African Practice in International Economic Law 2022-2023

Annabel Nanjira [*] ***and Nwamaka Okany*** [*]

From 2022 - 2023, the international trade agenda of the African continent was dominated by steps taken towards the operationalization of the African Continental Free Trade Area Agreement (AfCFTA), an agreement of huge significance for future trade relations both between African States and between Africa and the outside world. With the AfCFTA being negotiated in stages amidst the continued euphoria surrounding its adoption, the AfCFTA Protocols adopted between 2022 - 2023 constituted a vital component of the fleshing out of the trade objectives envisaged under the AfCFTA Agreement. Meanwhile the growing challenge of climate change, the consequences of global climate policy for Africa's future industrial policies, a crisis in one of Africa's most successful regional economic blocs – the Economic Community of West African States (ECOWAS) – in the aftermath of the July 2023 military coup in Niger, the geopolitical and trade implications of the Russia-Ukraine war and the global backlash against Investor-State Dispute Settlement (ISDS) which reached a climax in 2022 with the mass withdrawal of many European Union (EU) member States from the Energy Charter Treaty were developments competing for the continent's attention. African Practice in International Economic Law in the period under discussion demonstrated the continent's measured assertiveness in charting its own course and seeking to speak with one voice at this pivotal transitional period in global economic relations and governance. The practice of the period equally demonstrates the continent's leveraging of and contribution to the dividends of international economic cooperation.

Introduction

The entry into force of the African Continental Free Trade Area Agreement (AfCFTA)[3] in May 2019 following the deposit of the 24th instrument of ratification, and the official launch of trading under the Agreement on 1 January 2021 ushered in a game-changing era of trade relations between African countries. The AfCFTA was adopted under the auspices of the African Union (AU) as a framework for boosting trade between African States (as well as facilitating industrialization, regional value chain development, job

* LL.B (Kabarak University), LL.M (University of Pretoria).
* LL.B (University of Nigeria), B.L (Nigerian Law School, Abuja), LL.M (Universiteit Utrecht), Lecturer and Researcher in International Law.

3 African Union, Agreement Establishing the African Continental Free Trade Area, 21 March 2018 (AfCFTA Agreement) <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>

creation and economic growth on the continent). Considering its emphasis on increasing Africa's economic self-reliance and self-sustained development, the AfCFTA also looked set to affect the dynamics of Africa's future trade relations with the outside world. Between January 2022 to December 2023, there were 8 AfCFTA ratifications. This brought the total number of ratifications as at 2023 from 39 to 47, with 7 signatories (Benin, Liberia, Libya, Madagascar, Somalia, South Sudan and Sudan) yet to ratify the agreement, and only one out of all 55 member States of the African Union – Eritrea – yet to both sign and ratify the AfCFTA.[4]

Between 2022 – 2023, Africa made significant steps towards the operationalisation of the AfCFTA. Several AfCFTA protocols were finalised within this period including protocols on Investment, Competition Policy, Intellectual Property, Digital Trade, and Women and Youth in Trade. Additionally, the number of countries part of the Guided Trade Initiative increased with the latest admission of Nigeria and South Africa as members.

Considering the centrality of AfCFTA to the African trade agenda of the period under consideration, the first section of this article focuses on key developments in the operationalization of AfCFTA. These include national and regional implementation strategies developed for the AfCFTA, trade-related protocols that have been finalised under the AfCFTA and the AfCFTA Investment Protocol. The section also highlights the role of the Pan-African Payments and Settlement System (PAPSS). The section, in addition, discusses the AfCFTA legal framework on Economic Partnership Agreements (EPAs) and Free Trade Agreements (FTAs), which have been a prevalent feature in recent economic relations between African countries and Third Parties.

Section 2 of the article looks at the continued effect on Africa's trade relations of its heightened diplomatic and strategic importance in the wake of the 2022 Russia-Ukraine War and the crisis in the Economic Community of West African States (ECOWAS) triggered by the July 2023 military coup in Niger as well as its economic effects. In Section 3, African practice on the Energy Transition is discussed through the prism of the continent's participation at COP28. Section 4 discusses some recent development in trade involving African States, focusing on trade and trade-related disputes between African countries in regional courts. Lastly, Section 5 highlights a number of international investment (-related) agreements signed by African States during the period under discussion. It concludes by examining the future of the now controversial system of dispute settlement known as investor-State dispute settlement (ISDS) from an African perspective.

