Establishing an Integrated Judiciary to Facilitate the African Continental Free Trade Area

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I. INTRODUCTION

Global and regional trade can be efficacious in spurring prosperity, development, and improvement in human quality of life. This is true for Africa as in other regions of the world. A primary vehicle for international trade and development over the past 70 years has been regional economic integration. While the potential for economic integration as a catalyst for regional progress is sizeable, Africa is a principal example that in the absence of appropriate legal infrastructure, trade regimes can be ineffective at best and instruments for gross inequities at worst. Africa is not new to the game in global trade and has thorough exposure to its implications, from the fabled trade routes of the Sahara Desert, Red Sea, and Indian Ocean to the caustic trans-Atlantic slave trade and colonialism. The dearth of a wholesome legal framework in the latter has yielded unsuitable conditions for the continent. Moreover, the absence of a proper and comprehensive legal system to enable constructive trade within Africa has deprived the continent of the collective value that could inure from enhanced trade.

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According to the United Nations Development Programme, 40 percent of Sub-Saharan Africans currently live in extreme poverty,[2] comprising more than half of the world's total population living in extreme poverty.[3] The World Bank estimates that the GDP per capita in Africa is 10 percent that of the GDP per capita worldwide.[4] In Sub-Saharan Africa, this translates to a GDP per capita of only $1,600 compared to nearly $36,000 GDP per capita within the European Union (EU).[5] According to the 2019 United Nations Human Development Index, 86 percent of the countries with low human development are in the continent of Africa.[6] Indeed, the impact of underdevelopment in Africa goes beyond economics. The average life expectancy of a person living in Sub-Saharan Africa is presently 61 years, compared to a hefty 79 years for a person living in Europe.[7]

In spite of these indicators, African nations have been resilient with some of the world's strongest annual economic growth rates. Five of the world's ten fastest growing economies are in Africa, with Ethiopia at number two, Rwanda at number three, Cote d'Ivoire at number six, Djibouti at number seven, and Senegal at number nine.[8] These growth rates demonstrate the immense potential of Africa's economic "lions." While many African economies are roaring ahead, an ongoing impediment to Africa's optimized economic growth has been deficient intra-African trade. A 2019 report from the United Nations Conference on Trade and Development spotlights that today African intracontinental trade represents only 17 percent of total African trade, compared with 68 percent intracontinental

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2. *See Africa*, UNITED NATIONS, https://www.africa.undp.org/content/rba/en/home/regioninfo.html (last visited Nov. 11, 2021).

3. *See World Economic Situation and Prospects*, UNITED NATIONS at 121, 127–28 (2020), http://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_CH3_AFR.pdf.

4. *See World Bank Open Data*, THE WORLD BANK (2020), https://data.worldbank.org.

5. *Id.*

6. *See Human Development Index,* UNITED NATIONS HUMAN DEV. REP. (2018), http://hdr.undp.org/en/content/human-development-index-hdi.

7. *See World Mortality 2019*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS (2019), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Feb/un_2019_worldmortalityreport.pdf.

8. *See* Prableen Bajpai*, The 5 Fastest Growing Economies In The World*, NASDAQ (Jun. 27, 2019), https://www.nasdaq.com/articles/the-5-fastest-growing-economies-in-the-world-2019-06-27.

trade in Europe and 59 percent in Asia.[9]

African nations recently made a significant leap towards overcoming this obstacle with the creation of the African Continental Free Trade Area (AfCFTA). The AfCFTA is a continent-wide free trade area with the end-goal of an economically seamless Pan-African space where goods can be traded and business transacted fluidly across borders without costly tariffs.[10] The United Nations Commission for Africa projects that the removal of tariffs in Africa under the AfCFTA will increase intra-African trade to over 50 percent of total African trade over the next 22 years.[11] The report further specifies that "Intra-African trade in industrial products alone would increase between about 25 [percent] and 30 [percent]. For agriculture and food products, the increase would range between 20 [percent] and 30 [percent], and it would be between 5 [percent] and 11 [percent] in energy and mining products."[12]

This growth in trade springing from the AfCFTA should render fundamental improvements in the quality of life for Africans, including the creation of jobs, the reduction of poverty, and other positive externalities such as longer life expectancies. Africa is poised to secure a strong position in the global economy in the coming decades. Nonetheless, even with this promise of economic progress and growth, the continent must critically build the necessary legal infrastructure to ensure that the AfCFTA's implementation is both effective and equitable in protecting the rights of Africans. An integrated African judiciary can create this secure, equitable, and expedient space for the maximized utility of the AfCFTA to Africans.

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9. *See Economic Development in Africa Report 2019: Made in Africa: Rules of Origin for Enhanced Intra-African Trade*, UNITED NATIONS CONF. ON TRADE & DEV. (2019), https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=520.

10. *See African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents,* TRADE LAW CTR., https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html [hereinafter *AfCFTA Legal Texts*].

11. *See An Empirical Assessment of African Continental Free Trade Area Modalities on Goods,* UNITED NATIONS COMMISSION ON AFR., https://repository.uneca.org/bitstream/handle/10855/41828/b1192911x.pdf.

12. *Id.*

II. HISTORICAL PATH TO THE AFRICAN CONTINENTAL FREE TRADE AREA

Africa has a rooted history of continental trade built upon legal and political organization, which traditionally institutionalized the cultural values and ethical norms of African societies. Pre-colonial African societies engaged in plenteous trade covering territories that transcended current national borders.[13] Some of these societies included the Songhai and Kanem-Bornu empires of the African Sahel, the Kongo and Lunda kingdoms of Central Africa, the Bantu-Swahili states and Kitara kingdom of East Africa, the Axum kingdom and Somali sultanates of the Horn of Africa, the Moorish and Egyptian kingdoms of North Africa, the Zimbabwe and Nguni kingdoms of Southern Africa, and the Akan and Yoruba states of West Africa.[14] In a few generations, however, this socio-political organization, which had gelled over centuries, was upended and replaced through colonialism with a system designed solely to funnel African potential and productivity out of the continent and into Europe and the Americas.[15]

The economic and political havoc of colonialism was consummated in the notorious Berlin Conference of 1884, where European powers consolidated their multifarious interests to establish a legal regime that ravaged Africa economically, politically, and culturally.[16] African nations and families were rent with colonially imposed borders, and historic rivals were heaped into political fictions that bore no resemblance to the organic fabric of the continent.[17] The legacy of Berlin is that African polities, concocted by design to serve Western interests, have struggled to function as conduits of economic vibrancy and political fortitude for Africans.[18]

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13. *See generally* CHEIK ANTA DIOP, PRECOLONIAL BLACK AFRICA (1987).

14. *See generally* SAHEED ADERINTO, AFRICAN KINGDOMS: AN ENCYCLOPEDIA OF EMPIRES AND CIVILIZATIONS (2017); *see also generally* WILLIE F. PAGE, ENCYCLOPEDIA OF AFRICAN HISTORY AND CULTURE (2005).

15. *See generally* Stephen Ocheni and Basil C. Nwankwo, *Analysis of Colonialism and Its Impact in Africa*, 8 CROSS CULTURAL COMMC'N 46 (2012).

16. *See* Ieuan Griffiths, *The Scramble for Africa: Inherited Colonial Borders*, 152 THE GEOGRAPHICAL J. 204 (1986).

17. *See* Matt Rosenberg, *The Berlin Conference to Divide Africa: The Colonization of the Continent by European Powers*, THOUGHTCO. (June 30, 2019), https://www.thoughtco.com/berlin-conference-1884-1885-divide-africa-1433556.

18. *See* Griffiths, *supra* note 16, at 204.

It is not the legacy of colonialism alone that has beleaguered the continent. The siphoning of the continent's economic vigor to fuel Western mercantilism was relayed into the modern era by the Bretton Woods Conference of 1944, where the modern global financial system was established. The progeny of Bretton Woods, the World Bank, the International Monetary Fund, and the World Trade Organization (formerly the General Agreement on Tariffs and Trade), have collectively cemented a global economic scheme that has perpetuated the disadvantage of Africa and buried the continent in virtually unredeemable debt.[19]

The one-two combination of the Berlin Conference and the Bretton Woods Conference bankrupted Africa while inequitably harnessing the continent with the burden of hoisting the global economy.[20] While there are many contemporary factors, including the legacy of colonialism and the persistence of neocolonialism, to which Africa's current challenges can be attributed, one significant factor has been depressed trade between African countries. This is not coincidental, as Africa's economic infrastructure was fashioned to channel the continent's resources to the West, and not to facilitate internal productivity, dynamism, and growth.

This problem has not gone unnoticed within the continent. Even from the earliest inception of Africa's new nations in the 1950s and 1960s, there was a recognition that integration was critical to the progress of the continent. African nations, splintered and fragmented into micro-economies in the wake of their newly seized independence, were faced with a dilemma: to completely disband the divisive colonial borders or to take a more pragmatic approach.[21] It was ultimately resolved that in

19. *See* Adebayo Adedeji, *An African Perspective on Bretton Woods, in* THE UN AND THE BRETTON WOODS INSTITUTIONS 60-61 (1995); *see also* D. Moore Sieray, *The Bretton Woods Institutions and The Self-Deceiving State in Africa; How International Finance Capital and Blunted Vision Have Underdeveloped Africa*, 28 J. AFR. RSCH. & DEV. 183, 186–91 (1998).

