

SABC MEMBER LEGAL INSIGHTS

The AfCFTA's Dispute Resolution Framework: New Opportunities & Key Considerations For Swiss Investors In Africa

MARCH/APRIL 2025

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About AfCFTA

The African Continental Free Trade Area (AfCFTA) represents a landmark development in African economic integration, creating the world's largest free trade area by number of participating countries, encompassing 1.3 billion people and a combined GDP of \$3.4 trillion.

For Swiss investors with historically strong economic ties to Africa, the AfCFTA presents both new opportunities and important considerations. Ultimately, the value of any international free trade agreement lies in the protection it affords to investors.

Swiss-African trade relations continue to show remarkable resilience and growth, with Switzerland's total trade volume with Africa reaching approximately CHF 7.5 billion in recent years. As the AfCFTA advances through its implementation phase, a clear understanding these protections – particularly its dispute resolution mechanisms – becomes essential for Swiss businesses looking to expand or sustain their operations on the continent.

The AfCFTA's Dispute Resolution Architecture

State-to-State Dispute Settlement

The AfCFTA's state-to-state dispute settlement mechanism closely mirrors the WTO system while incorporating Africa-specific elements. The system operates through the Dispute Settlement Body (DSB), composed of representatives from all State Parties, which oversees the entire dispute resolution process and holds the authority to establish panels and adopt reports.

The panel and appellate process follows a structured timeline: parties must first engage in consultations for 60 days, followed by panel composition within 10 days of establishment. The panel typically concludes its proceedings within five months, with any subsequent appellate review limited to 90 days, ensuring a relatively swift resolution of trade disputes.

To demonstrate how this process works in practice, consider this scenario: a Swiss pharmaceutical company faces discriminatory registration requirements in Country A that favour products from Country B. While the company cannot directly initiate state-to-state proceedings, it can collaborate with Swiss authorities to challenge these barriers through the AfCFTA dispute resolution mechanisms.



Investment Dispute Resolution

The Investment Protocol, currently under negotiation, aims to establish a comprehensive framework for resolving investment disputes within the AfCFTA. It is expected to provide multiple dispute resolution avenues, including traditional investor-state arbitration, mediation and conciliation, and state-to-state dispute settlement. Key procedural innovations may include enhanced transparency requirements, a potential appeals mechanism, and provisions for early dismissal of frivolous claims.

For Swiss businesses operating across multiple African jurisdictions, a well-rounded dispute resolution strategy is essential. Leveraging both the multilateral protections of the AfCFTA framework and existing bilateral investment treaty (BIT) safeguards will be crucial to mitigating risks and ensuring investment security.

Practical Implications for Swiss Businesses



Strategic Considerations

Selecting the appropriate dispute resolution forum requires a careful assessment of multiple factors. The AfCFTA mechanism provides continent-wide enforcement and specialised expertise but remains largely untested. Traditional arbitration offers well-established procedures and experienced arbitrators but often entails higher costs and potential enforcement challenges, particularly when utilising established African or foreign arbitral institutions. Domestic courts, while offering local expertise and direct enforcement, may face challenges related to judicial capacity and consistency.

The actual costs of AfCFTA proceedings are yet to be determined as the system becomes fully operational. However, the consolidation of disputes at a continental level could present cost efficiencies compared to managing multiple proceedings across different jurisdictions. Swiss businesses should closely monitor the development of fee structures and administrative costs to make informed decisions as the AfCFTA dispute resolution framework evolves.



Interface with Existing Frameworks

The interaction between AfCFTA and existing dispute resolution mechanisms creates a sophisticated and multi-layered network of options. Switzerland currently maintains bilateral investment treaties (BITs) with 27 African countries, most of which include arbitration clauses under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). The AfCFTA framework is expected to complement these existing arrangements, while regional mechanisms such as the OHADA arbitration framework, the COMESA Court of Justice, and the East African Court of Justice will continue to play significant roles.

