping jurisdiction between the two systems, leading to uncertainty in resolving trade disputes among common member states. The absence of a clear hierarchy between AfCFTA and EAC dispute settlement raises risks of forum shopping by disputing parties seeking favorable outcomes. Gaps exist in consolidating proceedings and enforcing decisions coherently across the interconnected frameworks. The research aims to provide insights into enhancing dispute resolution effectiveness by proposing guiding principles, legal harmonization strategies, and institutional coordination mechanisms governing interfaces between continental and regional trade agreements exemplified by the AfCFTA-EAC nexus. Overcoming these challenges can promote legal certainty, uphold the rule of law, and facilitate Africa's economic integration objectives.

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List of Acronyms

AfCFTA	African Continental Free Trade Area Agreement
RECs	The regional economic communities
EAC	East African Community
ECOWAS	Economic Community of West African States
EACJ	East African Court of Justice
SADC	Southern African Development Community
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DRB	Dispute Resolution Board
WTO	World Trade Organization

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Chapter One

Introduction

1.1 Background of the study

The African Continental Free Trade Agreement (AfCFTA) represents a landmark initiative in African economic integration, launched in 2018 to boost intra-African trade and foster economic development through continental integration.¹ The AfCFTA establishes a comprehensive framework for trade liberalization across the continent, including provisions for the resolution of trade disputes among its member states.²

Article 20 of the AfCFTA Agreement provides for the establishment of a Dispute Settlement Mechanism, stating:

"A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties."³

This mechanism is further elaborated in the Protocol on Rules and Procedures on the Settlement of Disputes, which outlines the structure and procedures for resolving trade conflicts within the AfCFTA framework.⁴

Concurrently, regional economic communities (RECs) such as the East African Community (EAC) have their own established trade agreements and dispute resolution mechanisms. The EAC, founded in 1999, operates under the Treaty for the Establishment of the East African Community, which provides for its own dispute settlement system.⁵ Article 23 of the EAC

¹ Agreement Establishing the African Continental Free Trade Area, signed March 21, 2018, entered into force May 30, 2019.

² Ibid. Article 4 (Objectives)

³ Ibid. Article 20 (Dispute Settlement).

⁴ Protocol on Rules and Procedures on the Settlement of Disputes, African Continental Free Trade Area Agreement, signed March 21, 2018.

⁵ Treaty for the Establishment of the East African Community, signed November 30, 1999, entered into force July 7, 2000.

Treaty establishes the East African Court of Justice (EACJ) as the principal judicial organ of the Community, with jurisdiction over the interpretation and application of the Treaty.⁶

The coexistence of the AfCFTA and RECs like the EAC, with overlapping memberships, creates several complexities in the realm of dispute resolution. Recent scholarly research has highlighted these challenges. Akinkugbe (2021) examines the dispute settlement framework of the AfCFTA, highlighting the importance of understanding the institutions involved. The analysis reveals that while the framework aims to provide a robust system, challenges related to compliance and the interaction with existing regional mechanisms like those of ECOWAS and SADC may pose significant issues.⁷

Akinkugbe (2020) examines the potential hurdles in the AfCFTA dispute settlement system, emphasizing the limited support for judicial dispute settlement in Africa. He suggests that consultations might offer the most practical approach for states to engage with the process, especially given the complexities introduced by existing regional mechanisms.⁸

The interface between global and regional trade dispute mechanisms has been a subject of scholarly attention. The overlap of jurisdictions between the WTO and AfCFTA dispute settlement systems presents significant challenges and requires careful delineation to avoid conflicts.⁹ This analysis offers valuable insights into potential challenges and solutions for managing the AfCFTA-REC dispute resolution interface.

Focusing specifically on the EAC, Ruhangisa (2020) reviews the functioning and jurisprudence of the East African Court of Justice (EACJ), including its role in adjudicating trade disputes

⁶ Ibid., Article 23 (Role of the Court of Justice).

⁷ Olabisi D Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP, 2021 forthcoming) https://digitalcommons.schulichlaw.dal.ca/scholarly_works/605/

⁸ Akinkugbe, O. D. (2020). "Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment." *African Journal of International and Comparative Law*, 30(1), 50-73.

⁹ <https://www.afronomicslaw.org/2019/10/16/concurrent-jurisdiction-between-the-world-trade-organization-and-the-afcfta-dispute-settlement-systems/>

among EAC partner states.¹⁰ This work provides crucial insights into the regional mechanism's operations and its potential interactions with the continental AfCFTA system.

The need for harmonization between the AfCFTA and REC dispute settlement mechanisms is emphasized by several scholars. The necessity of examining legal and institutional harmonization challenges between the AfCFTA dispute body and RECs is emphasized by the UNCTAD policy brief.¹¹ Similarly, The United Nations Economic Commission for Africa (UNECA) highlights the jurisdictional ambiguity and the lack of clear relationships between the AfCFTA dispute system and REC mechanisms, including those of the East African Community (EAC). This ambiguity poses challenges in the consolidation of multiple and overlapping trading regimes, necessitating a coherent and coordinated governance framework to ensure effective implementation of the AfCFTA.¹²

As the AfCFTA and REC agreements continue to expand in parallel, resolving jurisdictional uncertainty and institutional disconnects becomes vital for equitable and efficient trade dispute settlement in Africa. This study aims to address the research gap concerning the resolution of interfaces between continental and regional dispute mechanisms, using the interface issues between AfCFTA and EAC dispute avenues as an exemplar case deserving closer investigation.

Recent efforts by member states under the AfCFTA framework have highlighted the importance of integrating REC mechanisms to promote legal certainty and prevent jurisdictional overlaps. For instance, the ECOWAS Committee's September 2024 meeting in Abidjan underscored the role of regional collaboration in advancing the AfCFTA agenda, particularly through initiatives

¹⁰ Ruhangisa J E, 'The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)' in Erika de Wet and Annika Rudman (eds), *Judicial Organs of Regional Economic Communities in Africa* (T.M.C. Asser Press 2011) 19-42

¹¹ United Nations Conference on Trade and Development, 'African Continental Free Trade Area: Design of Dispute Settlement Mechanism Should Reflect Preferences and Realities of All Its Member States' (Policy Brief No 105, 2021) https://unctad.org/system/files/official-document/presspb2022d13_en.pdf accessed 20 July 2024

¹² United Nations Economic Commission for Africa, 'Governing the African Continental Free Trade Area–Regional Economic Communities Interface' (UNECA, 2021) <https://hdl.handle.net/10855/46717> accessed 29 July 2024.

such as the Guided Trade Initiative. These developments provide a promising backdrop for addressing the challenges analyzed in this study.¹³

1.2 Literature Review

The literature review delves into existing studies on the AfCFTA's dispute settlement system, modeled after the WTO's framework, and research on the EAC's dispute settlement mechanisms, including the East African Court of Justice. While some scholars have explored potential overlaps and conflicts between global dispute settlement bodies like the WTO and regional frameworks, there is a notable gap in the literature regarding the intersections and interfaces between the AfCFTA's continental dispute settlement system and the EAC's regional mechanism. Despite individual comprehensive analyses of these two systems, there is a lack of adequate analysis on how they may interact or conflict with each other when addressing trade disputes involving member states that belong to both the AfCFTA and EAC.

Scholars have offered various perspectives on the African Continental Free Trade Agreement (AfCFTA) dispute settlement system, highlighting both its potential strengths and areas for improvement. Vickers (2019) provides an essential understanding of how AfCFTA interfaces with various Regional Economic Communities (RECs) across Africa, emphasizing the need for clear delineation to support effective dispute resolution.¹⁴ Similarly, Hartzenberg (2011) highlight the importance of coordination and harmonization between the AfCFTA and RECs to optimize dispute resolution mechanisms.¹⁵ Akinkugbe (2021) offers an in-depth examination of the AfCFTA dispute settlement framework, highlighting its procedural aspects and initial

¹³ Economic Community of West African States, 'ECOWAS Pursues the Effective Implementation of the African Continental Free Trade Area (AfCFTA) Across the Region' (ECOWAS, 25 September 2024) <https://www.ecowas.int> accessed 23 December 2024., ECDPM, 'How AfCFTA-regional relations can support continental trade' (ECDPM, February 2024) <https://ecdpm.org> accessed 23 December 2024

¹⁴ Vickers B, 'The Relationship Between the AfCFTA and Africa's Regional Economic Communities (RECs)' in David Luke and Jamie Macleod (eds), *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (Routledge 2019)

¹⁵ T Hartzenberg, 'Regional Integration in Africa: Challenges and Prospects' (2011) *World Trade Organization Economic Research and Statistics Division Staff Working Paper*

implementations.¹⁶ Erasmus (2021) provides a detailed exploration of the AfCFTA dispute settlement mechanism, focusing on the panel process.¹⁷ Gathii and Akinkugbe (2021) offer comparative insights into various RECs, including the EAC, and their dispute resolution mechanisms.¹⁸

Regarding the EAC dispute settlement framework, Ruhangisa reviews the functioning and jurisprudence of the East African Court of Justice (EACJ), including its role in adjudicating trade disputes among EAC partner states.¹⁹ James Thuo Gathii explores the role and effectiveness of the East African Court of Justice (EACJ) in resolving trade and human rights disputes, highlighting trends, challenges, and enforcement issues.²⁰

Studies on overlaps between global and regional dispute mechanisms include insights from the UNCTAD Policy Brief No. 105, which explores the interplay between the AfCFTA dispute settlement framework and existing mechanisms under regional economic communities such as ECOWAS and SADC. It draws lessons on managing overlaps and recommends enhancing accessibility and efficiency in the dispute resolution process by adopting digital tools and reinforcing capacity-building measures.²¹ Oppong (2011) conducts a comparative analysis of the

¹⁶ OD Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2021)

¹⁷ G Erasmus, 'The institutions of the dispute settlement mechanism of the AfCFTA' (Tralac, 12 August 2020) <https://www.tralac.org/blog/article/15377-the-institutions-of-the-dispute-settlement-mechanism-of-the-afcfta.html> accessed 27 July 2024

¹⁸ JT Gathii, 'African Regional Trade Agreements as Legal Regimes' (Cambridge University Press 2011)

¹⁹ East African Court of Justice, 'EACJ: Ten Years of Operation' (EACJ, 2013) <https://www.eacj.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf> accessed 27 July 2024

²⁰ Ginsburg T. The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change. Edited by James Thuo Gathii. Oxford, UK: Oxford University Press, 2020. Pp. xxv, 384. Index. *American Journal of International Law*. 2021;115(4):777-780. doi:10.1017/ajil.2021.38

²¹ United Nations Conference on Trade and Development, 'African Continental Free Trade Area: Design of dispute settlement mechanism should reflect preferences and realities of all its member States' (Policy Brief No. 105, January 2023) https://unctad.org/system/files/official-document/presspb2022d13_en.pdf accessed 29 July 2024.

interface between global (WTO) and regional (ECOWAS) trade dispute mechanisms, examining jurisdictional tensions.²²

Erasmus (2021) highlights the importance of understanding the institutions involved in the AfCFTA dispute settlement mechanism, which is crucial for addressing potential legal and institutional challenges between AfCFTA and regional economic communities.²³

Hartzenberg et al. (2022) highlight jurisdictional ambiguity and the lack of clear relationships between the AfCFTA dispute system and REC mechanisms like the EAC's, emphasizing the need for further research in this area.²⁴

The existing scholarship provides rich analyses of the AfCFTA and EAC dispute settlement systems individually, covering aspects like institutional design, jurisdictional scope, procedural efficacy, compliance challenges, and comparative assessments against other regional frameworks. However, there is a notable gap in examining the critical interface between these continental (AfCFTA) and regional (EAC) dispute resolution mechanisms, which have overlapping memberships. This intersection raises concerns around jurisdictional ambiguity, risks of forum shopping between parallel systems, possibilities of conflicting judgments, and a need for coordinating compliance/enforcement between the interlinked bodies.