20. The legal regimes of the global economic system allowed for the pillaging of Africa's human and natural resources, leaving the continent reeling and impoverished, and then extending to the continent debt derived from the gains of Africa's exploitation. An equitable legal regime would have allowed for Africans to sue for restitution, changing the narrative and legal consequences of monies extended by global institutions from "debt" to *reparations*. A fully integrated continental organization could have forestalled Africa's exploitation from the outset.

21. *See* Marco Zoppi, *The OAU and the Question of Borders*, 2 J. AFR. UNION STUD. 43, 47–52 (2013) (explaining the creation of groups with different positions on what to do with the colonial borders).

Africa's new space of political independence, a pragmatic approach would be necessary in order to preserve a degree of stability and steadiness within the continent.[22] It was concurrently recognized that the counterbalance to preserving the geopolitical status quo, which was intrinsically foreign to the continent, was for Africa to pursue economic integration and political union. The revered heroes of African liberation such as Kwame Nkrumah, Jomo Kenyatta, and Haile Selassie embraced and promoted the concept of an integrated and united Africa.[23]

On May 25, 1963, the Organization of African Unity was established to advance this goal.[24] On July 9, 2002, another significant step was taken towards this integrative vision, with replacement of the Organization of African Unity with the African Union (AU).[25] The AU's organs for facilitating economic and political union include the Assembly, the Executive Council, the Commission, the Pan-African Parliament, and the Court of Justice (presently the African Court on Human and Peoples' Rights).[26]

In 2018, Africa made its most profound progression towards integration with the creation of the AfCFTA. Established through the Agreement Creating the African Continental Free Trade Area (the "Agreement"), the AfCFTA entered into force on May 30, 2019, when 22 AU member states deposited their instruments of ratification of the Agreement.[27] The predominant objective of the AfCFTA is to create a single and secure market for goods and services in the AU through the reduction or progressive elimination of tariffs.[28] This reduction in tariff (and non-tariff) barriers is meant to incentivize trade and profit within Africa and deepen economic integration of the continent. The Agreement envisions the AfCFTA as a

22. *Id.*

23. *See generally* KWAME NKRUMAH, AFRICA MUST UNITE (1963); *see also* Jat Wale, *An Emperor Tries to Unite Africa*, N.Y. TIMES (Mar. 8, 1964), https://www.nytimes.com/1964/03/08/archives/an-emperor-tries-to-unite-africa-a-generation-older-than-other.html.

24. *The Organization of African Unity and the African Union*, USAID (Jan. 18, 2017), https://www.usaid.gov/african-union/history.

25. *About the African Union*, AFR. UNION, https://au.int/en/overview (last visited Nov. 11, 2021).

26. Organization of African Unity, Constitutive Act of the African Union art. 5, July 11, 2000, 2158 U.N.T.S. 3.

27. *See AfCFTA Legal Texts*, *supra* note 10.

28. Agreement Establishing the African Continental Free Trade Area, pmbl, Mar. 21, 2018. 58 I.L.M. 1028 (entered into force May 30, 2019) [hereinafter AfCFTA Agreement].

mechanism to promote socio-economic development, enhanced global competitiveness of African economies, industrial and agricultural development, and improved food security.[29] The Agreement specifically articulates, "a continental market with the free movement of persons, capital, goods and services . . . [is] crucial for deepening economic integration, and promoting agricultural development, food security, industrialisation and structural economic transformation . . . ."[30] Africa's integration will additionally establish greater economic and political negotiating leverage in the global arena, and consequently, more favorable conditions for Africa's continued progress and development.

While the AfCFTA is a noteworthy step in the direction of African economic integration and enhanced development, the legal infrastructure within the treaty is inadequate in establishing a proper judicial foundation for its effective and equitable implementation. This deficit in continental judicial infrastructure has been one of many impediments to Africa's full integration, and its prolongation is a barrier to fully implementing the AfCFTA.[31] A closer examination of the continent's current regional judicial network and assessment of possible models for greater judicial integration is instructive in exploring solutions that will create a more ripe legal environment for the AfCFTA's full realization.

III. LEGAL CHALLENGES IN IMPLEMENTING THE AFRICAN CONTINENTAL FREE TRADE AREA

Critical to the success of the AfCFTA are judicial institutions commissioned to settle legal disputes and create a secure environment for the free flow of trade throughout the continent. Craig Jackson underscores this, asserting that "dispute settlement and rule-making are crucial elements in economic integration."[32] Jackson goes on to explain, "A judiciary that is seen as independent will engender confidence in an

29. *Id.* at art. 3.

30. *Id.* at pmbl.

31. *See generally* Iwa Salami, *Legal and Institutional Challenges of Economic Integration in Africa*, 17 EUR. L.J. 667 (2011) (discussing how a weak legal framework impacts African economic integration).

32. Craig Jackson, *Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 139, 149 (2003).

integration scheme, especially in the investment sector—which integration schemes need for their success . . . it has been argued that previous integration efforts in Africa suffered in terms of trade expansion because of uncertainties about the ability of the judiciaries to resolve economic disputes."[33] Elisa Tino expounds upon this idea, stressing:

> [t]he increasing "maturity" of interstate cooperation, both from a normative-institutional and material point of view, and the strengthening of regional identity groups, raises the demand for legal certainty, uniformity in interpretation and application of the law of the organisation, and homogeneity in protection of different interests; this is the reason why the need for autonomous and permanent regional judicial bodies has arisen.[34]

The Agreement attempts to establish these stabilizing legal mechanisms in its Protocol on Rules and Procedures on the Settlement of Disputes (the "Protocol").[35] However, the Protocol has substantial gaps that fall short of the AfCFTA's stated goal of creating a "secure market for the goods and services of State Parties through adequate infrastructure . . . ."[36]

Perhaps the most notable deficiency of the Protocol is that only state parties have access to dispute settlement remedies. Under the Agreement, a "State Party" is defined as a "Member State" of the AU that has ratified or acceded to the AfCFTA.[37] The Protocol expressly sets the parameters of its scope as "apply[ing] to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement."[38] Private parties such as exporters, importers, producers, or service providers do not have access to the AfCFTA

33. *Id.* at 159 n. 107.

34. Elisa Tino, *The Role of Regional Judiciaries in Eastern and Southern Africa*, *in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK 2012, 140, 141 (2013).

35. *See generally* Agreement Establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the Settlement of Disputes, Mar. 21, 2018 (entered into force May 30, 2019), https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [hereinafter AfCFTA Protocol].

36. AfCFTA Agreement, *supra* note 28.

37. *Id.* at art. 1.

38. AfCFTA Protocol, *supra* note 35, at art. 3, ¶ 1.

dispute settlement apparatus.[39] Private parties are only protected by the provisions of the Protocol if a state party brings its own complaint, indirectly benefiting the private party.[40]

The stark drawback of this omission is two-fold: private rights will not always be congruent or synonymous with the interests of states, and even when they are, states often have an interest in *not* bringing complaints against another state actor. Paul Kalenga points this out, presciently exhorting in a 2016 assessment of the AfCFTA negotiations, "Given that African governments find it difficult to litigate against each other, it is necessary that private parties are also entitled to legal remedies when their rights are violated. After all, governments do not trade among each other, but private traders and service providers do."[41]

The deficit in protecting private rights will not only dampen the frequency of parties transacting confidently in interstate commerce, but it will impede the full embrace of the Agreement by state citizens. Martha Belete Hailu stresses that this has been a stifling trend in African integration efforts, where a "state-centric" focus has failed to solicit the vital participation and embrace by "private actors and the general public . . . [which] has contributed to hindering the integration process of the continent."[42] Tino also points out the benefits of private causes of action:

> [I]ndividuals' direct access to justice is very important. In fact, it provides a means for overcoming the traditional reluctance of states to sue each other; it performs the constitutional function of limiting the power of governments to decide which disputes are worth litigating; and it enhances the legitimacy of the organisation's legal order. Indeed, through litigation, individuals can effect legal change within it.[43]

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39. *Id.* at art. 4, ¶ 1.

40. *See* Gerhard Erasmus, *Dispute Settlement in the African Continental Free Trade Area*, TRADE L. CTR.: BLOG (July 11, 2019), https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html.

41. Paul Kalenga, *Critical Issues in the Negotiations of the Continental Free Trade Area* 18 (Trade L. Ctr., Working Paper No. S16WP05, 2016).

42. Martha Belete Hailu, *Regional Economic Integration in Africa: Challenges and Prospects*, 8 MIZAN L. REV. 299, 325 (2014).

43. Tino, *supra* note 34, at 153.

Furthermore, the Protocol does not have the teeth to adequately enforce breaches of the rights prescribed by the AfCFTA or other rights that may be violated as parties engage more readily in interstate commerce under the guise of the AfCFTA. The body established to resolve disputes arising under the AfCFTA, the Dispute Settlement Body (DSB), does not issue legal decisions in concert with enforcement by other judicial bodies, but instead is devised to make "recommendations" aimed at the "settlement" of disputes between parties.[44] While signatories to the Agreement have bound themselves to the terms of the Agreement, including the DSB's decisions,[45] the Protocol does not require states to acknowledge the judicial legitimacy of the DSB's decisions. As significantly, the panels formed by the DSB for resolving disagreements between state parties are not composed of full-time justices, but instead, ad hoc "rosters" of volunteer experts whose participation can be vetoed by the state parties.[46] The Protocol also calls for the panels to consult with the state parties, giving them the "opportunity to develop . . . *mutually* satisfactory solution[s]."[47] The necessity that state parties endorse and implicitly consent to the dispute resolution process will severely diminish the independence and credibility of the panels in resolving disputes.