Experience shows that successfully navigating disputes in Africa often requires a diversified approach. Businesses frequently rely on commercial arbitration for supplier disputes, mediation for distribution agreements, and local courts for employment matters.

This underscores the need for flexibility in dispute resolution strategies, ensuring that Swiss companies can adapt to the most effective mechanism for each specific situation.



Key Sectors & Specific Considerations

Machinery and Equipment

Swiss machinery exporters face specific challenges related to technical standards and compliance. Common disputes include technical barriers to trade, conformity assessment issues, and conflicts arising from installation and maintenance agreements. The AfCFTA's push to harmonise technical standards and streamline trade procedures offers significant advantages in mitigating these disputes and enhance legal predictability for Swiss exporters.

Construction & Infrastructure

Infrastructure projects across Africa frequently face disputes that could benefit from the AfCFTA's harmonised approach. Common challenges include disagreements over technical specifications, project delay claims, and warranty enforcement issues spanning multiple jurisdictions.

The AfCFTA's unified dispute resolution framework has the potential to enhance legal certainty, streamline cross-border enforcement, and provide a more efficient mechanism for resolving construction-related disputes. This could be particularly beneficial for Swiss construction firms engaged in large-scale infrastructure projects across the continent.

Pharmaceuticals

Swiss pharmaceutical companies face sector-specific challenges, particularly regarding intellectual property protection. These include patent enforcement across multiple jurisdictions, regulatory approval disputes, and

issues related to parallel imports. The AfCFTA's harmonised approach presents new opportunities for managing these challenges more effectively by providing a unified framework for resolving disputes.

Recent experiences of Swiss pharmaceutical companies with patent protection and regulatory approvals across African jurisdictions demonstrates how the AfCFTA's harmonised approach to dispute resolution could enhance legal certainty and benefit pharmaceutical companies' operations across Africa.

Financial Services

Swiss banks and insurance companies operating in Africa encounter unique challenges related to cross-border payment systems. The AfCFTA introduces new provisions for payment and settlement systems that will shape how financial institutions address disputes. These provisions cover both procedural aspects of dispute resolution and the often intricate regulatory compliance requirements associated with cross-border transactions.

Swiss financial institutions' experience in managing disputes across multiple African jurisdictions underscores the potential advantages of a harmonised dispute resolution system under AfCFTA. Their ability to navigate diverse regulatory frameworks offers valuable insights for financial institutions seeking to expand their African operations while ensuring compliance and mitigating risks.





Practical Recommendations



Immediate Steps for Swiss Businesses

A well-drafted contract is a fundamental first step for Swiss businesses operating under the AfCFTA framework. Companies should incorporate flexible dispute resolution clauses, considering escalation mechanisms that explicitly reference AfCFTA procedures. These clauses must also address potential jurisdictional conflicts between different dispute resolution forums to ensure clarity and enforceability.

Businesses should develop comprehensive dispute resolution strategies that account for the full range of available forums, including AfCFTA mechanisms, regional arbitration institutions, and BIT protections.

Establishing and maintaining strong relationships with local counsel across jurisdictions is essential, while closely monitoring the implementation of AfCFTA provisions to anticipate regulatory changes and adapt strategies accordingly.



Long-term Strategic Considerations

Robust record-keeping and standardised dispute tracking systems are critical for successful dispute resolution under the AfCFTA framework. Businesses should implement internal mechanisms for documenting contractual obligations, compliance efforts, and dispute-related communications. Regularly reviewing and updating dispute resolution strategies will ensure continued effectiveness as the AfCFTA system evolves.

Long-term success under the AfCFTA framework requires proactive engagement with key stakeholders. Swiss businesses should establish relationships with local arbitration centres, engage with African business partners to understand their dispute resolution preferences, and participate in discussions surrounding AfCFTA implementation. Active involvement in these discussions can provide valuable insights and potential opportunities to shape the development of the dispute resolution system to better align with business interests.



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