While some scholars have explored tensions between global (WTO) and regional trade dispute avenues, limited attention has been given to analyzing the specific issues arising from the nexus of AfCFTA and EAC dispute settlement regimes. Principles for delimiting jurisdictions, consolidating proceedings, harmonizing jurisprudence, and managing institutional relationships between these overlapping African dispute bodies remain underexplored.

Key research gaps identified include lack of empirical case analyses, legal harmonization challenges, compliance patterns, roles of non-state actors, and comparative benchmarking

²² Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011)

²³ G Erasmus, 'The Institutions of the Dispute Settlement Mechanism of the AfCFTA' (2021) *tralac Blog* <https://www.tralac.org/blog/article/15377-the-institutions-of-the-dispute-settlement-mechanism-of-the-afcfta.html> accessed 27 July 2024

²⁴ Hartzenberg T, Erasmus G, van Wyk D and Miritto CB, *African Trade and Integration: Law, Practice and the Courts* (Tralac 2022).

against best practices from other regions to elucidate ways of streamlining the AfCFTA-EAC interface. Filling these gaps through in-depth inquiry can inform frameworks for coherent, efficient dispute resolution spanning Africa's continental and sub-regional economic integration arrangements.

While the existing scholarship provides valuable insights into the individual frameworks of the AfCFTA and EAC dispute settlement mechanisms, there remains a significant gap in understanding their interface and potential conflicts. This study aims to address this gap by offering a comprehensive analysis of the jurisdictional overlaps, potential for forum shopping, and risks of conflicting judgments between these two systems. Unlike previous research that has largely focused on these mechanisms in isolation, this study will provide a nuanced examination of their interaction, particularly in cases involving member states common to both the AfCFTA and EAC. Furthermore, while some scholars have explored tensions between global (WTO) and regional trade dispute avenues, this research will specifically focus on the continental-regional interface within Africa, using the AfCFTA-EAC relationship as a case study. By doing so, this study will contribute to the development of principles for delimiting jurisdictions, consolidating proceedings, harmonizing jurisprudence, and managing institutional relationships between overlapping African dispute bodies. This approach will not only fill the current research gap but also provide practical insights for policymakers and legal practitioners navigating the complex landscape of trade dispute resolution in Africa.

1.3 Statement of the problem

The African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) have established separate dispute settlement mechanisms to address trade disputes among member states. However, the overlapping membership between AfCFTA and EAC raises complex jurisdictional questions and challenges regarding the hierarchy and interaction of these mechanisms (UNECA, 2021).²⁵

The lack of clarity on the jurisdictional boundaries and relationships between AfCFTA and EAC dispute resolution bodies creates ambiguity for parties involved in trade disputes. This ambiguity

²⁵ United Nations Economic Commission for Africa, 'Governing the African Continental Free Trade Area–Regional Economic Communities Interface' (UNECA, 2021) <https://hdl.handle.net/10855/46717> accessed 29 July 2024.

increases the risk of forum shopping, where disputants may seek to choose the forum they perceive as most favorable for their case, leading to inconsistent outcomes and potential fragmentation of dispute resolution efforts.

Furthermore, the absence of clear procedures for consolidating related disputes increases the likelihood of conflicting judgments if similar trade disputes are simultaneously heard in both AfCFTA and EAC forums. These issues undermine the effectiveness and coherence of trade dispute resolution under AfCFTA, hindering the smooth implementation of trade relations among member states.

Therefore, there is a critical need to define the interface between AfCFTA and EAC dispute settlement mechanisms. Addressing the current jurisdictional ambiguity, risks of forum shopping, and potential for conflicting judgments is essential for enhancing the efficiency, consistency, and credibility of trade dispute resolution within the African continent.

1.4 Research Questions

The African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) have established dispute resolution mechanisms to address trade disputes among their member states. However, the coexistence of these overlapping regional arrangements raises complex jurisdictional issues and challenges in determining the appropriate forum for resolving trade disputes. This study seeks to examine the ambiguity in the allocation of authority between AfCFTA and EAC dispute resolution bodies, the risks of forum shopping and conflicting judgments, and the need for clear principles and coordination protocols to govern their interaction. Through a comprehensive analysis, this research aims to provide insights into enhancing the effectiveness and coherence of dispute resolution mechanisms within the context of these interlinked regional trade agreements. The following are the research questions drawn from the identified literature gap:

1. How are authority and jurisdictional boundaries allocated between AfCFTA and EAC dispute resolution bodies, contributing to uncertainty in determining the appropriate forum for resolving trade disputes among common member states?

2. To what extent does the absence of a clear hierarchy between AfCFTA and EAC dispute settlement mechanisms increase the risk of forum shopping by disputing parties seeking more favorable outcomes?
3. How can the consolidation of dispute resolution proceedings between AfCFTA and EAC dispute resolution bodies mitigate the risk of conflicting judgments on interconnected trade disputes?
4. How can synergies be fostered between the continental (AfCFTA) and regional (EAC) dispute settlement systems to eliminate fragmentation while leveraging their specialized capabilities?
5. What legal and institutional frameworks should govern the interfaces between dispute resolution avenues under overlapping regional trade agreements, as exemplified by the interaction between the AfCFTA and EAC mechanisms?

1.5 Objective of the study

1.5.1 General Objective

The general objective of this study is to examine the interface between the dispute settlement mechanisms of the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC), focusing on jurisdictional clarity, risks of forum shopping, and the need for coordination protocols.

1.5.2 Specific Objectives

The specific objectives of this study are:

1. To analyze the allocation of authority and jurisdictional boundaries between the AfCFTA and EAC dispute resolution bodies, with a focus on the uncertainty in determining the appropriate forum for resolving trade disputes among common member states.
2. To assess the impact of the absence of a clear hierarchy between AfCFTA and EAC dispute settlement mechanisms on the risk of forum shopping by disputing parties seeking favorable outcomes.
3. To evaluate how the consolidation of dispute resolution proceedings between AfCFTA and EAC dispute resolution bodies can mitigate the risk of conflicting judgments on interconnected trade disputes.

4. To explore strategies for fostering synergies between the continental (AfCFTA) and regional (EAC) dispute settlement systems to eliminate fragmentation while leveraging their specialized capabilities.
5. To recommend legal and institutional frameworks that should govern the interfaces between dispute resolution avenues under overlapping regional trade agreements, using the interaction between the AfCFTA and EAC mechanisms as a case study.

1.6 Significance of the Study

The significance of this study lies in its potential to clarify the interface between the continental (AfCFTA) and regional (EAC) dispute settlement realms in Africa, which is crucial for cross-border trade and investment relationships. By defining jurisdictional authority and strengthening connectivity between AfCFTA and EAC dispute bodies, this research can provide greater coherence for economic actors in resolving trade differences under overlapping free trade agreements.

Establishing clear principles for the allocation of jurisdiction and hierarchy between the interconnected AfCFTA and EAC dispute mechanisms would enhance legal certainty for traders and disputing parties. The smooth implementation of the AfCFTA treaty also requires managing intersections with regional dispute avenues like the EAC system, highlighting the importance of this study.

The recommendations derived from this analysis can inform protocols for improved coordination between continental and regional dispute settlement regimes, aiding in the consolidation of proceedings and enforcements between institutions such as the AfCFTA Secretariat and the EAC Secretariat.

By addressing gaps that enable forum shopping between parallel AfCFTA and EAC dispute processes, the findings from this study can facilitate impartial trade dispute resolution and uphold rule-based trading arrangements among African countries, thereby bolstering the credibility of dispute settlement mechanisms.

Overall, bridging research gaps on reconciling continental and regional trade dispute systems can support stronger cross-border economic relationships under the AfCFTA. It can help devise frameworks to systematically connect interlinked dispute settlement avenues, which is

significant for promoting equitable, efficient, and harmonized dispute resolution architecture to enable AfCFTA objectives.

The significance of this study lies in promoting legal certainty, preventing fragmentation risks, and bolstering institutional coordination between AfCFTA and EAC trade dispute mechanisms that intersect under overlapping free trade agreements.

1.7 Research Methodology

The research methodology for this thesis employs a mixed-methods approach, integrating doctrinal analysis, comparative examination, and review of secondary literature. This methodological framework is designed to provide a comprehensive understanding of the dispute settlement mechanisms within the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC), particularly focusing on their interface and overlapping memberships.

Doctrinal research methodology: This approach involves a thorough examination of legal texts, agreements, protocols, roles, structures, jurisdictions, and procedures related to the AfCFTA and EAC dispute settlement mechanisms. Key documents to be analyzed include the AfCFTA Agreement, its Protocol on Rules and Procedures on the Settlement of Disputes, the EAC Treaty, and other relevant legal instruments governing the dispute bodies. This analysis is essential for understanding the mandate, scope, and functioning of the AfCFTA Dispute Settlement Body (DSB) and the EAC Dispute Settlement Mechanism (DSM).

Comparative analysis methodology: The study will conduct a comparative analysis of the dispute settlement processes and jurisdictions of the AfCFTA DSB and the EAC DSM. This comparative approach aims to identify areas of overlap, divergence, potential conflicts, and hierarchy issues between the two systems. Given the overlapping memberships of some countries in both the AfCFTA and the EAC, this analysis is crucial for understanding the complexities of the dispute resolution frameworks, procedures, and institutional structures.

Secondary data review: The research will also involve reviewing existing secondary data sources, including scholarly commentaries, reports, analyses, and case studies related to the AfCFTA and EAC dispute settlement mechanisms. Additionally, literature on the intersections between regional and global trade dispute frameworks will be reviewed. This secondary data

review will complement the primary research and provide insights from other scholarly works on the topic, helping to identify research gaps and potential areas for contribution.