Finally, the processes stipulated by the Protocol for parties to settle disputes are particularly cumbersome, meandering, and protracted. There are layers of delay built into the necessary consultations, mediations, panel deliberations, and appeals called for by the Protocol.[48] When state parties are in a dispute, they must first enter into consultations to attempt to find a mutually agreed resolution through the consultations.[49] The parties may also use "confidential" mediation and conciliation *any time* throughout the dispute,[50] whereby they "may suspend or terminate those proceedings, at any time, if they consider that the . . . conciliation or mediation process has failed to settle the dispute."[51] While the initial use of mediation as a precursor to litigation in a general sense is not in itself detrimental to legal

44. AfCFTA Protocol, *supra* note 35, at arts. 4, ¶ 2, 23, 24.
45. *Id.* at art. 6, ¶ 5.
46. *Id.* at arts. 10, ¶ 1, 6, 7, 20, ¶ 1.
47. *Id.* at art. 12, ¶ 3 (emphasis added).
48. *Id.* at arts. 8, 9, 15.
49. *Id.* at arts. 6, ¶ 1, 7.
50. *Id.* at art. 8, ¶ 1.
51. *Id.* at art. 8, ¶ 4.

process, providing it as an escape hatch to unscrupulous players midstream is potentially disruptive to the efficient judicial flow of the conflict resolution process.

If a consultation or mediation fails to occur, or the state parties fail to settle a dispute through a consultation or mediation, the Protocol provides that "any party to the dispute shall, after notifying the other parties to the dispute, refer the matter to the DSB."[52] Once a matter is referred to the DSB, a Dispute Settlement Panel (the "Panel") is formed.[53] The Panel "[sets] in motion the process of a formal resolution of the dispute as provided for in the Protocol."[54] Based upon *confidential* proceedings of the Panel and "reports" it generates,[55] "the DSB shall make its determination of the matter and its decision shall be final and binding on the parties to a dispute."[56] In essence, the Panel produces non-legal reports through proceedings that are conducted in secrecy, thus removing public access and legitimacy of the proceedings.

If a complaining party is not satisfied with the Panel's decision in a dispute, the complaining party may appeal the decision to a standing Appellate Body.[57] The members presiding on the Appellate Body consists of "persons" with relevant "expertise" (not necessarily jurists) who serve on the body for a four-year term.[58] The Protocol does not grant jurisdiction to a bona fide judicial entity to decide disputes and interpret the language of the AfCFTA. It is the duty of the state parties to fully implement the recommendations and rulings of the DSB. The primary recourse for non-compliance with a DSB *recommendation* is the reciprocal suspension of trade concessions (or preferences) under the AfCFTA and *voluntary* "compensation."[59]

Onsando Osiemo comments on the history of sanctions such as those in the Protocol:

> In all the African [regional trade agreements] the Community court's judgments are stated to be final and

52. *Id.* at art. 6, ¶ 2.
53. *Id.* at art. 9.
54. *Id.* at art. 6, ¶ 4.
55. *Id.* at arts. 18, 7, ¶ 7(a), 17.
56. *Id.* at art. 6, ¶ 5.
57. *Id.* at art. 19, ¶ 6, 21.
58. *Id.* at art. 20, ¶ 4, 7.
59. *Id.* at art. 25, ¶ 1.

> binding on Member States and Member States are required to take implementing measures. However, there are no provisions for monitoring compliance or sanctions in case of default. A direct consequence of these weak provisions is the high rate of non-compliance with community courts' judgments and low levels of implementation of community treaty provisions and laws.[60]

Osiemo's contextual appraisal corroborates an analysis that although the Protocol includes the term "binding," it is in actuality non-obligatory upon states post-ratification and requires their consent in each individual case. This lack of truly binding effect will ultimately degrade the legitimacy of the DSB. Tino highlights that African treaties establishing legal entities such as the DSB have been ratified in the past, but this has not historically translated into the actual acceptance of the legitimacy of these bodies and their decisions.[61] Tino elucidates that this stems from a fundamental problem:

> Generally, member states cooperate by adopting non-binding acts; if they decide to bind each other, they adopt agreements or protocols, only binding signatory parties and not directly creating rights and obligations for individuals. So, potential disputes involve member states exclusively and to settle them they prefer to resort to diplomatic and political means in order to preserve their national sovereignty.[62]

The Protocol's creation of the DSB mechanism is well-meaning, but it likely will not contribute to a prime environment for the burgeoning AfCFTA where the rights of Africans participating in a globally oriented Pan-African economy are protected. In this absence of effective legal agency through the Protocol, further examination of the current judicial framework within the continent is necessary to explore what might be forged to more readily facilitate an apt integration process.

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60. Onsando Osiemo, *Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa*, 41 L. ISSUES ECON. INTEGRATION 87, 114 (2014).

61. Tino, *supra* note 34, at 153–54.

62. *Id.* at 140.

IV. AFRICAN REGIONAL COURTS AS BUILDING BLOCKS OF AN INTEGRATED JUDICIARY

The Agreement calls for the "need to establish clear, transparent, predictable and mutually-advantageous rules to govern Trade in Goods and Services, Competition Policy, Investment and Intellectual Property among State Parties, by resolving the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties."[63] In spite of this lofty aim, the AfCFTA fails to establish a harmonious and comprehensive legal mechanism to iron out the inefficiencies within the current legal regime. Notwithstanding the provisions of the Protocol and DSB, there is not a cohesive continental entity empowered to adjudicate private disputes that may arise under the aegis of the AfCFTA.

Even given the shortcomings of the DSB, Africa's regional courts can serve as supplemental building blocks of a continental judiciary to resolve disputes between parties and protect legal rights in the intracontinental economy. However, the current patchwork of courts are themselves beset with jurisdictional holes and organizational inefficiencies. The regional courts are presently disorganized into an irregular motley of overlapping regions with variant levels of jurisdiction and none with the jurisdiction to interpret the AfCFTA or duly adjudicate the transactions it aims to facilitate.

This problem is highlighted by Hailu, who notes that each regional economic community (REC) has its "own legal personality . . . [as] legal entities and as such generate their own jurisprudence. Multiplicity of membership subjects individuals to numerous legal regimes inviting for forum shopping and generating conflicting results. This will again create a problem in the enforcement of judgments entered by tribunals that are created by the RECs."[64] The seemingly incoherent organization of the regional courts with overlapping and inconsistent jurisdictions is a product of the lack of coordination between the AU and RECs in which the courts preside. While African regional courts have not been optimally plotted, they nonetheless possess the mechanics for a continental judiciary that could augment the AfCFTA. An examination of the regional judiciaries illuminates this important observation.

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63. AfCFTA Agreement, *supra* note 28, at pmbl.

64. Hailu, *supra* note 42, at 321.

A. AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

The one continental court with jurisdiction theoretically to decide matters that affect persons throughout the continent is the African Court of Human and Peoples' Rights (ACHPR). The ACHPR, formerly the African Court, was established on January 25, 2004, as the only legal organ of the AU.[65] The court is the nearest entity to an African judiciary, which might be better positioned to adjudicate disputes of parties transacting business across the continent. In contrast to the DSB, the ACHPR has several features that would be more advantageous in resolving disputes arising under the AfCFTA. First, the ACHPR is a bona fide judiciary with decisions that have the binding force of law in ratifying states; second, the ACHPR is an established AU entity with over 30 years of jurisprudence and concrete rules of procedure for more effective legal process;[66] third, the ACHPR has a body of justices who consistently serve a fixed term with a steady docket of cases to more readily handle cases and build expertise in relevant bodies of law;[67] and fourth, there are limited pathways to the court for private parties, which can be expanded.[68]

The ACHPR is established to safeguard and enforce the basic human rights of Africans enshrined in the African Charter on Human and Peoples' Rights (the "Charter").[69] The ACHPR

65. *See Welcome to the African Court*, AFR. CT. ON HUM. & PEOPLES' RIGHTS, https://www.african-court.org/wpafc/welcome-to-the-african-court/ (last visited July 13, 2021).

66. Christina Fanenbruck and Lenya Meißner stress the importance of judicial longevity in contrasting the success of the European Court of Justice and the pseudo-success of the African Court of Justice with the SADCT. Christina Fanenbruck & Lenya Meißner, *Supranational Courts as Engines for Regional Integration? A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice, and the Andean Court of Justice* 24 (Institutional Repository of the Freie Universität Berlin, Working Paper No. 66, 2015) ("This variable is concerned with path-dependency and supposes that the longer a court exists, the more likely it is to advance integration. This is explained simply by the fact that it has more time to do so. Processes and traditions can form and take root within institutional structures.").

67. *See Summary of All Orders Issued by the Court*, AFR. CT. ON HUM. & PEOPLES' RIGHTS (July 29, 2020), https://en.african-court.org/index.php/cases.

68. *See* Protocol to the African Charter on Human and Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights arts. 5, ¶ 3, 34, ¶ 6, June 10, 1998 – Feb. 8, 2016 (entered into force Jan. 25, 2004) [hereinafter African Human Rights Court Charter].

69. *See Welcome to the African Court*, *supra* note 65.

has 11 justices who serve six-year terms, renewable for one term.[70] The court has a President who serves for one two-year term and works full-time to oversee cases and manage administrative duties of the court, along with ten other justices serving part-time.[71] The court has its own Rules of Procedure and holds "four ordinary sessions per annum, each of which . . . last[s] about fifteen days."[72] The greater regularity of the ACHPR is distinct from the DSB, which in contrast, serves as a *fully* ad hoc panel assembled to resolve disputes on an as-needed basis and an Appellate Body that does not meet consistently.

The jurisdiction of the ACHPR is confined to human rights matters. Article III of the protocol establishing the court outlines jurisdiction as follows: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."[73] The Court essentially has jurisdiction to decide cases arising under the Charter. The Charter addresses important rights such as the right to life, assembly, religion, property, and other basic and fundamental human rights.[74] The Charter does not, however, address the kinds of matters that may emerge from conducting business in various countries throughout Africa under the AfCFTA. For example, the Charter does not create laws addressing contractual rights or redress for tortious acts.[75] Consequently, the ACHPR lacks jurisdiction to decide the types of cases needed for business to flow more freely and equitably from country to country in a secure Pan-African environment under the AfCFTA.

Moreover, the jurisdictional reach of the court to parties, whether state or private, is geographically confined to states that have presently ratified the Charter. Presently, 30 African states have ratified the jurisdiction of the ACHPR, including

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70. African Human Rights Court Charter, *supra* note 68, at arts. 11, 15.

71. *Id.* at art. 21, ¶ 1.

72. African Court on Human and Peoples' Rights: Rules of Court r.14, June 20, 2008, https://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf [hereinafter ACHPR Rules].

73. *See* African Human Rights Court charter, *supra* note 68, at art. 3, ¶ 1.

74. African (Banjul) Charter on Human and Peoples' Rights ch. 1, June 1, 1981 (entered into force Oct. 21, 1986), https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf.

75. *See generally id*.

Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, Tanzania, Togo, Tunisia, and Uganda.[76] This leaves 24 AU states that have not yet ratified the treaty establishing the ACHPR and subsequently do not yet fall within the personal jurisdiction of the court.

Parties with standing to submit applications to the court are also restricted. These parties are generally, the African Commission on Human and Peoples' Rights (the "Commission"), state parties representing a citizen whose rights have been violated, state parties to a complaint before the Commission, and African intergovernmental organizations.[77] Individuals and nongovernmental organizations (NGOs) only have direct standing before the court if their countries have filed a declaration of competence for the court to hear complaints directly from these non-state parties.[78] There are presently only six countries that have made such declarations: Burkina Faso, The Gambia, Ghana, Malawi, Mali, and Tunisia.[79]

When a country has declared that the ACHPR has competence to hear a complaint from a non-state actor, "[t]he Court may . . . if it deems it necessary, hear . . . the individual or NGO that initiated a communication to the Commission . . . ."[80] There are essentially two windows for the complaint of a private party to reach the court: (1) if the Commission brings a claim that an NGO or individual has initiated with the Commission; or (2) if the action is brought directly by an NGO or individual registered with the Commission from a country that has made a declaration of the court's competence to hear such complaints.

This narrow pathway is constraining to the efficacy of the ACHPR in adjudicating important cases. The court is tasked with the protection of individual rights as prescribed internally by African states, but proper standing before the court often hinges upon state parties bringing abuses before the court. This creates a largely innocuous environment for bad actors to violate the rights of private citizens with impunity or insulation from

76. *See Welcome to the African Court*, *supra* note 65.

77. African Human Rights Court Charter, *supra* note 68, at art. 5, ¶ 1.

78. *Id.* at arts. 5, ¶ 3, 34, ¶ 6.

79. *Declarations*, AFR. CT. ON HUM. & PEOPLES' RIGHTS, https://www.african-court.org/wpafc/declarations/ (last visited Nov. 11, 2021).

80. ACHPR Rules, *supra* note 72, at r. 29, ¶ 3(c).

passive or complicit state actors.[81] Notwithstanding these limitations, the Charter does at least technically require states to "comply with the judgment [of the ACHPR] in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."[82]

While the ACHPR holds promise for filling the gaps of the DSB in protecting the rights of Africans engaging in intracontinental trade, it would need several key addendums to fulfill this important role. The court will need to expand its subject matter jurisdiction; the court's competence and personal jurisdiction will need to be expanded throughout the continent; and the court will need to create greater pathways of private causes of action.

B. COMMON MARKET OF EASTERN AND SOUTHERN AFRICA COURT OF JUSTICE

The Common Market of Eastern and Southern Africa Court of Justice (COMESACJ) was established as the judicial vehicle of COMESA in 1994.[83] The COMESACJ's primary purpose is to "ensure the adherence to law in the interpretation and application of [the COMESA] Treaty."[84] The COMESACJ is perhaps the best model of a Pan-African judiciary. The court has two divisions, a Division of First Instance and an Appellate Division that can hear appeals from the other division on matters of law, jurisdiction, and procedural irregularities.[85] There are a total of 12 judges, seven of whom serve on the Division of First Instance and five of whom serve on the Appellate Division.[86] Judges may serve for a term of five years, and a reappointment of one term.[87] Member states are bound by the COMESA Treaty to enforce decisions of the COMESACJ "without delay."[88]

The COMESACJ has jurisdiction to hear cases brought by

81. The court *may* render both advisory decisions as well as decide contentious cases. ACHPR Rules, *supra* note 72, at r. 26.

82. African Human Rights Court Charter, *supra* note 68, at art. 30.

83. Treaty Establishing the Common Market for Eastern and Southern Africa art. 7, Dec. 8, 1984 [hereinafter COMESA Treaty].

84. *Id.* at art. 19, ¶ 1.

85. *Id.* at arts. 19, ¶ 2, 23, ¶ 3.

86. *Id.* at art. 20, ¶ 1.

87. *Id.* at art. 21, ¶ 1.

88. *Id.* at art. 34, ¶ 3.

COMESA member states asserting that another member state has failed to meet its obligations or has otherwise violated the terms of the treaty.[89] The court may also hear cases brought by a member state asserting that the COMESA Council has acted illegally or in violation of the treaty.[90] Conversely, the COMESA Secretary-General refers matters to the court for decision if the COMESA Council determines that a member state is out of compliance with COMESA for a predetermined time.[91] Any "resident" in a member state may file a complaint in the COMESACJ asserting that a COMESA member state has violated the treaty or its protections once all judicial remedies have been exhausted in the national courts.[92] The COMESACJ has jurisdiction to decide disputes between COMESA and its employees arising out of COMESA's employee regulations.[93] The COMESACJ may also hear any claim against COMESA or its servants.[94] Finally, the court has jurisdiction to hear cases where the parties, whether member states or otherwise, have agreed for the COMESACJ to arbitrate a particular dispute.[95]

The COMESA Treaty grants the COMESACJ supremacy in its interpretation of the treaty over the decisions of national courts, while reserving to national courts the authority to hear disputes involving COMESA where jurisdiction has not been conferred to the COMESACJ.[96] National courts may seek a preliminary ruling from the COMESACJ on the interpretation of the treaty or validity of an act under the treaty, and importantly, are required to refer any such case to the COMESACJ where there is no legal remedy at the national level.[97] The COMESA Treaty additionally allows the COMESACJ to give advisory opinions to the COMESA Authority, the COMESA Council, or a member state.[98]

The COMESACJ presides over a geographic region stretching from Libya and Egypt through much of the Horn of African down into Southern Africa as far as Zimbabwe.[99]

89. *Id.* at art. 24, ¶ 1.
90. *Id.* at art. 24, ¶ 2.
91. *Id.* at art. 25.
92. *Id.* at art. 26.
93. *Id.* at art. 27, ¶ 1.
94. *Id.* at art. 27, ¶ 2.
95. *Id.* at art. 28.
96. *Id.* at art. 29.
97. *Id.* at art. 30.
98. *Id.* at art. 32.
99. *See id.* at art. 1.

Coincidentally, the COMESACJ's territorial jurisdiction consists of many of the countries that have not ratified the ACHPR. The puzzle-like juxtaposition of the COMESACJ's geographic coverage with the current reach of the ACHPR in fact covers much of the African continent. The integration of the courts could be the foundation of a continental judicial system that cultivates a legal environment conducive for regular transacting across state lines. The convergence of the two courts with the expansion of jurisdiction to decide cases presently delegated to the DSB, as well as additional jurisdiction necessary to facilitate legally sound African integration, would greatly advance the objectives of the AfCFTA.

C. EAST AFRICAN COURT OF JUSTICE

The East African Court of Justice (EACJ) is the most robust regional court in Africa, due in large part to the fact that East Africa is the most integrated region in Africa.[100] Not only does the court have the authority to render decisions on matters of the East African Community (EAC), which are binding upon member states to enforce,[101] but the court has a full judicial apparatus that includes lower and appellate courts.[102] The EACJ was established in 1998 as the primary judicial vehicle for the EAC.[103] The court consists of a maximum of 15 justices who serve for a seven-year, non-renewable term.[104]

The EACJ has jurisdiction to interpret and apply the treaty establishing the EAC and any other jurisdiction that the EAC Council confers upon the court, including jurisdiction over human rights matters.[105] Further, the following parties have standing to bring an action before the court: (1) an EAC member state either bringing a complaint against another EAC member state or EAC entity, for failing to comply with a requirement of the EAC Treaty, or bringing an action to determine the legality or contravention of an act under the EAC Treaty;[106] (2) the EAC

100. *See Rankings,* AFR. REGIONAL INTEGRATION INDEX (May 13, 2020), https://www.integrate-africa.org/rankings.