Recognizing the potential limitations of this study, particularly the evolving nature of the AfCFTA and EAC frameworks and potential constraints in accessing certain information, several mitigation strategies will be employed. To address the dynamic nature of these mechanisms, this research will incorporate the most up-to-date information available at the time of writing, while also acknowledging that some aspects may be subject to change. Regular monitoring of official communications from both the AfCFTA Secretariat and EAC organs will be conducted throughout the research process to capture any significant developments.

To mitigate limitations in accessing information, particularly regarding ongoing or confidential proceedings, this study will utilize a diverse range of sources. These will include publicly available official documents, academic literature, expert commentaries, and, where possible, interviews with key stakeholders involved in AfCFTA and EAC dispute resolution processes. Additionally, the research will draw upon comparative analyses of similar regional-continental interfaces in other parts of the world to provide broader context and insights. By employing these strategies, this study aims to present a comprehensive and nuanced analysis despite the inherent challenges in researching evolving international trade mechanisms.

Overall, this mixed-methods approach provides a robust framework for investigating the complex jurisdictional issues, risks, and coordination challenges arising from the interconnected AfCFTA and EAC dispute settlement mechanisms. By combining doctrinal analysis, comparative examination, and review of secondary literature, the research methodology aims to offer a comprehensive and nuanced understanding of the interface between these two regional trade dispute resolution systems.

1.8 Scope of the Study

The scope of this study is to conduct a comprehensive analysis of the interface between the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) dispute settlement mechanisms. The study will focus on clarifying the jurisdictional challenges, risks associated with forum shopping, and the complexities of coordination and harmonization between these two regional trade dispute resolution systems.

Specifically, the study will involve a detailed examination of the legal texts, agreements, protocols, roles, structures, jurisdictions, and procedures governing the AfCFTA and EAC dispute settlement mechanisms. It will also undertake a comparative analysis of the dispute settlement processes and jurisdictions of the AfCFTA Dispute Settlement Body (DSB) and the EAC Dispute Settlement Mechanism (DSM) to identify areas of overlap, divergence, potential conflicts, and hierarchy issues between the two systems.

To achieve this, the study will review existing secondary data sources, such as scholarly commentaries, reports, analyses, and case studies related to the AfCFTA and EAC dispute settlement mechanisms. Additionally, it will review literature on the intersections between regional and global trade dispute frameworks to complement the primary research.

Geographically, the study will focus on the African continent, with particular attention to countries that are members of both the AfCFTA and the EAC. The temporal scope will encompass developments since the establishment of the AfCFTA and the EAC, with a focus on recent trends and advancements in their dispute settlement mechanisms.

Overall, this study aims to contribute to the existing body of knowledge by providing insights into enhancing the effectiveness and coherence of dispute resolution mechanisms within the context of these interlinked regional trade agreements. It is expected that the findings of this study will have implications for trade relations and economic integration in Africa, ultimately contributing to the broader goal of promoting sustainable development and prosperity on the continent.

1.9 Limitations of the Study

While this research aims to provide a comprehensive analysis of the interface between the AfCFTA and EAC dispute settlement mechanisms, several limitations should be acknowledged:

1. **Evolving Nature of Frameworks:** Both the AfCFTA and EAC dispute settlement frameworks are relatively new, and their implementation is still evolving. As such, there may be limited precedents or practical cases to draw upon for a comprehensive analysis of their intersection.

2. **Access to Information:** The study may be constrained by the availability and accessibility of official documents, records, and data related to the functioning of the AfCFTA and EAC dispute settlement bodies, especially regarding ongoing or confidential proceedings.
3. **Theoretical Emphasis:** Given the nascent stage of these dispute settlement mechanisms, the research may have a stronger theoretical and analytical focus, with limited empirical data or case studies to examine.
4. **Geopolitical Factors:** The research may not fully capture the geopolitical dynamics, power relations, and political considerations that could influence the effective implementation and coordination of dispute settlement mechanisms between African states.
5. **Scope Limitation:** While the study focuses on the AfCFTA-EAC interface, it may not delve deeply into the intersections between the AfCFTA and other regional economic communities (RECs) in Africa, which could also present similar challenges.
6. **Rapidly Evolving Landscape:** The landscape of international trade agreements and dispute settlement mechanisms is constantly evolving, and new developments or amendments to existing frameworks may occur during the course of the research, potentially affecting the relevance or applicability of some findings.

Despite these limitations, the research aims to provide valuable insights and recommendations that can contribute to the ongoing efforts to streamline and harmonize the dispute settlement mechanisms of the AfCFTA and EAC, while acknowledging the need for continuous monitoring and adaptation as these frameworks evolves.

1.10 Organization of the Research

This research is structured into four main chapters: Introduction, The AfCFTA and The EAC Dispute Settlement Mechanisms, Areas of Intersection between the AfCFTA and EAC Dispute Systems, and Conclusions and Recommendations. The organization and content of each chapter are as follows:

Chapter One: Introduction

This chapter provides an overview of the research, including background information, literature review, and statement of the problem, objectives, significance, research questions, methodology, scope, and limitations of the study.

Chapter Two: The AfCFTA and the EAC Dispute Settlement Mechanisms

This chapter presents a detailed examination of the dispute settlement mechanisms established under the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC). It covers the following aspects:

- The AfCFTA Dispute Settlement Mechanism/Body: Mandate, jurisdiction, procedures, and institutional structure.
- The EAC Dispute Settlement Mechanism: Objectives, scope, procedures, and institutional framework.
- Comparative Analysis of the AfCFTA and EAC Dispute Settlement Mechanisms.

Chapter Three: Areas of Intersection between the AfCFTA and EAC Dispute Systems

This chapter identifies and analyzes the key areas of intersection, overlap, and potential conflicts between the AfCFTA and EAC dispute settlement mechanisms, including overlapping jurisdiction, hierarchy ambiguities, risks of forum shopping, and gaps in consolidating and enforcing decisions.

Chapter Four: Conclusions and Recommendations

This final chapter presents the conclusions drawn from the research, summarizing the main findings and implications. It also provides recommendations and potential strategies for addressing the challenges identified and streamlining the interface between the AfCFTA and EAC dispute settlement mechanisms.

Additionally, the research includes a bibliography section listing the relevant sources consulted, including books, journal articles, publications, international treaties, and agreements. This organization aims to provide a structured and comprehensive analysis of the research problem, beginning with an introduction to the topic, followed by an examination of the individual dispute settlement mechanisms, an analysis of their areas of intersection, and finally, conclusions and recommendations to address the identified challenges.

Chapter Two

The AfCFTA and the EAC Dispute Settlement Mechanism/Body

2.1 The AfCFTA Dispute Settlement Mechanism/Body

The Dispute Settlement Body (DSB) is established under Article 20 of the AfCFTA Agreement, which outlines its primary function of administering the Dispute Settlement Mechanism to resolve disputes arising between State Parties.²⁶ Article 20 specifies that the DSM shall be governed by the Protocol on Rules and Procedures on the Settlement of Disputes, which details the operational aspects and structure of the DSB.

The primary mandate of the AfCFTA DSB is to facilitate the settlement of disputes through various means, including consultations, mediation, and adjudication processes. Its overarching aim is to promote a predictable and transparent trading environment within the AfCFTA free trade area by fostering a consistent understanding and application of the Agreement among member states.²⁷

The DSB's jurisdiction covers disputes between AfCFTA State Parties concerning their rights and obligations under the Agreement. This jurisdiction extends to all areas covered by the AfCFTA Agreement, including its protocols. The AfCFTA Agreement contains 8 protocols, each with its own procedural nuances. Among them, areas like Intellectual Property and Competition Policy may require specialized attention due to their separate protocols and dispute resolution processes, which could present distinct challenges in harmonizing with regional mechanisms like those of the EAC.²⁸

In the event of a dispute, the DSB follows a well-defined procedure. Initially, the parties engage in consultations, which typically last for 60 days unless otherwise agreed, to resolve the matter

²⁶ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) art 20.

²⁷ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) art 2 of Protocol on Rules and Procedures on the Settlement of Disputes.

²⁸ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) arts 6, 7 and 8.

amicably.²⁹ If no resolution is reached within 60 days or if one party refuses to engage, consultations are deemed to have failed, and the process moves to the next stage. The DSB establishes a panel of experts within 10 days of the request, with both parties agreeing on the panelists or, if they cannot agree, the Secretariat appoints the members.³⁰ The panel examines the legal and factual aspects of the dispute as defined by the request for its establishment, and it issues a report with findings and recommendations.³¹ If a party disagrees with the panel's legal findings, it can appeal to the Appellate Body, which has the authority to uphold, modify, or reverse the legal conclusions but not factual determinations.³²

If a State Party fails to comply with the DSB's rulings, the Agreement provides for remedies such as compensation and the suspension of concessions or other obligations.³³ These measures are intended to encourage compliance and maintain the integrity of the dispute settlement system. The AfCFTA Dispute Settlement Body operates through a structured process emphasizing transparency, impartiality, and adherence to the agreed-upon rules and obligations under the Agreement. It serves as a critical institutional mechanism for resolving trade disputes among AfCFTA member states and promoting a rules-based trading system within the African Continental Free Trade Area.

2.1.1 Mandate, Jurisdiction, and Procedures

2.1.1.1 Mandate

The DSB's primary mandate is to administer and oversee the dispute settlement process within the AfCFTA agreements.³⁴ While Article 20 of the main AfCFTA Agreement establishes the DSB, its specific functions are detailed in the Protocol on Rules and Procedures on the Settlement of Disputes.

²⁹ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) art 7 of Annex on Rules and Procedures on the Settlement of Disputes.

³⁰ Ibid art 9.

³¹ Ibid art 9.

³² Ibid arts 20, 21 and 22.

³³ Ibid arts 25.

³⁴ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) art 20.

The DSB's mandate includes facilitating consultations, establishing panels, and adopting reports issued by panels or the Appellate Body as outlined in Article 5 of the Protocol on Rules and Procedures on the Settlement of Disputes. Article 5 further stipulates that the DSB oversees the surveillance of implementation of rulings and has the authority to authorize compensation or the suspension of concessions in cases of non-compliance. This ensures the effective enforcement of the AfCFTA Agreement and promotes adherence to the rule of law in trade disputes.