101. *See* Treaty for the Establishment of the East African Community art. 38, ¶ 3, Nov. 30, 1999 (amended Aug. 20, 2007) [hereinafter EAC Treaty].

102. *Id.* at art. 23, ¶¶ 2–3.

103. *Id.* at art. 9, ¶ 1.

104. *Id.* at art. 24, ¶ 2.

105. *Id.* at art. 27.

106. *Id.* at art. 28.

Secretary General, under the direction of the EAC Council of Ministers, filing a complaint against a member state that is out of compliance with the treaty;[107] (3) an EAC resident bringing a complaint against an EAC member state for acts that are in contravention of or illegal under the EAC Treaty;[108] (4) EAC employees objecting to the terms and conditions of their employment;[109] and (5) commercially contracting parties that have agreed to an arbitration clause granting the court jurisdiction to arbitrate a dispute.[110]

In addition, the EAC Council of Ministers may request advisory opinions from the court, and national courts and tribunals can seek an opinion on the interpretation or application of the EAC Treaty and other EAC acts.[111] The EAC Court has supremacy in its interpretation of the treaty over the decisions of national courts, while national courts maintain the authority to hear disputes involving the EAC where jurisdiction has not been conferred to the EACJ.[112]

The EACJ lacks jurisdiction to adjudicate disputes arising out of "transactions" within the EAC region.[113] However, its organization is a template for other regional African judiciaries in the continent. The structure and jurisdiction of the EACJ, with some additional layers of jurisdiction, can be exported and integrated with other African regional courts.

D. ECONOMIC COMMUNITY OF WEST AFRICAN STATES COURT OF JUSTICE

The Economic Community of West African States Court of Justice (ECOWASCJ) was established as the principal legal organ of the Economic Community of West African States (ECOWAS) under Article 11 and Article 15 of the Revised Treaty of the ECOWAS (ECOWAS Treaty), signed in Abuja in 1993.[114] The ECOWAS Treaty expressly notes that it is "conscious of the

107. *Id.* at art. 29.
108. *Id.* at art. 30.
109. *Id.* at art. 31.
110. *Id.* at art. 32.
111. *Id.* at arts. 36, 34.
112. *Id.* at art. 33.
113. *See id.* at art. 27.
114. *See* Revised Treaty of the Economic Community of West African States art. 6, July 24, 1993, https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf.

role the Court of Justice can play in eliminating obstacles to the realization of Community objectives and accelerating the integration process . . . ."[115] The court has seven justices who serve a term of five years, renewable once.[116]

The ECOWASCJ has jurisdiction to adjudicate disputes relating to the enactment, application, and interpretation of ECOWAS instruments, laws, regulations, and decisions.[117] The court further has jurisdiction to determine cases involving human rights violations in any ECOWAS member state,[118] the liability of ECOWAS to parties for non-contractual damages,[119] and the resolution of disputes as an Arbitration Tribunal of ECOWAS.[120] Finally, the court has the authority to decide any dispute where the parties have an agreement for the court to settle a dispute between the parties.[121]

Parties with standing to come before the court include: (1) ECOWAS member states; (2) the ECOWAS Executive Secretary in actions asserting that a member state has failed to meet an ECOWAS obligation; (3) ECOWAS member states, ECOWAS Council of Ministers, or the ECOWAS Executive Secretary bringing actions to determine the legality of an action pursuant to ECOWAS texts; (4) individuals and corporate entities asserting a violation of rights by an ECOWAS official; (5) individuals asserting human rights violations where the matter is not before another international court; (6) ECOWAS staff who have "exhausted all appeals processes available . . . under the ECOWAS Staff Rules and Regulations"; and (7) a national court of an ECOWAS member state seeking interpretation of an ECOWAS instrument, protocol, or regulation.[122]

When comparing the ECOWASCJ with the ACHPR, one important observation is that the ECOWASCJ has jurisdiction

115. Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Article 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol pmbl, Jan. 19, 2005, http://www.courtecowas.org/wp-content /uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf [hereinafter ECOWAS Court Protocol].

116. Protocol A/P.l/7/91 on the Community Court of Justice arts. 3, ¶ 2, 4, ¶ 1, July 6, 1991.

117. ECOWAS Court Protocol, *supra* note 115, at art. 3, ¶ 1.

118. *Id.* at art. 3, ¶ 4.

119. *Id.* at art. 3, ¶ 2.

120. *Id.* at art. 3, ¶ 5.

121. *Id.* at art. 3, ¶ 6.

122. *Id.* at art. 4.

in national sovereign space where the ACHPR lacks full jurisdiction. For example, ECOWAS members Liberia, Sierra Leone, Guinea, and Guinea Bissau have not ratified the treaty establishing the ACHPR. Furthermore, Niger, Nigeria, Senegal, and Togo have not yet made declarations acknowledging the competence of the ACHPR to hear cases brought by private individuals and NGOs.[123] The ECOWASCJ, on the other hand, has jurisdiction to hear actions by individuals in these countries concerning human rights violations they can bring directly before the court.[124] While the integration of the ECOWASCJ with the ACHPR could help close jurisdictional loopholes in the continental judicial landscape, both courts need additional jurisdiction to hear disputes arising out of transactions across national borders that are between diverse citizens. This jurisdiction would naturally fall to regional courts such as the ECOWASCJ and the EACJ, reconstituted, with the ACHPR reendowed with jurisdiction to interpret AU treaties such as that establishing the AfCFTA.

E. PENDING AND DEFUNCT REGIONAL AFRICAN COURTS

There are other regional courts on the continent that have either not yet commenced or are now defunct. Specifically, the Economic Community of Central African States (ECCAS) has authorized a Court of Justice to ensure the ECCAS Treaty is observed and to decide on the interpretation and application of the Treaty.[125] The decisions of the court would be binding upon member states, but the court is not yet functional.[126] The court, once commenced, would have jurisdiction to ensure the legality of the decisions, directives and regulations of ECCAS, decide on actions brought by ECCAS member states concerning the ECCAS Treaty, give preliminary rulings on the interpretation of the Treaty, decide the validity of ECCAS actions, and give advisory opinions on any legal matter requested by the ECCAS Conference or Council.[127]

Now defunct, the Southern African Development Community Tribunal (SADCT) was established in 2005 to

123. *See Welcome to the African Court*, *supra* note 65.

124. ECOWAS Court Protocol, *supra* note 115, at art. 4.

125. Treaty Establishing the Economic Community of Central African States art. 16, Oct. 18, 1983 (entered into force Dec. 18, 1984), 23 I.L.M. 945.

126. *See id.*

127. *Id.*

interpret the SADC Treaty and instruments.[128] While making some notable decisions between 2005 and 2010, the SADCT was curtailed in 2010 after it became involved in the political matter of white landowners' rights in Zimbabwe.[129] The failure of the SADCT is useful in analyzing potential pitfalls in African judicial integration. As Christina Fanenbruck and Lenya Meißner observe, the controversial case of *Campbell v. Republic of Zimbabwe* led to the demise of the tribunal and "th[e] ruling did not advance integration within SADC because the Zimbabwean government failed to adhere to the court's rulings."[130] Fanenbruck and Meißner continue:

> As a result of the *Campbell* case and the process it set in motion, in 2012 the [SADCT's] jurisdiction was confined to member states. Considering that only individuals had approached the SADCT up to that moment, this effectively transformed it into a dormant institution, void of its original purpose. Moreover, as African states have a tradition to not go to court against one another, this will likely ensure that the . . . [SADCT] will remain an empty shell . . . in the future.[131]

One of the major objections of the SADCT was that Zimbabwe had not ratified the treaty establishing the court.[132] Furthermore, because the SADCT did not bear legitimacy at the grassroots level, its curtailment produced no public outcry.[133] The obvious lesson is that any efforts to integrate the African regional judiciaries will require member states to fully vest in the arrangements through ratification. The less conspicuous but all-imperative lesson is that more widespread utilization of the courts to litigate in nationally diverse transactions will anchor the courts' legitimacy among the citizenry. The re-commission of

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128. SADC is the Southern African Development Community. *See SADCT*, S. AFR. DEV. COMMUNITY, https://www.sadc.int/about-sadc/sadc-institutions/tribun (last visited Nov. 11, 2021).

129. *See SADC: Q&A on The Tribunal*, HUMAN RTS. WATCH (Aug. 11, 2011, 4:18 PM), https://www.hrw.org/news/2011/08/11/sadc-qa-tribunal.

130. Fanenbruck & Meißner, *supra* note 66, at 13.

131. *Id.* at 15 (emphasis added).

132. *Id.* at 20.

133. *See* Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 318 (2016) ("Secretariats, civil society groups and regional parliaments can slow down sanctioning initiatives, enhance transparency and create opportunities to rally against backlash proposals.").

the SADCT with this important jurisdiction will help to legitimize the court as with other African regional courts.

V. EXPLORING MODELS FOR REGIONAL JUDICIAL INTEGRATION

The African project of achieving economic integration is not a novelty in the international realm. There are examples that can be modeled for an integrated African judiciary. The Court of Justice of the European Union, the Caribbean Court of Justice, and the United States Courts are three instructive models that range from less extensive to more extensive judicial systems, respectively. A Pan-African judiciary could draw from these models while being structured with Africa's unique legal, cultural, historical, and political traditions as foremost considerations.

A. COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union (CJEU) is established under Section 5 of the Consolidated Version of the Treaty on the Functioning of the European Union (EU Treaty).[134] There is one higher "Court of Justice" and a General Court of Justice whose decisions can be appealed to the Court of Justice on questions of law.[135] The EU Treaty also allows for the EU Parliament to create lower specialized courts to hear certain classes of cases, and whose decisions can be appealed to the General Court on questions of law.[136] CJEU judges serve a term of six years.[137]

The CJEU's jurisdiction falls into two general categories: interpretation of EU treaties and the resolution of disputes involving EU entities. Concerning the former, the court has jurisdiction to interpret EU treaties and to decide on the validity and interpretation of the acts of EU entities.[138] When deciding cases involving the interpretation of EU treaties or the validity of actions by other EU entities, national courts may request that

134. Consolidated Version of the Treaty on the Functioning of the European Union sec. 5, July 6, 2016, 2016 O.J. (C 202) 47 [hereinafter EU Treaty].

135. *Id.* at arts. 251, 256.

136. *Id.* at art. 257.

137. *Id.* at arts. 253–54.

138. *Id.* at art. 267.

the CJEU decide preliminarily on the matter, or are obligated to submit the cases to the CJEU if there is no national remedy.[139] The court can resolve disputes between member states concerning the interpretation of EU treaties where those states have agreed to have the court decide the dispute,[140] and the court can similarly interpret arbitration clauses granting jurisdiction to the court.[141] In addition to deciding cases authorized under the EU Treaty, the court can issue advisory opinions to the EU Parliament, the EU Council, or the EU Commission concerning whether a proposed international agreement entered into by the EU is permissible under the EU Treaty.[142]

There are multiple areas where the CJEU may resolve disputes involving EU entities. The court has jurisdiction to decide whether the EU Council has acted legally to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."[143] The court also has jurisdiction to resolve disputes between EU employees and the EU[144] as well as cases involving liability or contractual obligations of the EU.[145]

Beyond this, the EU Parliament and EU Council are empowered to provide the court with jurisdiction over other areas such as penalties contained in jointly adopted regulations and disputes arising under EU laws pertaining to intellectual property rights.[146] Although the court does not have jurisdiction to hear cases involving human rights, there is a separate court, the European Court of Human Rights, which was established seven years after the CJEU to hear cases pertaining to violations of the European Convention on Human Rights.[147] There are

139. *Id.*
140. *Id.* at art. 273.
141. *Id.* at art. 272.
142. *Id.* at art. 218, ¶ 11.
143. *Id.* at arts. 269, 7.
144. *Id.* at art. 270.
145. *Id.* at arts. 268, 340.
146. *Id.* at art. 262–63. This grant of jurisdiction must be agreed upon by the respective member states through their own constitutional processes. *Id.* There are a number of additional and unique areas of jurisdiction that should be mentioned. The court may, at the direction of the EU Council, force a member of the EU Commission into retirement who has inappropriately acted outside the bounds of his or her responsibilities as a member of the EU commission. *Id.* at arts. 245, 247. The court has further jurisdiction over certain limited matters of the EU Investment Bank. *Id.* at art. 271.
147. *See* EUR. CT. HUMAN RIGHTS, *Court in Brief*, https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Nov.

other areas where the CJEU is explicitly excluded from jurisdiction by the EU Treaty, such as deciding on matters of foreign affairs and policy and the actions of police within member states.[148]

There are a number of instances where parties have standing to appear before the CJEU. Both EU member states and *persons* may bring complaints before the court pertaining to the illegality or failure of major EU organs to meet their obligations under the EU treaties.[149] The EU Commission may bring an EU member state before the CJEU if the EU Commission determines that the member state has failed to comply with its responsibilities under EU treaties and after a formal request from the EU Commission.[150] An EU member state may also bring a matter before the court where the member state believes another member state is out of compliance with any of the EU treaties.[151] EU member states are obligated to comply with the court's judgments concerning their compliance with the EU treaties.[152]

The jurisdictional reach of the CJEU is a useful model for Africa in that it aims to achieve a similar goal of facilitating continental economic integration. The CJEU is also distinct from the realities of an African court, given that Africa is not yet as far in the integration process as Europe, and the organs of the AU are not yet as developed and engrained in the political structure of the continent as those of the EU. Nonetheless, there are facets of the CJEU that can be transferred to a more developed African judiciary. For instance, as the CJEU can interpret EU treaties and acts, an African judiciary could be granted similar jurisdiction to decide on matters involving agreements and actions of the AU. For models of adjudicating private disputes that fall outside of the purview of treaty interpretation (where the CJEU falls short), assessment will need to be made of more extensive judiciaries.

B. CARIBBEAN COURT OF JUSTICE

The Caribbean Court of Justice (CCJ) was established in

11, 2021).

148. EU Treaty, *supra* note 134, at art. 275.

149. *Id.* at arts. 263, 265.

150. *Id.* at arts. 258, 260.

151. *Id.* at art. 259.

152. *Id.* at arts. 258, 260.

2001 with a goal of "deepening . . . the regional integration process [of the Caribbean Community]."[153] The court consists of no more than ten judges (including a President) who serve until they reach age 72.[154] Member states of the Caribbean Community (CARICOM) are required by treaty to comply with the decisions of the court, which create legally binding precedent within the community.[155]

The court has exclusive, compulsory jurisdiction over: (1) disputes between CARICOM member states that have signed the agreement establishing the court; (2) disputes between a member state and CARICOM; (3) referrals from national courts or tribunals of member states; and (4) applications by nationals in accordance with proper standing, concerning the interpretation and application of the treaty establishing CARICOM (CARICOM Treaty).[156]

The court has discretionary appellate jurisdiction as a matter of right to parties in the following cases: (1) civil proceedings where the matter in dispute, including property, is at least $25,000 in Eastern Caribbean currency; (2) proceedings dealing with the dissolution or nullity of marriage; (3) proceedings involving a constitutional question of a member state; (4) decisions where a lower court of a member state has jurisdiction over the protection of fundamental rights or constitutional rights; (5) decisions where a lower court of a member state has jurisdiction over constitutional rights; and (6) any other cases where a member state grants the CCJ jurisdiction or any matter that by way "of its great general or public importance or otherwise, ought to be submitted to the Court . . . ."[157] The treaty establishing the CCJ (CCJ Treaty) gives the court the same jurisdiction and powers as appellate courts in CARICOM member states,[158] and a number of states have utilized the court as such—although not all.[159] Under Article 13 of the CCJ treaty, the court also has jurisdiction to deliver advisory opinions concerning the interpretation and

153. Agreement Establishing the Caribbean Court of Justice pmbl., Feb. 14, 2001 [hereinafter CCJ Treaty].

154. *Id.* at arts. 4, ¶ 1, 9, ¶ 3.

155. *Id.* at arts. 15, 22.

156. *Id.* at arts. 12, 24.

157. *Id.* at art. 25.

158. *Id.* at art. 25, ¶ 6.

159. *See* Andrew N. Maharajh, *The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court*, 47 CORNELL INT'L L.J. 735, 738 (2014).

application of the CARICOM Treaty.[160]

CARICOM nationals have standing to appear before the court when the following factors come into alignment: (a) the CCJ has determined that a matter involving a right conferred by the CARICOM Treaty upon a member state directly inures to the benefit of a national, (b) the national has been prejudiced concerning a right that inures to the benefit of the national, (c) the relevant member state has not brought the matter before the court or has "expressly" consented to the national bringing the matter before the court instead of the member state, and (d) the court "has found that the interest of justice requires that the persons be allowed to espouse the claim."[161]

In matters involving "the settlement of international commercial disputes," parties are encouraged to use arbitration and alternative dispute resolution to the maximum extent possible, with the facilitation and enforcement of member states.[162] This approach may be inadequate for an African judiciary to facilitate the AfCFTA. However, there are features of the CCJ that might be advantageous for an African judiciary. For example, the innovation of the CCJ allowing individuals direct access to the court where member states do not either represent the party or grant express permission for the party to appear before the court might be a model that balances the political culture of African states not to yield sovereignty to regional judiciaries. To this point, the cultural and historical kinship of CARICOM with Africa might be suggestive that models employed in CARICOM will be more conducive for incorporation in Africa.