Specifically, the DSB's mandate includes:

1. Facilitating consultations between disputing parties to find amicable solutions.³⁵
2. Establishing panels to adjudicate disputes and issue reports with findings and recommendations.³⁶
3. Adopting panel and appellate body reports.³⁷
4. Maintaining surveillance of implementation of rulings and recommendations.³⁸
5. Authorizing suspension of concessions and other obligations under the covered agreements.³⁹

This overarching mandate involves several key responsibilities and functions:

1. Ensuring Consistent Interpretation: The DSB plays a crucial role in ensuring the administration and enforcement of the AfCFTA Agreement. According to Erasmus, the DSB oversees the adoption of panel and Appellate Body reports and maintains surveillance of the implementation of rulings, which fosters compliance with the Agreement's provisions.⁴⁰ While this indirectly promotes consistency in legal interpretation, the development of AfCFTA jurisprudence will likely emerge over

³⁵ African Continental Free Trade Area Agreement (adopted 21 March 2018, entered into force 30 May 2019) art 7 of Protocol on Rules and Procedures on the Settlement of Disputes.

³⁶ Ibid arts 9.

³⁷ Ibid arts 19.

³⁸ Ibid arts 24.

³⁹ Ibid arts 25.

⁴⁰ Gerhard Erasmus, What Disputes could be heard by the AfCFTA Dispute Settlement Mechanism? (Tralac Trade Law Centre, 28 Jul 2020) <https://www.tralac.org/blog/article/14802-what-disputes-could-be-heard-by-the-afcfta-dispute-settlement-mechanism.html> and The AfCFTA Dispute Settlement Mechanism as part of a continental Trade Regime - tralac trade law centre, 5 October 2021 <https://www.tralac.org/blog/article/15378-the-afcfta-dispute-settlement-mechanism-as-part-of-a-continental-trade-regime.html>

time as more disputes are resolved.

2. **Facilitating Dispute Resolution:** The DSB facilitates the resolution of disputes between state parties by providing avenues for consultations, mediation, and adjudication processes. As outlined in Article 20 of the AfCFTA Agreement, the DSB offers a rules-based adjudication mechanism aimed at resolving disagreements amicably through consultations whenever possible. When necessary, the DSB provides a formal adjudication process to ensure compliance with the Agreement.⁴¹
3. **Monitoring Compliance:** The DSB is mandated to monitor the implementation of its rulings and recommendations by state parties. It has the authority to authorize compensatory measures or the suspension of concessions in cases of non-compliance, ensuring the effective enforcement of its decisions.⁴²
4. **Promoting Legal Certainty:** By overseeing the dispute settlement process and developing a consistent body of jurisprudence, the DSB contributes to promoting legal certainty and predictability within the AfCFTA free trade area. This fosters a stable and transparent trading environment for economic actors” (Akinkugbe, 2020).⁴³
5. **Upholding the Rule of Law:** The DSB’s mandate is to uphold the rule of law within the AfCFTA framework by ensuring that member states adhere to their agreed-upon rights and obligations under the Agreement. Its decisions aim to reinforce the principles of fairness, impartiality, and the rule-based nature of the

⁴¹ Ibid, AfCFTA Agreement (2018) art 20.,

⁴² Akinkugbe, Olabisi D., Dispute Settlement: African Continental Free Trade Area (AfCFTA) (March 31, 2021). Max Planck Encyclopedia of International Procedural Law, Hélène Ruiz Fabri (Ed), Oxford University Press, Forthcoming, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825805 or https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825805

⁴³ Olabisi D Akinkugbe, ‘Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment’ (2020) 28 Afr J Intl & Comp L 138. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745

AfCFTA trading system.⁴⁴

2.1.1.2 Jurisdiction

The jurisdiction of the AfCFTA DSB is broad and applies to disputes between state parties concerning the rights and obligations under the AfCFTA Agreement's provisions. This includes, but is not limited to, issues related to trade in goods, services, and investment within the AfCFTA framework, as well as other rights and obligations outlined in the Agreement.⁴⁵

The DSB's jurisdiction under the AfCFTA Agreement extends to all areas covered by the Agreement's protocols, including competition policy, intellectual property rights, and investment, as outlined in Article 8 of the AfCFTA Agreement. While these protocols may establish specialized dispute settlement rules, the AfCFTA Dispute Settlement Mechanism remains an alternative for resolving state-to-state disputes arising from these protocols, ensuring consistency in the overall dispute resolution framework.

It is important to note that the DSB's jurisdiction is restricted to disputes between member states. It does not have the authority to adjudicate disputes involving non-state actors, such as private companies or individuals, unless they are brought by a state parties on their behalf.

2.1.1.3 Procedures

The AfCFTA Agreement establishes a structured process for dispute settlement, emphasizing amicable resolution through consultations and mediation before resorting to adjudication, as outlined in Articles 6 and 7 of the Protocol on Rules and Procedures on the Settlement of Disputes.⁴⁶ The key steps in the dispute settlement process are:

1. Consultations: When a dispute arises, the parties are required to engage in

⁴⁴ Akinkugbe, O. D., 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2019) 27 Afr J Int'l & Comp L 502.

⁴⁵ AfCFTA Agreement (2018), Protocol on Rules and Procedures on the Settlement of Disputes, art 3., Olabisi D Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2020) 28 Afr J Intl & Comp L 138. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745

⁴⁶ *AfCFTA Agreement* (2018) protocol on Rules and Procedures on the Settlement of Disputes, arts 6 and 7.

consultations with the aim of finding a mutually acceptable solution.⁴⁷ This stage encourages dialogue and negotiation between the parties before escalating the dispute further.

2. Good Offices, Conciliation, and Mediation: State Parties may at any time voluntarily undertake good offices, conciliation or mediation to resolve their disputes.⁴⁸ These processes are confidential and without prejudice to the rights of the State Parties in any further proceedings.
3. Panel Establishment: A State Party may request the establishment of a panel at any time during the dispute settlement process, including before or after engaging in good offices, conciliation, or mediation.⁴⁹ The request for a panel can be made immediately after the end of the consultation period if the dispute has not been settled.⁵⁰ The panel, typically consisting of three experts, examines the case, considers the evidence and arguments from both parties, and issues a report containing its findings and recommendations.
4. Appeal: If a party disagrees with the panel's legal findings, it can appeal the panel's report to the Appellate Body. The Appellate Body, a standing body composed of seven members, reviews the legal aspects of the case and can uphold, modify, or reverse the panel's legal conclusions.⁵¹
5. Implementation: The parties involved are required to comply with the DSB's rulings and implement the recommendations within a specified timeframe.⁵² This stage is crucial for ensuring the effectiveness of the dispute settlement process and promoting compliance with the Agreement's obligations.
6. Compensatory Measures: If a member state fails to comply with the DSB's rulings, the Agreement provides for compensatory adjustments or the suspension

⁴⁷ Ibid. art 7.

⁴⁸ Ibid. art 8.

⁴⁹ Ibid. art 9.

⁵⁰ Ibid, art 9(1).

⁵¹ Ibid, art 20.

⁵² Ibid, art 24.

of concessions to that member.⁵³ This enforcement mechanism serves as a deterrent against non-compliance and aims to maintain the integrity of the AfCFTA free trade area.⁵⁴

Throughout the dispute settlement process, the DSB emphasizes transparency, impartiality, and adherence to the rules and procedures outlined in the AfCFTA Agreement. This structured approach is designed to promote a predictable and rules-based trading environment within the African Continental Free Trade Area.

2.1.2 Institutional Structure

The AfCFTA Agreement establishes a comprehensive institutional framework to support the effective functioning of the Dispute Settlement Body (DSB) and the dispute settlement process. This institutional structure comprises several key components, each playing a specific role in facilitating the resolution of disputes among member states.

1. **Dispute Settlement Body (DSB):** The Dispute Settlement Body (DSB) of the AfCFTA is composed of representatives from all AfCFTA member states. It operates as a special session of the AfCFTA Council of Ministers when convened to address dispute settlement matters.⁵⁵ Each member state has one representative in the DSB, typically a high-ranking trade official or diplomat. The DSB is led by a chairperson, elected from among the member states' representatives. This composition ensures that all AfCFTA members have an equal voice in the dispute settlement process, reflecting the agreement's commitment to inclusivity and fair representation in trade governance.
2. **Panels:** When a dispute arises and proceeds to adjudication, the DSB establishes a panel to examine the case and issue a report with findings and recommendations. These panels are ad hoc in nature, formed specifically for each

⁵³ Ibid, art 25.

⁵⁴ Akinkugbe OD, 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2020) 28 Afr J Intl & Comp L 138.

⁵⁵ *AfCFTA Agreement* (2018) Annex 5 on Rules and Procedures on the Settlement of Disputes, art 5.

dispute, and typically consist of three panelists selected from a roster of experts. The panelists are nominated by AfCFTA member states and approved by the DSB based on their expertise and impartiality, ensuring the credibility and fairness of the adjudication process.⁵⁶

3. Appellate Body: The Appellate Body is a standing body composed of seven members serving four-year terms. Its primary function is to review panel reports that have been appealed by a party on legal grounds. The Appellate Body has the authority to uphold, modify, or reverse the legal findings of the panel, ensuring the consistent interpretation and application of the AfCFTA Agreement's provisions. Its rulings are final and binding, providing legal certainty and promoting the rule of law within the AfCFTA framework.⁵⁷
4. Expert Review Group: The AfCFTA Agreement provides for the establishment of an Expert Review Group as outlined in AfCFTA Agreement (2018), Annex 5 on Rules and Procedures on the Settlement of Disputes Article 16(5-6) and detailed in Annex 2. This group serves a specific technical function within the dispute settlement process. When a dispute involves scientific or technical matters, a panel may, at the request of a party to the dispute or on its own initiative, request a written report from an Expert Review Group on the relevant factual issues. The Expert Review Group's role is to provide objective assessment of the facts of a scientific or technical nature that have been presented by the parties to the dispute. It does not make legal interpretations or conclusions. The composition and procedures for the Expert Review Group are governed by Annex 2 of the dispute settlement protocol AfCFTA Agreement, ensuring that appropriate expertise is available to panels when dealing with complex technical issues.
5. Secretariat: The Secretariat plays a vital administrative and support role in the functioning of the AfCFTA Dispute Settlement Body.⁵⁸ It provides administrative and logistical support to the DSB, panels, and Appellate Body,

⁵⁶ Ibid. art 6 and 10.

⁵⁷ Ibid. art 20.

⁵⁸ Ibid. art 29.

ensuring the smooth operation of the dispute settlement process. The Secretariat facilitates communication, organizes meetings, manages documentation, and assists in the overall coordination of dispute settlement activities.

The institutional structure of the AfCFTA Dispute Settlement Body is designed to ensure transparency, independence, and due process in the resolution of disputes. Each component plays a specific role, contributing to the overall objective of promoting a predictable, rules-based, and fair trading environment within the African Continental Free Trade Area.

2.2 The EAC Dispute Settlement Mechanism

The East African Community (EAC) is a regional intergovernmental organization currently composed of seven member states: Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda, and the Democratic Republic of Congo (DRC).⁵⁹ The EAC has established a dispute settlement mechanism to address trade-related disputes and conflicts that may arise among its member states. The EAC dispute settlement mechanism aims to maintain the integrity of the regional integration process and promote the effective implementation of EAC agreements and protocols.

The East African Community (EAC) established a Dispute Settlement Mechanism (DSM) under the EAC Treaty to resolve disputes not only between Partner States but also involving individuals or legal entities regarding the interpretation or application of the treaty.⁶⁰ The DSM aims to ensure adherence to EAC commitments and objectives, promoting the effective implementation of EAC agreements and protocols.

The East African Court of Justice (EACJ) provides this mechanism, which is accessible to Partner States, the EAC itself, and legal and natural persons. Under Article 30 of the EAC Treaty, any person residing in a Partner State can refer matters to the Court, challenging the

⁵⁹ East African Community, 'About EAC' (East African Community, 2023) <https://www.eac.int/about-eac> accessed 30 July 2024.

⁶⁰ Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) art 23 <https://www.eac.int/documents/category/key-documents> accessed 30 July 2024.

legality of acts, regulations, directives, decisions, or actions of a Partner State or the EAC if they are believed to be unlawful or in violation of the Treaty's provisions.⁶¹

Furthermore, the Treaty provides for the Court's jurisdiction over disputes between the Community and its employees that arise out of the terms and conditions of employment or the interpretation and application of the staff rules and regulations.⁶²

2.2.1 Objectives, Scope, and Procedures

2.2.1.1 Objectives

The primary objectives of the EAC Dispute Settlement Mechanism (DSM) are multifaceted and aimed at promoting effective regional integration and adherence to the EAC Treaty. These objectives encompass:

1. **Compliance and Adherence:** Ensuring that EAC Partner States comply with their obligations and commitments undertaken under the EAC Treaty and associated agreements.⁶³ The DSM serves as a mechanism to hold member states accountable for their actions and commitments.⁶⁴
2. **Violation Determination:** Enabling the determination of whether an EAC Partner State has violated the rules and provisions of the EAC Treaty or related instruments.⁶⁵ The DSM has the authority to examine alleged violations and recommend remedies for resolution.⁶⁶

⁶¹ Ibid. art 30.

⁶² Ibid. art 31.

⁶³ East African Community. (1999). Treaty for the Establishment of the East African Community. Article 23., Gathii, J. T. (2011). African Regional Trade Agreements as Legal Regimes. Cambridge University Press. pp. 268-270.

⁶⁴ H Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010) 54(1) Journal of African Law 74

⁶⁵ Treaty for the Establishment of the East African Community (1999) Articles 23, 27., J T Gathii, African Regional Trade Agreements as Legal Regimes (Cambridge University Press 2011) 271-273.

⁶⁶ H Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010) 54(1) Journal of African Law 74-94.

3. Fair and Transparent Procedures: The EAC Treaty establishes a judicial system through the East African Court of Justice (EACJ), providing fair, transparent, and consistent procedures for settling disputes. The EACJ serves as the primary judicial organ for resolving conflicts within the EAC framework.⁶⁷ Unlike some other international dispute settlement mechanisms, the EAC system does not involve panels or an appellate review process. Instead, the EAC Treaty establishes a two-tier judicial system through the East African Court of Justice (EACJ), a First Instance Division and an Appellate Division and it operates as a formal court system with original and appellate jurisdictions within the same institution.⁶⁸ These judicial procedures promote due process and impartiality in the resolution of disputes among Partner States, as well as cases brought by legal and natural persons within the Community.⁶⁹
4. Rights Preservation: Preserving the rights of EAC Partner States and stakeholders, such as individuals and businesses, under the EAC Treaty.⁷⁰ The DSM, through the East African Court of Justice (EACJ), provides a mechanism for upholding these rights and promoting accountability.⁷¹
5. Jurisprudence Development: The EACJ contributes to the development of a consistent body of jurisprudence and interpretation of the EAC Treaty through its rulings. These judicial decisions serve as a reference for future disputes and help

⁶⁷ EAC Treaty (1999) art 23, 27., J E Ruhangisa, 'The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)' in A Possi and J Kalb (eds), *The East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2011) 111-134.

⁶⁸ J T Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2015) 24(2) *Duke Journal of Comparative & International Law* 249-296.

⁶⁹ K J Alter, J T Gathii and L R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European Journal of International Law* 293-328.

⁷⁰ EAC Treaty (1999) art 30., A Possi, 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community' (2013) 15(1) *African Human Rights Law Journal* 192.

⁷¹ J T Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249-296.

harmonize the legal framework within the EAC.⁷²

6. Reinforcing Integration: Reinforcing the efficacy and integrity of the EAC integration process by ensuring adherence to the agreed-upon objectives and obligations. The DSM plays a crucial role in upholding the commitments made by Partner States to further regional cooperation and economic integration.⁷³

2.2.1.2 Scope

The EAC Dispute Settlement Mechanism addresses disputes not only between EAC Partner States but also involving natural and legal persons residing in EAC Partner States and disputes related to EAC institutions. These disputes may pertain to the interpretation or application of the EAC Treaty, as provided under Articles 30 and 28.⁷⁴ This includes:

1. Disputes between Partner States
2. Cases brought by legal and natural persons resident in a Partner State
3. Disputes between the Community and its employees
4. Cases referred by national courts of Partner States on the interpretation of the Treaty

This broader scope ensures that the EAC dispute resolution system addresses a comprehensive range of issues affecting the Community, its Member States, and its residents. The mechanism provides access to justice for various stakeholders within the EAC framework, promoting accountability and the rule of law across the Community.⁷⁵

It includes:

⁷² H. Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010) 54(1) *Journal of African Law* 74, 84 (discussing the EACJ's role in fostering legal consistency through its rulings).

⁷³ East African Community, *Treaty for the Establishment of the East African Community* (1999) art Article 6(d) or Article 5(2).; James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 278-280.

⁷⁴ East African Community, *Treaty for the Establishment of the East African Community* (1999) art 30,28 <https://www.eac.int/documents/category/key-documents> accessed 24 July 2024.; James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 268-270.

⁷⁵ Henry Onoria, 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010) 54(1) *Journal of African Law* 74-94.

1. Treaty Interpretation and Application: Disputes related to the interpretation or application of the provisions within the EAC Treaty itself.⁷⁶
2. Common Market Protocol: Disputes related to violations of the core principles of the EAC Common Market Protocol, which governs the free movement of goods, services, labor, and capital within the EAC region.⁷⁷
3. Customs Union Agreements: Disputes arising from the implementation of the EAC Customs Union agreements, which aim to harmonize trade policies and facilitate the free movement of goods among Partner States.⁷⁸
4. Common Market Aspects: Disputes relating to specific legal and regulatory aspects of the EAC Common Market, including issues related to investment, labor mobility, intellectual property rights, competition policy, and environmental regulations.⁷⁹
5. State and Non-State Actors: The DSM allows disputes to be brought not only by EAC Partner States but also by legal and natural persons against a member state for violations of EAC commitments. This expands the scope to include disputes involving non-state actors, such as businesses and individuals.⁸⁰
6. Remedies and Enforcement: The East African Court of Justice (EACJ), consisting of a First Instance Division and an Appellate Division, has the authority to make

⁷⁶East African Community, *Treaty for the Establishment of the East African Community* (1999) arts 27-29.

⁷⁷ East African Community, *Protocol on the Establishment of the East African Community Common Market* (2009) <https://www.eac.int/documents/category/key-documents> accessed 24 July 2024.; James Thuo Gathii, 'Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79(1) *Law and Contemporary Problems* 37-62.

⁷⁸ East African Community, *Protocol on the Establishment of the East African Customs Union* (2004) <https://www.eac.int/documents/category/key-documents> accessed 24 July 2024.; J.E. Ruhangisa, 'The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)' in A. Possi and J. Kalb (eds), *The East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2011) 111-134.

⁷⁹ James Thuo Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2015) 24(2) *Duke Journal of Comparative & International Law* 249-296.

⁸⁰ East African Community, *Treaty for the Establishment of the East African Community* (1999) arts 30, 33.; A Possi, 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community' (2013) 15(1) *African Human Rights Law Journal* 192-213.

judgments and provide remedies to resolve disputes. The Court's judgments are binding on the Partner States and other parties to a case. While the Court can declare acts of Partner States or Community organs to be unlawful or in violation of the Treaty, it does not have the power to nullify national laws of EAC member states directly. Instead, it can declare such laws to be in contravention of the Treaty, leaving it to the Partner States to align their national laws with the Court's rulings.⁸¹ The Court can order various remedies, including: Declarations of rights, Injunctions, Specific performance and pecuniary compensation.

Enforcement of the Court's decisions ultimately relies on the compliance of Partner States, as stipulated in Article 38(3) of the EAC Treaty, which requires Partner States to take measures to implement the Court's judgments.⁸²

EAC Partner States must promptly comply with decisions of the East African Court of Justice, as stipulated in Article 38 of the EAC Treaty. The EAC Council plays a supervisory role in ensuring that Partner States adhere to these obligations.⁸³

The DSM primarily has jurisdiction over disputes between EAC member states. However, under Article 30 of the EAC Treaty, the DSM allows natural and legal persons (including businesses) to bring cases against a Partner State if the dispute involves the legality of acts, regulations, directives, or decisions by a Partner State or the EAC. This expands the scope of the DSM to cover disputes between a Partner State and a business entity. While the EAC DSM does not cover disputes between third-party states or purely private commercial disputes between companies, the EAC Secretariat monitors compliance and implementation of DSM rulings, and Partner States must provide status reports on implementing decisions.⁸⁴

2.2.1.3 Procedures

⁸¹ James Thuo Gathii, 'The East African Court of Justice: Human Rights and Business Actors Compared' in H. Lenk and others (eds), *Emerging Issues in Sustainable Development* (Springer 2018).; Karen J. Alter, James Thuo Gathii, and Laurence R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European Journal of International Law* 293-328.

⁸² East African Community, *Treaty for the Establishment of the East African Community* (1999) art 38(3).

⁸³ *Ibid.*

⁸⁴ James Thuo Gathii, 'Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79(1) *Law and Contemporary Problems* 45-50.