C. UNITED STATES COURTS

The United States Courts (USC) system is the most integrated model in the spectrum of judicial systems examined. The USC system is based upon judicial federalism, or the division of responsibilities in adjudicating cases between the 50 American states and territories and the national government. This division of judicial power is created by the United States Constitution (U.S. Constitution), which authorizes federal

160. CCJ Treaty, *supra* note 153, at art. 13.
161. *Id.* at art. 24.
162. *Id.* at art. 23.

"judicial Power" under Article III.[163] The U.S. Constitution creates the highest federal court, the Supreme Court, and authorizes the Congress to create lower federal courts.[164] There are a maximum of nine Supreme Court justices who serve for life with good behavior.[165] Congress has created federal courts under the United States Code, Title 28, Judiciary and Judicial Procedure.[166] Title 28 establishes 94 federal district courts[167] and thirteen regional-based circuit courts of appeals[168] with jurisdiction to hear cases appealed from the federal district courts.[169] Any appellate decision of a circuit court of appeals can subsequently be appealed to the Supreme Court if the high court accepts the case.[170]

The courts of individual states and territories are courts of general jurisdiction, which can hear most categories of cases, including those related to state law as well as cases involving federal law. The USC are federal courts of specific enumerated jurisdiction. The U.S. Constitution provides several categories of cases that the USC can at least theoretically hear, including: (1) cases arising under the U.S. Constitution, federal statutes, and treaties; (2) cases affecting ambassadors, other public ministers, and consuls; (3) cases of admiralty and maritime jurisdiction; (4) controversies in which the United States is a party; (5) controversies between two or more states; (6) controversies between a state and citizens of another state; (7) controversies between citizens of different states; (8) controversies between citizens of the same state claiming lands under grants of different states; and (9) controversies between a state, or the citizens thereof, and foreign states, citizens or subjects.[171]

In summary, the U.S. Constitution authorizes certain areas of judicial power where the Supreme Court and its lower federal courts are permitted to adjudicate. This power granted by the U.S. Constitution is extended by Congress as jurisdiction to the USC under Title 28, pursuant to Article III, Section I of

163. U.S. CONST. art. III, § 1.
164. U.S. CONST. art. III, § 1.
165. U.S. CONST. art. III, § 1; 28 U.S.C. § 1.
166. *See* 28 U.S.C. §§ 1–5001.
167. 28 U.S.C. §§ 81–131; 28 U.S.C. § 132.
168. 28 U.S.C. § 41. Note that the United States Court of Appeals for the Federal Circuit is an exception among the circuit courts of appeals and is not a regional-based court.
169. 28 U.S.C. § 1291.
170. 28 U.S.C. § 1254.
171. U.S. CONST. art. III, § 2.

the U.S. Constitution. While all of the powers granted under the U.S. Constitution have not been fully distributed to the USC under Title 28, the Congress can at any time extend this jurisdiction to the fullest extent permitted by the U.S. Constitution.[172] The primary areas of jurisdiction that Congress has distributed to the USC are: (1) actions where there is a question of federal law;[173] and (2) actions where more than $75,000 is controverted, between citizens of different states with complete diversity,[174] between state citizens and foreign citizens (except where the foreign citizen is a permanent United States resident domiciled in the same state as the state citizen),[175] or between citizens of different states with complete diversity where foreign citizens are also parties.[176] Relatedly, the USC district courts cannot hear actions between foreign citizens unless the action is also between citizens of different states with complete diversity.[177]

Another important feature of the USC system is that states through the U.S. Constitution have agreed to give "Full Faith and Credit" to the decisions of the courts of all other states.[178] This deeply integrated judicial framework of the USC has helped the United States economy to consolidate into the world's strongest. Aspects that can be drawn from the USC system, beyond this important attribute of comity, is the courts' jurisdictional reach to private actions of state and federal law involving parties from different states. This jurisdictional attribute of the USC system has aided the United States economy in fully integrating without the same fragmentation and state-centered fissures as the EU.[179] Furthermore, the Full Faith and Credit Clause has allowed parties to bring actions in state courts with the confidence that those decisions will be honored in state courts throughout the union.[180] An African judiciary with similar jurisdictional reach could create a stable

172. *See* Cary v. Curtis, 44 U.S. 236, 245 (1845).

173. 28 U.S.C. § 1331.

174. 28 U.S.C. § 1332(a)(1); *see also* Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806).

175. 28 U.S.C. § 1332(a)(2).

176. 28 U.S.C. § 1332(a)(3).

177. *Id.*

178. U.S. CONST. art. IV, § 1.

179. There have, of course, been major exceptions to this such as the United States Civil War. Nonetheless, by and large, the United States economy has progressed relatively homogeneously (with varying levels of development).

180. *See* U.S. CONST. art. IV, § 1.

legal environment for intracontinental commerce.

The final attribute of the USC system that would benefit an African judiciary is its geographic appellate divisions over a vast expanse of territory. The courts of appeals are organized into logical geographic regions of the United States that generally coincide with the jurisprudential and cultural norms of the respective regions.[181] This is a dimension that an African judiciary would need, which is, to a degree, already in place with the various sub-regional judiciaries and RECs.

VI. ACHIEVING AN INTEGRATED AFRICAN COURT OF JUSTICE

Scholars have critically examined the prospects for greater judicial integration at the regional level in Africa. Fanenbruck and Meißner contrast the relative success of the CJEU with African regional courts, specifically analyzing the unsuccessful stint of the SADCT and the mediocre performance of the ACHPR's predecessor, the African Court of Justice. In this comparative analysis, Fanenbruck and Meißner posit five key determinative factors for the success of regional judiciaries in supporting the integration process. These factors are political support, legitimacy, private access, prolonged existence, and problem pressure.[182] The two scholars observe that while the former African Court of Justice enjoyed political support as well as relative legitimacy and prolonged existence, it lacked full private access to the court, and consequently, what is referred to as "problem pressure."[183] The premise of problem pressure is "that whenever there is an acute need for a dispute settlement mechanism due to high economic interdependence in the region, the installed court is more likely to take on a proactive role than if another settlement system is readily available."[184]

Osiemo presents an important observation that provides insight into this phenomenon of low problem pressure within African regional judiciaries:

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181. *See Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Mar. 18, 2021).

182. *See* Fanenbruck & Meißner, *supra* note 66, at 24 tbl. 3.

183. *Id.* at 22.

184. The lack of problem pressure within the ACHPR is ranked as high in priority in the integrative matrix of the Comparative Study Design findings. *Id.* at 22.

> [A] significant number of the cases brought before the African Regional Courts . . . have been either actions for enforcement of employment rights by the communities' employees . . . or enforcement of human . . . . These cases do not impact on regional economic integration . . . . [I]t is to be noted that the African Regional courts have been given jurisdiction in these none core areas under their constitutive treaties.[185]

Osiemo goes on to explain that "[b]ecause of the low levels of intra-community trading both individuals and businesses might not find it worthwhile or economical to initiate infringement proceedings."[186] In essence, the lack of problem pressure for African continental and regional courts compared to the CJEU can be explained by the low present threshold of interstate trade and free movement of persons within Africa, as well as more nascent regional institutions in contrast with the EU. When African markets open with greater mobility of enterprise across the continent, problem pressure within the African judicial apparatus will undoubtedly rise, so long as the apparatus is capable of adjudicating relevant cases.[187]

Osiemo, however, does not reach a similar conclusion when assessing the current role of African regional courts in facilitating integration. Osiemo appraises whether African regional courts have incorporated the "constitutionalization" factors that Joseph Weiler attributes to the success of the CJEU in advancing EU integration.[188] These include: (1) granting direct effect of community law in member states' legal regimes; (2) extending supremacy of community law over national law; (3) interpreting that community entities have implied powers necessary to serve legitimate ends pursued; and (4) holding judicial review actions in the regional courts.[189] Osiemo determines that African courts have not met the mark in

185. Osiemo, *supra* note 60, at 99–100.

186. *Id.* at 112–13.

187. Fanenbruck and Meißner also note that SADCT did not fare well in any of the measures. This has been examined earlier, and it is most helpful to scrutinize the primary factor that distinguishes the success of the CJEU in contrast with the ACHPR (or ACJ as analyzed in the authors' work). *See* Fanenbruck& Meißner, *supra* note 66, at 24 tb1. 3.

188. Osiemo, *supra* note 60, at 92; *see also* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2413–19 (1991).

189. Osiemo, *supra* note 60, at 115.

applying these factors.[190] While Osiemo's assessment is accurate in the present, the regional courts can be reconfigured and infused with jurisdictional powers to shore up these weaknesses.

Craig Jackson also contrasts African regional judiciaries with the CJEU. Jackson expresses concern that younger African nations may have more difficulty accomplishing judicial integration than older European sovereigns, warning of the "fragility of federalism based upon a group of sovereigns."[191] A more optimistic outlook, however, is that younger African nations may be less entrenched in stale and rigid notions of national sovereignty. For instance, the United States, when it was similarly young and recently liberated from colonial rule, ultimately rejected the loose confederative model for a more tightly wound federal system.[192] African states, since early on in their formation, have also demonstrated a willingness to pursue economic integration.

In response to this idea, Jackson prudently cautions that the "multiple sovereignties" of African states aspiring for integration is an impediment that the United States as a single sovereign did not have to overcome when it granted the USC power to decide cases in areas of federal law such as the regulation of interstate commerce.[193] This challenge of superimposing judicial federalism upon multiple sovereign African states can be addressed with greater judicial integration at the sub-regional level and more limited jurisdiction at the continental level. At the sub-regional level, African judiciaries would need three key features emphasized by Jackson as "crucial building blocks for a strong judiciary."[194] These attributes are: direct effect of interpreting community law in national courts, judicial review of state actions, and supremacy of community law over national law.[195] Jackson stresses that "[these] concepts are useful, providing a check on political organs of governance. In the case of Africa, neither of these principles will take root unless the judiciary is capable of asserting them in

190. Osiemo also stresses that it is important to require states to exhaust national laws, stating that when this is not present within African Agreement, "[t]his . . . has the potential for bringing national judiciaries into conflict with regional ones where the rule is not applied." *Id.*

191. Jackson, *supra* note 32, at 176.

192. *See generally* U.S. CONST.; ARTICLES OF CONFEDERATION OF 1781.