The EAC Dispute Settlement Mechanism follows a structured process for resolving disputes, emphasizing amicable settlement through consultations and mediation before resorting to adjudication. The key steps in this process are:

1. Consultation: When a dispute arises, the parties are encouraged to engage in consultations and negotiations to resolve the matter amicably. This stage fosters dialogue between the parties, aiming to settle disputes through mutual agreement.⁸⁵
2. Mediation: Mediation is not a prerequisite to adjudication. Instead, it is provided as an alternative dispute resolution method under the EACJ Rules of Procedure (2019, Rule 64). Parties may choose mediation at any stage of the proceedings, but it is voluntary and confidential. The mediation process is facilitated by the EAC Secretariat and provides an opportunity for the parties to resolve disputes with the assistance of a neutral mediator.⁸⁶
3. Adjudication: If mediation is unsuccessful or bypassed, the dispute may be referred directly to the East African Court of Justice (EACJ) for adjudication. The EACJ has jurisdiction to hear and determine disputes involving Partner States as well as natural and legal persons. Under Article 30 of the EAC Treaty, individuals and businesses can challenge actions of Partner States or EAC institutions, especially concerning the interpretation and application of the Treaty.⁸⁷
4. Enforcement: EAC Partner States are required to comply with the decisions of the East African Court of Justice (EACJ). Under Article 44 of the EAC Treaty, the execution of judgments, particularly those imposing pecuniary obligations, is governed by the rules of civil procedure in the Partner State where enforcement is sought. The EACJ's Registrar authenticates the judgment, after which the party in whose favor the judgment is issued can proceed with enforcement.⁸⁸ In cases of non-

⁸⁵ James Thuo Gathii, "The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries," (2010) 12 Oregon Review of International Law 245, p. 252-253

⁸⁶ East African Court of Justice Rules of Procedure, Rule 64, available at <https://www.eacj.org/wp-content/uploads/2023/02/EACJ-Rules-of-Procedure-2019.pdf>

⁸⁷ Ibid; East African Community, *Treaty for the Establishment of the East African Community* (1999) art 30(1).

⁸⁸ EAC Treaty Article 44.

compliance by a Partner State, the EAC Council may authorize additional measures, including compensatory measures or the suspension of benefits under the EAC Treaty, to ensure the effectiveness of the dispute resolution process.⁸⁹

The EAC Dispute Settlement Mechanism is designed to promote the effective resolution of disputes among EAC not only between EAC Partner States but also involving natural and legal persons, ensuring the consistent interpretation and application of the EAC Treaty and related instruments.⁹⁰ By providing a legal framework for resolving disputes, the DSM contributes to the maintenance of peace, stability, and cooperation within the East African Community.

2.2.2 Institutional Structure of the EAC Dispute Settlement Mechanism (DSM)

The EAC Dispute Settlement Mechanism (DSM) comprises several key institutional components, each playing a specific role in the resolution of disputes among EAC Partner States:

1. **East African Court of Justice (EACJ):** The EACJ is the judicial organ of the East African Community (EAC) and operates in two tiers: the First Instance Division and the Appellate Division.⁹¹ The First Instance Division hears disputes regarding the interpretation and application of the EAC Treaty, including cases involving Partner States, legal persons, or individuals. The Appellate Division serves as the final arbiter, hearing appeals from the First Instance Division. Judges of the EACJ are appointed by the Summit of the EAC and are drawn from Partner States based on their expertise in law, ensuring a rotation system between

⁸⁹ In cases of non-compliance with DSM decisions or obligations under the Treaty, the Council has the authority to recommend compensatory measures or suspensions of benefits, as outlined in Article 143 of the EAC Treaty. The Council may recommend sanctions, including the suspension of benefits, to the Summit when a Partner State defaults on its obligations.

⁹⁰ James Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249, 255-257.

⁹¹ East African Community (EAC) Treaty, Article 23 and 27.

the two divisions.⁹² The court's mandate extends beyond disputes between Partner States, as it also hears cases brought by individuals and businesses under Article 30 of the EAC Treaty, thereby ensuring the consistent interpretation of EAC law.

2. EAC Secretariat: The EAC Secretariat plays a vital role in supporting the functioning of the dispute settlement mechanism. It provides administrative and logistical support to the East African Court of Justice (EACJ), facilitating the resolution of disputes.⁹³ The Secretariat also monitors the implementation of decisions by EAC Partner States, ensuring compliance with EAC commitments.⁹⁴ Additionally, it serves as a repository for dispute-related documentation and assists in communication between parties involved in disputes.
3. EAC Council: The EAC Council is the policy-making body of the EAC⁹⁵ and plays a supervisory role in the DSM⁹⁶. In cases of non-compliance with DSM decisions or obligations under the Treaty, the Council has the authority to recommend compensatory measures or suspensions of benefits, as outlined in Article 143 of the EAC Treaty. The Council may recommend sanctions, including the suspension of benefits, to the Summit when a Partner State defaults on its obligations.⁹⁷ The Council's oversight helps ensure the effectiveness and integrity of the DSM.

The institutional structure of the EAC Dispute Settlement Mechanism is designed to ensure the effective resolution of disputes among EAC Partner States, promoting peace, stability, and cooperation within the East African Community. Each component plays a specific role in facilitating the resolution of disputes, contributing to the overall objective of maintaining the integrity of the EAC integration process. The EACJ, in

⁹² East African Community (EAC) Treaty, Article 24(1) and (2).

⁹³ Ibid art 71(1)(e).

⁹⁴ Ibid art 71(1)(l)

⁹⁵ EAC Treaty (1999) art 14.

⁹⁶ EAC Treaty (1999) art 14(2): The EAC Council supervises the implementation of decisions, including those made under the Dispute Settlement Mechanism (DSM). According to Article 14 (2), the Council gives directions to the Partner States and other organs, which can include supervising the enforcement of decisions from the DSM.

⁹⁷ EAC Treaty (1999) art 38, 143.

particular, has been noted for its potential in protecting human rights within the EAC⁹⁸, as well as its role in advancing regional integration through its jurisprudence.

2.3 Comparative Analysis of the AfCFTA and EAC Dispute Settlement Mechanisms

While both the African Continental Free Trade Area (AfCFTA) and the East African Community (EAC) has established dispute settlement mechanisms to address trade-related disputes among member states, there are key differences in their objectives, scope, and institutional structures.

2.3.1 Comparative Analysis of Objectives, Scope, and Institutional Structures

Objectives

The primary objective of the AfCFTA Dispute Settlement Mechanism is to ensure the effective implementation and consistent interpretation of the AfCFTA Agreement among member states.⁹⁹ It aims to promote a predictable and transparent trading environment within the AfCFTA free trade area by resolving disputes through consultations, mediation, and adjudication processes.¹⁰⁰

The EAC Dispute Settlement Mechanism, while also concerned with treaty interpretation, has a broader focus. It aims to maintain the integrity of the regional integration process, promote the effective implementation of EAC agreements and protocols, and ensure compliance with EAC

⁹⁸ Ally Possi, 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community' (2013) 17 Max Planck Yearbook of United Nations Law 173

⁹⁹ Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) art 20

¹⁰⁰ Olabisi D Akinkugbe, 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2019) 28(1) African Journal of International and Comparative Law 138, 140-142

commitments and objectives.¹⁰¹ This wider scope reflects the EAC's status as a regional economic community with deeper integration goals.¹⁰²

While both the AfCFTA and EAC Dispute Settlement Mechanisms share a common goal of ensuring treaty compliance and fostering a predictable trading environment, they diverge in their broader objectives. The AfCFTA DSM is more narrowly focused on trade facilitation and dispute resolution within the free trade area, whereas the EAC DSM addresses not only trade issues but also the broader objectives of regional integration and governance. This reflects the deeper integration ambitions of the EAC, setting it apart from the more trade-centric AfCFTA DSM.

Scope

The scope of the AfCFTA Dispute Settlement Mechanism (DSM) covers disputes between AfCFTA state parties concerning their rights and obligations under the AfCFTA Agreement.¹⁰³ This includes disputes related to trade in goods, services, and investment within the AfCFTA framework. While initially appearing limited to economic disputes, the AfCFTA DSM's jurisdiction extends to all areas covered by the Agreement's protocols, including competition policy, intellectual property rights, and investment, as outlined in Article 8 of the AfCFTA Agreement.¹⁰⁴ These protocols may establish specialized dispute settlement rules; however, the AfCFTA DSM remains an alternative mechanism for resolving state-to-state disputes arising from these protocols, ensuring consistency in the overall dispute resolution framework.

In contrast, the EAC DSM encompasses a broader range of disputes. It addresses issues between EAC Partner States regarding the interpretation or application of the EAC Treaty¹⁰⁵, including disputes related to the EAC Common Market Protocol, customs union agreements, and various

¹⁰¹ Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255 (EAC Treaty) art 23

¹⁰² James Thuo Gathii, 'The East African Court of Justice: Human Rights and Business Law Jurisprudence' in *The Performance of Africa's International Courts* (Oxford University Press 2020) 306-307

¹⁰³ AfCFTA Agreement art 20; Protocol on Rules and Procedures on the Settlement of Disputes, African Continental Free Trade Area Agreement (signed 21 March 2018) Art 3.

¹⁰⁴ AfCFTA Agreement art 8.

¹⁰⁵ EAC Treaty art 27(1).

aspects of the EAC Common Market.¹⁰⁶ Significantly, the EAC DSM allows cases to be brought not only by states but also by legal and natural persons, expanding its jurisdiction beyond state-to-state disputes.¹⁰⁷ Additionally, the scope of the East African Court of Justice (EACJ) has evolved to include human rights issues, further broadening the DSM's jurisdiction beyond purely economic or trade-related matters.¹⁰⁸

While both the AfCFTA and EAC DSMs serve to resolve disputes and promote the consistent implementation of their respective agreements, the EAC DSM has a broader scope. The EAC's mechanism encompasses not only economic disputes but also allows individuals and legal entities to challenge violations, with the potential to address human rights issues. By contrast, the AfCFTA DSM, although extending to competition policy and intellectual property rights through specialized protocols, primarily focuses on state-to-state economic disputes, maintaining a more trade-centered scope. This distinction reflects the EAC's deeper regional integration ambitions, which include governance and human rights, whereas the AfCFTA remains more focused on creating a unified trade environment.

Institutional Structure

The institutional structure of the AfCFTA Dispute Settlement Mechanism includes a Dispute Settlement Body (DSB), panels of experts, an Appellate Body, and a Secretariat.¹⁰⁹ The DSB oversees the dispute settlement process, while panels and the Appellate Body adjudicate disputes and issue reports with findings and recommendations. The Secretariat provides administrative and logistical support to the DSB and panels, ensuring the smooth operation of the mechanism.¹¹⁰

¹⁰⁶ James Thuo Gathii, 'The East African Court of Justice: Human Rights and Business Law Jurisprudence' in *The Performance of Africa's International Courts* (Oxford University Press 2020) 307-308ff

¹⁰⁷ EAC Treaty art 30.

¹⁰⁸ EAC Treaty art 27(2).

¹⁰⁹ AfCFTA Agreement art 20(3)

¹¹⁰ Olabisi D Akinkugbe, 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2019) 28(1) *African Journal of International and Comparative Law* 138, 143-145

In comparison, The EAC Dispute Settlement Mechanism comprises the East African Court of Justice (EACJ), the EAC Secretariat, and the EAC Council.¹¹¹ The EACJ serves as the primary judicial organ, with jurisdiction over disputes between EAC Partner States, as well as cases brought by legal and natural persons.¹¹² The Secretariat provides administrative support, and the Council has the authority to authorize compensatory measures or the suspension of benefits under the EAC Treaty.¹¹³

2.3.2 Comparative Assessment

While both the African Continental Free Trade Area (AfCFTA) and the East African Community (EAC) dispute settlement mechanisms aim to resolve disputes and promote compliance with their respective agreements, they reflect the distinct purposes and contexts of each organization:

1. **Regional Integration:** The EAC's approach is more deeply embedded in a comprehensive regional integration process, reflecting its status as a regional economic community.¹¹⁴ The AfCFTA's mechanism, while focusing on harmonizing trade practices across a diverse range of African countries, also seeks to promote deeper economic integration.¹¹⁵ This includes reducing regulatory barriers, enhancing the movement of goods, services, and labor, and fostering intra-African investments and industrialization to drive broader economic development across the continent.
2. **Access:** The AfCFTA mechanism is primarily state-to-state, reflecting its focus on inter-governmental trade disputes.¹¹⁶ The EAC mechanism, by contrast, allows for broader access, including by legal and natural persons, reflecting its more integrated approach to regional

¹¹¹ EAC Treaty arts 9, 23, 71

¹¹² *ibid* arts 23, 27, 30

¹¹³ *ibid* art 29.

¹¹⁴ Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92, 97-99

¹¹⁵ Regis Y Simo, 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) 23(1) *Journal of International Economic Law* 65, 68-70

¹¹⁶ AfCFTA Agreement art 20.

governance.¹¹⁷ While this broader access enhances the inclusivity of the EAC system, it raises questions about its effective use and administration. Allowing individuals and entities to bring disputes could increase the volume of cases and strain resources, potentially affecting the efficiency and speed of dispute resolution. However, it also enhances accountability and provides more stakeholders with the opportunity to seek legal remedies, which can contribute to stronger rule of law and governance within the region..

3. Institutional Depth: The AfCFTA has a more specialized dispute settlement structure focused specifically on trade-related issues. In contrast, the EAC established its own court system, the East African Court of Justice (EACJ), through the EAC Treaty. The EACJ serves multiple functions beyond just trade dispute settlement, including the interpretation of the EAC Treaty and addressing broader legal and governance issues within the EAC region.¹¹⁸

In essence, while both mechanisms share the fundamental goal of resolving disputes among member states, the EAC's approach is more deeply embedded in a comprehensive regional integration framework, characterized by its common market and customs union, which facilitate the free movement of goods, services, labor, and capital among its member states. "Meanwhile, the AfCFTA is tailored to support a broader scope of continental economic integration, encompassing not only trade liberalization in goods but also services, investment, intellectual property, competition policy, and the free movement of people across the African continent. This broader mandate aims to create a single continental market, which aligns with Africa's long-term goals of economic integration and development."¹¹⁹

The differences in scope and accessibility between the AfCFTA and EAC dispute settlement mechanisms reflect their distinct objectives and contexts. The AfCFTA's state-to-state approach aligns with its focus on facilitating trade across the continent, where harmonizing diverse national practices is a primary concern. In contrast, the EAC's more inclusive approach, allowing

¹¹⁷ EAC Treaty art 30.

¹¹⁸ James Thuo Gathii, 'The East African Court of Justice: Human Rights and Business Law Jurisprudence' in *The Performance of Africa's International Courts* (Oxford University Press 2020) 309-310

¹¹⁹ Olabisi D Akinkugbe, 'Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)' (2020) 1 *African Journal of International Economic Law* 291, 300-302

access to legal and natural persons, reflects its deeper integration goals and more established regional framework.

These distinctions have important implications for the effectiveness and reach of each mechanism. The AfCFTA's approach may be more suitable for addressing broad trade policy issues but could potentially overlook disputes that affect individual businesses or citizens. The EAC's more inclusive approach may foster greater engagement from a wider range of stakeholders but could also lead to a higher volume of cases and potential resource constraints.¹²⁰

2.3.3 Potential Challenges and Limitations

Both the AfCFTA and EAC dispute settlement mechanisms face potential challenges in their implementation and effectiveness:

1. **Enforcement:** Both mechanisms rely on member states' willingness to comply with rulings. The lack of a supranational enforcement mechanism could potentially undermine the effectiveness of decisions.¹²¹
2. **Capacity Constraints:** The AfCFTA, as a newer and larger institution, may face challenges in building the necessary institutional capacity to handle a potentially large volume of complex trade disputes across the continent.¹²²
3. **Overlapping Jurisdictions:** With many African countries belonging to multiple regional economic communities and now the AfCFTA, there's a potential for jurisdictional conflicts and forum shopping.¹²³

¹²⁰ James Thuo Gathii, "The Variation in the Use of Sub-Regional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice," *Law and Contemporary Problems* 79, no. 1 (2016): 37-62.

¹²¹ Olabisi D. Akinkugbe, "Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment," *African Journal of International and Comparative Law* 28, no. 2 (2020): 138-169

¹²² Regis Y. Simo, "Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility," *Journal of International Economic Law* 23, no. 1 (2020): 65-95.

¹²³ James Thuo Gathii, "African Regional Trade Agreements as Flexible Legal Regimes," *North Carolina Journal of International Law and Commercial Regulation* 35, no. 3 (2010): 571-668.

4. Political Sensitivities: Both mechanisms may face challenges in addressing disputes that touch on politically sensitive issues, potentially leading to non-compliance or withdrawal from proceedings.¹²⁴

These challenges underscore the need for ongoing evaluation and potential refinement of both dispute settlement mechanisms as they continue to operate and evolve.

¹²⁴ Karen J. Alter, James T. Gathii, and Laurence R. Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences," *European Journal of International Law* 27, no. 2 (2016): 293-328.

Chapter Three

Intersection between the African Continental Free Trade Agreement (AfCFTA) and East African Community (EAC) Dispute Resolution Systems

The African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) have established dispute settlement mechanisms to address trade disputes among member states. However, the coexistence of these two systems presents challenges related to overlapping jurisdiction, hierarchy ambiguities, risks of forum shopping, and gaps in consolidating and enforcing decisions. This chapter explores these areas of intersection and potential conflicts between the AfCFTA and EAC dispute resolution frameworks.

3.1 Overlapping Jurisdiction

Overlapping jurisdiction occurs when both the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) dispute settlement mechanisms have authority over the same dispute or issue. Given that EAC member states are also part of the AfCFTA, disputes between these states may fall under the jurisdiction of both systems simultaneously.

The AfCFTA Agreement acknowledges the potential for such overlaps. Article 19(1) of the AfCFTA Agreement states: "In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement."¹²⁵ This provision suggests that AfCFTA obligations should take precedence in cases of overlap. However, the practical implementation of this principle in dispute resolution remains unclear.

The EAC Treaty, in contrast, does not explicitly address its relationship with continental agreements like the AfCFTA. Article 27(1) of the EAC Treaty grants the East African Court of Justice "initial jurisdiction over the interpretation and application of this Treaty."¹²⁶ This broad

¹²⁵ African Union, Agreement Establishing the African Continental Free Trade Area, 21 March 2018, Article 19(1).

¹²⁶ East African Community, Treaty for the Establishment of the East African Community, 30 November 1999 (as amended on 14 December 2006 and 20 August 2007), Article 27(1).

jurisdiction could potentially overlap with AfCFTA dispute settlement in areas where both agreements cover similar trade issues.

A specific example of how a dispute might fall under both AfCFTA and EAC jurisdictions is a case involving non-tariff barriers (NTBs) between two EAC member states. For instance, if Kenya were to impose new health and safety regulations on dairy products that effectively blocked imports from Uganda, this could be seen as an NTB under both agreements:

1. Under the AfCFTA, Article 4 of the Protocol on Trade in Goods commits State Parties to "progressively eliminate non-tariff barriers" and Annex 5 on Non-Tariff Barriers provides a detailed mechanism for identifying, reporting, and eliminating NTBs.¹²⁷
2. Similarly, the EAC Customs Union Protocol, in Article 13, requires Partner States to remove all existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States.¹²⁸

In this scenario, Uganda could potentially choose to bring the dispute to either the AfCFTA Dispute Settlement Body or the East African Court of Justice, as both would have jurisdiction over the matter.

Areas of potential overlap include disputes regarding tariffs, non-tariff barriers, transit of goods, trade remedies, customs cooperation, and trade facilitation, where the commitments under the two arrangements may differ.

Recent research by Gathii (2021) highlights the challenges posed by overlapping jurisdiction in African trade agreements. These challenges include confusion and conflicting decisions,

¹²⁷ African Union, Agreement Establishing the African Continental Free Trade Area, Protocol on Trade in Goods, 21 March 2018, Article 4 and Annex 5.

¹²⁸ East African Community, Protocol on the Establishment of the East African Customs Union, 2 March 2004, Article 13.

coordination and cooperation issues, legal uncertainty, and complexities in case management by arbitral tribunals.¹²⁹

3.2 Hierarchy Ambiguities

The African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) have established distinct dispute settlement mechanisms, each based on their respective legal frameworks. However, the relationship between these two systems, particularly regarding which agreement would prevail in case of conflicts or inconsistencies, remains ambiguous.

The AfCFTA Agreement, through its Protocol on Rules and Procedures on the Settlement of Disputes, establishes a comprehensive dispute settlement mechanism, which is detailed in several provisions.¹³⁰ Article 3 of this Protocol confirms that it applies to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement, covering trade in goods, services, and related areas. This mechanism includes a multi-tiered process involving consultations, the establishment of panels, appellate review, and enforcement mechanisms to ensure compliance with rulings. These features together contribute to the comprehensive nature of the dispute settlement system, as outlined in Articles 4 to 25 of the Protocol. However, the Protocol does not explicitly address its relationship with pre-existing regional dispute settlement mechanisms such as the EAC.¹³¹

Article 19(1) of the AfCFTA Agreement does provide some guidance on the relationship between the AfCFTA and regional agreements, stating: "In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement."¹³² While this clause suggests a hierarchical superiority of the AfCFTA over regional agreements, its practical application in dispute settlement remains unclear.

¹²⁹ Gathii, J. T. (2021). "African Regional Trade Agreements as Flexible Legal Regimes." Cambridge University Press.

¹³⁰ Protocol on Rules and Procedures on the Settlement of Disputes, African Continental Free Trade Area Agreement, signed March 21, 2018 Article 3.

¹³¹ Ibid Articles 4-25.

¹³² African Continental Free Trade Area Agreement, Article 19(1), signed March 21, 2018, entered into force May 30, 2019.

On the other hand, the EAC Treaty, which predates the AfCFTA, establishes the East African Court of Justice (EACJ) as the principal judicial organ for the resolution of disputes.¹³³ Article 33(2) of the EAC Treaty states that "Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter."¹³⁴ However, the Treaty does not explicitly address its relationship with continental agreements like the AfCFTA or how potential conflicts in jurisdiction or decisions should be resolved.