193. Jackson, *supra* note 32, at 166.

194. *Id.* at 159.

195. *Id.*

appropriate cases."[196]

In Africa, national courts would need to have jurisdiction in areas where the regional courts already have jurisdiction—or direct effect. Both the COMESACJ and the EACJ presently accept this jurisdiction by national courts.[197] Furthermore, national courts need to ensure expansive comity in their regions and the regional courts also need to exercise comity with one another. These incorporations would prime legitimacy of the respective regional courts, while creating a secure legal environment for interstate commerce within Africa's diverse regions and across the continent.

Other scholars have indeed concluded that African regional courts are well on their way to facilitating continental integration. Jörg Kleis rebuts the presumption that African regional courts have not been well-situated to facilitate integration due to their inherent non-integrative mandate and non-compliance by AU states with their rulings. He asserts that the courts do in fact play an important role in "creating legal security"[198] where "regimes actively pursuing integration . . . [become] a breeding ground for dispute settlement, which . . . can be arranged by a community court [and] can rely on integration being the main goal of the entire community."[199] Kleis suggests that as African regions forge ahead with integration, regional courts will play a more vital role in their integration. This is consistent with the above assessment of the imminent proliferation of problem pressure with the execution of the AfCFTA.

Nguh Nwei Asanga Fon makes the argument that Africa possesses the foundation of a continental judiciary:

> While the patchwork of [African regional] judicial institutions does not necessarily make for the existence of a judicial system, it can also not be argued that the infrastructure for an African judicial system is non-existent. International courts and tribunals have emerged and flourished at both regional and continental levels. From every indication, the drive towards an

196. *Id.*

197. *See* EAC Treaty, *supra* note 101; COMESA Treaty, *supra* note 83.

198. JÖRG KLEIS, AFRICAN REGIONAL COMMUNITY COURTS AND THEIR CONTRIBUTION TO CONTINENTAL INTEGRATION 42 (2016).

199. *Id.* at 43.

African judicial system is well engaged.[200]

Nwei Asanga Fon astutely observes the momentum of African regional judiciaries. In fact, a visual comparison of the features of the African regional courts in relation to other models supports this assertion (See Table 1). While the DSB is the least developed mechanism, and the USC is the most integrated system, the regional courts in Africa have features that are largely consistent with comparable regional courts such as the CJEU and the CCJ.

There are a few key recommendations that would amalgamate the current pillars of an African judiciary into a consolidated, organized, and effective legal system. Organizationally, the complex web of African continental and regional courts should be integrated into a harmonized and reconstituted "African Court of Justice" (ACJ). The ACJ should have a court of last resort, the African High Court of Justice (AHCJ), with limited appellate jurisdiction over distinct regional courts.

In order to establish legitimacy based upon the collective values, traditions, and histories of Africa's diverse regions, the regional courts should be organized based upon geographic, cultural, political, and historical regions of the continent. Accordingly, the regional courts should consist of the African Sahel Court of Justice (ASCJ), the Central African Court of Justice (CACJ), the East African Court of Justice (EACJ), the Horn of Africa Court of Justice (HACJ), the North African Court of Justice (NACJ), the Southern African Court of Justice (SACJ), and the West African Court of Justice (WACJ). The AU states situated in each court's geographic region should be defined by the states of the respective regions, but there should be no overlap of states in more than one regional jurisdiction.

Each of the seven regional courts, the ASCJ, CACJ, EACJ, HACJ, NACJ, SACJ, and WACJ, should have compulsory appellate jurisdiction from any national court of the member states of the respective regions, where the parties have exhausted the due process of the national courts or there is inadequate national remedy, and where the civil case is (1) between citizens of different AU states, (2) between the regional entity and a member state of the region, (3) between the regional

200. Nguh Nwei Asanga Fon, *An 'African Justice': Legal Integration and the Emergence of an African Judicial System*, 467 J. AFR. & ASIAN STUD. 485, 494 (2019).

entity and a citizen of a member state of the region, or (4) between organs or employees of the regional entity.[201] Decisions of the regional courts should constitute binding precedent for all national courts within the region, unless overturned by the AHCJ where the AHCJ has jurisdiction. The national courts should be able to seek preliminary advisory opinions from the regional courts, and the regional courts should also be able to seek preliminary advisory opinions from the AHCJ.

The AHCJ should have discretionary appellate jurisdiction over any case of an entity or member state of the AU, or citizen thereof, from a regional court where the regional court has not brought the case to the AHCJ or has granted express permission to a party to take the case before the AHCJ, and where the interpretation, application, or legality of an agreement or act of any entity of the AU is dispositive. This jurisdiction would include authority to decide on the implementation of the AfCFTA and the interpretation of the Agreement as well as the Charter.[202] Decisions of the AHCJ should be the final authority on matters properly before the court and obligatory upon all other courts in Africa.[203] Finally, all national courts within each region should give comity to the decisions of any other national court within the region, and the regional courts should likewise give comity to the decisions of all other regional courts.

VII. CONCLUSION

The AfCFTA has set Africa on a trajectory to become a major global player in the 21st Century. If the continent moves forward with resolve and steadfastness, the yields of progress and prosperity could be momentous. The current agreement of the AfCFTA will likely come with additional iterations and modifications.[204] A vital addendum to the efforts of AU states towards economic integration will be an updated and integrated

201. It is additionally possible the proposed ACJ system would require an amount in controversy.

202. It is important to note that this proposal does not call for the ACJ to venture into the application of general international law, but first and foremost to build African jurisprudence based upon African laws and norms.

203. Democratic processes should be incorporated to assure that the courts have legitimacy among citizens of AU states and are not mere extensions of AU bureaucracy. An example would be the confirmation of ACJ judges by the Pan-African Parliament, although this AU organ will itself need to be reformed with more democratic legitimacy.

204. *See* AfCFTA Agreement, *supra* note 28.

continental judiciary that protects the rights of Africans engaging in commerce in the free trade area.

The organization of the ACJ system into two layers of jurisdiction, with regional courts of more extensive jurisdiction and a continental high court of limited jurisdiction, will be essential. Granting the regional courts jurisdiction to hear civil cases appealed from the national courts where parties are from different states and where regional entities are parties, will engender confidence by African citizens to engage in interstate commerce with greater assurance that national biases or defects in the national judiciaries will not cut short the citizens' basic rights. Further, the jurisdictional configuration of the regional courts with supremacy to decide questions of national law where there are diverse citizens, and national courts that apply community law in the regions, will institutionalize a regional jurisprudence and legal ethos that is organic to the regions while having a harmonizing effect.

The high court's limited jurisdiction to hear appeals from regional courts involving the interpretation of AU treaties and acts, where regional courts have the first option to bring such cases before the continental court, will illicit greater support from AU states to subscribe to the jurisdiction of the court and build a healthy continental legal environment. The private access to both the continental and regional courts in more frequently engaged transactions will encourage legitimization at the citizen level, thus solidifying the courts within the regions.

The reconfigured ACJ will create an environment where commerce flows more freely throughout Africa. But more importantly, it will provide Africans with greater protections against maleficent parties engaging in unfair or illegal trade. While the continental judiciary proposed here will expedite greater integration, there remains a need for lawmaking bodies within the AU and RECs that provide greater legal protections for Africans through community law. This, coupled with the ACJ system, will allow Africa to build a legal environment and jurisprudence that eschews neocolonialism and embodies African values, culture, tradition, and organization. Meanwhile, the revived and reconstituted ACJ system will serve a critical role in conveying Africa on the path of collective economic dynamism, development, and prosperity.

Table 1: Comparison Chart—Features of DSB and Regional Courts[205]

FEATURE	DSB	ACHPR	COMESA CJ	EACJ	ECOWAS CJ	CJEU	CCJ	USC
private causes of action		~	✓	✓	✓	✓	✓	✓
RECs/ government actions	✓	✓	✓	✓	✓	✓	✓	✓
contracts and torts jurisdiction				~	~	~	✓	✓
treaty interpretation jurisdiction	~		✓	✓	✓	✓	✓	✓
human/civil rights jurisdiction		✓			✓		✓	✓
open legal process and opinions		✓	✓	✓	✓	✓	✓	✓
full-time judges		~	✓	✓	✓	✓	✓	✓
original and appellate bodies	✓		✓	✓		✓		✓
Mediation/ arbitration jurisdiction	✓		✓	✓	✓	✓		
direct effect in national courts						✓	✓	✓
preliminary references/ advisories	✓		✓	✓	✓	✓	✓	
supremacy over national law			✓	✓		✓	✓	✓

~ Signifies that the court contains the feature in some limited degree, but not fully.

205. *See* AfCFTA Protocol, *supra* note 35; African Human Rights Court Charter, *supra* note 68; COMESA Treaty, *supra* note 83; EAC Treaty, *supra* note 101; ECOWAS Court Protocol, *supra* note 115; EU Treaty, *supra* note 134; CCJ Treaty, *supra* note 153; U.S. CONST. art. III; 28 U.S.C. §§ 1–5001.