This ambiguity creates uncertainty about whether the AfCFTA dispute settlement would prevail over an EAC dispute process when jurisdictions overlap, leading to challenges in understanding the mechanisms for appealing decisions and determining the supremacy of rules.

3.3 Forum Shopping Risks

Forum shopping refers to the practice of parties strategically selecting a particular dispute settlement forum that they believe will provide them with the most favorable outcome. In the context of the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC), the coexistence of multiple dispute resolution mechanisms raises concerns about potential forum shopping and overlapping jurisdictions.

To address this issue, Article 3(4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes explicitly limits forum shopping by ensuring that, once a party chooses to resolve a dispute through the AfCFTA dispute settlement process, it cannot simultaneously or subsequently seek recourse in another forum for the same matter.¹³⁵ This provision prevents parties from seeking judgments from multiple courts or arbitration bodies in the hope of securing a more favorable outcome. By restricting the selection of forums, the AfCFTA ensures that disputes are handled within its own Dispute Settlement Mechanism (DSM), thereby promoting consistency and avoiding conflicting rulings.

¹³³ Treaty for the Establishment of the East African Community, Article 23, signed November 30, 1999, entered into force July 7, 2000.

¹³⁴ *Ibid.*, Article 33(2).

¹³⁵ AfCFTA Agreement, Protocol on Rules and Procedures on the Settlement of Disputes, Article 3(2).

Given that many AfCFTA member states are also part of other regional economic communities (RECs) such as ECOWAS, SADC, and EAC, which have their own dispute settlement bodies, the AfCFTA rules are designed to avoid overlapping jurisdiction. Article 3(2) of the Protocol ensures that disputes specific to the AfCFTA are resolved exclusively within the AfCFTA DSM, rather than allowing parties to simultaneously pursue cases in REC courts or other international tribunals.

In contrast, the EAC Treaty grants the East African Court of Justice (EACJ) jurisdiction over disputes related to the interpretation and application of the Treaty in Article 27(1).¹³⁶ Although the EAC Treaty does not explicitly mention forum shopping, the broad jurisdiction of the EACJ could overlap with AfCFTA-related disputes, particularly in areas where both agreements cover similar trade issues. However, the AfCFTA Protocol mitigates this risk by ensuring that once a dispute resolution process is initiated under either the AfCFTA or another agreement, the selected forum must be exclusive, thereby limiting the possibility of forum shopping and ensuring that disputes are handled consistently within the relevant framework.

3.4 Gaps in Consolidating and Enforcing Decisions

Both the AfCFTA and the EAC dispute settlement mechanisms face challenges in the consolidation and enforcement of decisions. Although provisions for compliance exist in both frameworks, practical enforcement remains an issue, particularly when there is an overlap between their respective jurisdictions.

The AfCFTA Agreement, through its Protocol on Rules and Procedures on the Settlement of Disputes, outlines procedures for the implementation of rulings and recommendations. Article 25(1) emphasizes the importance of prompt compliance with the recommendations or rulings of the Dispute Settlement Body (DSB) to ensure effective resolution of disputes.¹³⁷ Furthermore, Article 25(3) provides for compensation or suspension of concessions in cases of non-

¹³⁶ East African Community (EAC) Treaty, Article 27(1).

¹³⁷ Protocol on Rules and Procedures on the Settlement of Disputes, African Continental Free Trade Area Agreement, Article 25(1), signed March 21, 2018.

compliance . However, there are still challenges in ensuring compliance, especially in instances where member states have conflicting obligations under multiple regional trade agreements.

Similarly, the EAC Treaty contains provisions for enforcing decisions. Article 38(3) mandates that a Partner State or the Council take immediate measures to implement the judgments of the East African Court of Justice (EACJ).¹³⁸ However, gaps remain in enforcing these decisions, particularly when disputes involve states that are members of both the EAC and AfCFTA. In such cases, the lack of a unified mechanism for enforcing decisions across both systems can lead to confusion or conflicting rulings.

Moreover, the absence of a robust, institutionalized framework for monitoring compliance with rulings across both systems exacerbates the problem. Neither the AfCFTA nor the EAC provide clear guidelines for how a ruling under one system should be recognized or enforced under the other, leading to potential enforcement gaps when decisions conflict.

These gaps in the consolidation and enforcement of decisions pose significant challenges to the credibility and effectiveness of both the AfCFTA and the EAC dispute settlement mechanisms.

¹³⁸ Treaty for the Establishment of the East African Community, Article 38(3), signed November 30, 1999, entered into force July 7, 2000

Chapter Four

Conclusions and Recommendations

4.1 Conclusions

The intersection between the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) dispute settlement mechanisms reveals significant challenges. The overlapping memberships of both agreements lead to jurisdictional overlap and ambiguity, creating risks of contradictory rulings, forum shopping, and uncertainty for economic actors engaged in cross-border trade and investment. The lack of a clear hierarchy between the AfCFTA and EAC dispute settlement systems, coupled with insufficient coordination provisions, hinders efficient and coherent dispute resolution across continental and regional trade agreements. The potential for forum shopping arises from the ability of parties to selectively approach the AfCFTA or EAC dispute body, undermining fairness, consistency, and credibility of the dispute settlement process. Gaps exist in the consolidation of proceedings and enforcement of decisions between the AfCFTA and EAC dispute settlement mechanisms, leading to fragmentation risks and challenges in ensuring compliance with rulings. Overcoming these challenges is crucial for promoting legal certainty, upholding the rule of law, and facilitating the smooth implementation of the AfCFTA's objectives of boosting intra-African trade and economic integration.

Fostering synergies between the AfCFTA and EAC dispute settlement systems is crucial to eliminate fragmentation while leveraging their specialized capabilities. One approach could involve establishing formal coordination mechanisms and information-sharing protocols between the secretariats and legal bodies of the two systems. This would facilitate cross-pollination of expertise, jurisprudence, and best practices, enabling the continental and regional mechanisms to learn from each other's strengths. Additionally, joint training programs and capacity-building initiatives could be implemented to promote consistent interpretation and application of trade rules across both systems. Where appropriate, the AfCFTA and EAC could explore possibilities for co-adjudication or parallel proceedings on interconnected disputes, drawing upon the specialized knowledge and resources of each mechanism. By fostering such synergies, the two systems can complement each other's roles, reducing duplication and enhancing the overall efficacy of dispute resolution within Africa's economic integration architecture.

The interaction between the AfCFTA and EAC dispute settlement mechanisms highlights the need for a comprehensive legal and institutional framework to govern interfaces between dispute resolution avenues under overlapping regional trade agreements. Such a framework should establish clear principles for determining the appropriate forum based on the subject matter, specific commitments involved, and the nature of the dispute. It should also outline mechanisms for consolidating related proceedings, harmonizing jurisprudence, and ensuring mutual recognition and enforcement of decisions across the interconnected systems. This framework could take the form of a separate protocol or annex to the existing agreements, developed through extensive consultations with member states, legal experts, and stakeholders. Institutionally, a joint governing body or coordinating committee comprising representatives from the AfCFTA, EAC, and other relevant regional economic communities could be established to oversee the implementation of this framework, facilitate cooperation, and address any emerging challenges or conflicts between the dispute settlement systems. By establishing such a comprehensive legal and institutional architecture, the credibility and coherence of dispute resolution across Africa's regional trade agreements can be strengthened, promoting legal certainty and upholding the rule of law in cross-border economic relations.

The findings of this thesis highlight the necessity of addressing jurisdictional ambiguities and procedural overlaps in REC and AfCFTA dispute mechanisms. As harmonization efforts continue, including initiatives like the AfCFTA Implementation Review Mechanism, the principles and frameworks proposed herein provide actionable insights for navigating the current transitional phase. These recommendations aim to bridge existing gaps, supporting a seamless eventual integration.

4.2 Recommendations

1. **Negotiate and Adopt a Separate Protocol:** It is essential to negotiate and adopt a separate protocol or agreement between the AfCFTA and EAC that clearly delineates jurisdictional boundaries and establishes a hierarchy between the two dispute settlement systems. This protocol should provide guidance on resolving conflicts and overlaps, minimizing ambiguity.
2. **Establish a Joint Committee:** To enhance coordination and coherence between the AfCFTA and EAC dispute settlement mechanisms, it is recommended to establish a joint committee or

working group comprising representatives from the AfCFTA Secretariat, EAC Secretariat, and legal experts. This committee can develop mechanisms for consolidating related proceedings and rulings between the two bodies.

3. **Develop Clear Rules for Forum Selection:** Through consultations with member states and stakeholders, clear rules, criteria, and procedures should be developed to determine the appropriate dispute settlement forum based on the subject matter of the dispute, the specific commitments involved, and other objective factors.
4. **Strengthen Institutional Coordination:** Strengthening institutional coordination and information-sharing between the AfCFTA Secretariat and EAC Secretariat through formal agreements and regular meetings is crucial. This will enable better monitoring of compliance, consistent enforcement of decisions, and the implementation of cross-retaliatory measures if required.
5. **Explore Unified Dispute Settlement System:** Initiating a feasibility study and consultations to explore the possibility of establishing a unified dispute settlement system in the long run is recommended. Such a system could leverage the specialized capabilities of existing regional mechanisms while ensuring harmonization and coherence across the AfCFTA.
6. **Undertake Legal Harmonization:** Undertaking legal harmonization efforts by aligning relevant provisions and procedures between the AfCFTA and EAC dispute settlement frameworks is essential. This will foster compatibility and reduce fragmentation risks, ensuring that the two systems work cohesively towards resolving trade disputes and upholding the rule of law.
7. **Capacity-Building Initiatives:** Developing and implementing capacity-building initiatives, knowledge-sharing platforms, and joint training programs for dispute settlement professionals across the AfCFTA and EAC systems is crucial. These initiatives should focus on fostering consistent interpretation and application of trade rules, enhancing the skills and expertise of dispute resolution professionals, and promoting a deeper understanding of the legal frameworks governing trade disputes in Africa.
8. **Facilitate Non-State Actor Participation:** Facilitating active participation of non-state actors, such as businesses, civil society organizations, and legal experts, in consultations and deliberations on streamlining the interface between the AfCFTA and EAC dispute settlement mechanisms is vital. Their inputs can provide valuable insights, promote transparency, and

ensure that the interests of all stakeholders are taken into account in the dispute resolution process.

This comprehensive set of recommendations and conclusions aims to address the challenges arising from the intersection of the AfCFTA and EAC dispute settlement systems. Implementing these recommendations will contribute to a more efficient, coherent, and credible dispute resolution architecture that supports the objectives of continental and regional economic integration in Africa.

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