4 For the status of AfCTFA ratifications, see AfCFTA, 'State Parties' <https://au-afcfta.org/state-parties/>; Trade Law Centre (TRALAC), 'Status of AfCFTA Ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>

1. Developments in the Operationalization of the AfCFTA

As part of steps taken to operationalize the AfCFTA, AfCFTA State Parties made significant efforts to come up with implementation strategies for the AfCFTA Agreement between 2022 – 2023. AfCFTA implementation strategies are essentially policy documents and action plans State Parties are expected to prepare in order to expedite the implementation of the AfCFTA Agreement and realise its benefits at national as well as regional level. In these policy documents, State Parties as well as African regional integration organizations (RECs) identify areas of strategic national or regional interest and key interventions to be made in order to fully reap the benefits of the AfCFTA. AfCFTA State Parties are required to set up National Implementation Committees (NICs) to facilitate implementation.[5] So far, Kenya, Ghana, Nigeria, Côte d'Ivoire Tunisia, Comoros and Congo are some of the countries having a NIC.[6]

Kenya and Ghana (August 2022), Namibia (November 2022), Nigeria (December 2022) and ECOWAS (July 2023) were among countries/RECs that unveiled their AfCFTA implementation strategies between 2022 – 2023. The East African Community was in the process of developing its AfCFTA implementation strategy during the 2022-2023 period.[7] In all, at least 25 countries and RECs had unveiled their AfCFTA implementation strategies by 2022-2023, with countries like Cameroon, Guinea, Togo and Zimbabwe having already concluded the preparation of their national AfCFTA implementation strategies before 2022.[8]

The 2022- 2023 period also saw a continued expansion in the number of AfCFTA State Parties part of the Guided Trade Initiative (GTI). The GTI is an initiative launched in October 2022 by the AfCFTA Secretariat to kickstart meaningful trade among interested State Parties that have met the minimum requirements for commencing trade. As at

5 This requirement is in line with the Decision of the 31st Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Mauritania from 1–2 July 2018. On AfCFTA implementation strategies, ECA's role and NICs, see David Luke, Judith Ameso and Mahlet Girma Bekele, 'On Implementing the AfCFTA in 2021' (Enhanced Integrated Framework, 16 March 2021) <https://www.enhancedif.org/en/op-ed/implementing-afcfta-2021>; ECA, 'AfCFTA Implementation Strategies: Synthesis Report - January 2024', 26 March 2024 <https://www.uneca.org/afcfta-implementation-strategies>; Million Habte and Dirk Willem te Velde, 'How Implementation Committees are Moving the African Free Trade Area from Talks to Action' (World Economic Forum, 21 April 2023) <https://www.weforum.org/agenda/2023/04/moving-from-talks-to-implementation-of-the-african-free-trade-area-through-national-implementation-committees/>

6 Million Habte and Dirk Willem te Velde (note 5)

7 For news on the development of the EAC AfCFTA Implementation Strategy, see East African Community, 'EAC Experts Meeting on the Draft EAC Regional Strategy on the Implementation of the AfCFTA' <https://www.eac.int/news-and-media/calendar-of-events/event/956-eac-experts-meeting-on-the-draft-eac-regional-strategy-on-the-implementation-of-the-afcfta>

8 For the number of countries and RECs that had prepared and unveiled their national implementation strategies by December 2022, cf: ECA, 'Nigeria Validates Its AfCFTA Implementation Strategy', 7 December 2022 < https://www.uneca.org/stories/nigeria-validates-its-afcfta-implementation-strategy>; David Luke, Judith Ameso and Mahlet Girma Bekele (note 5)

January 2024, 12 State Parties had finalised their legal modalities to enable trade under the GTI to commence. The latest admission of South Africa and Nigeria in January and July of this year – 2024 - brings the total number of GTI countries to 14.

To support further operationalisation of the AfCFTA, and in particular the AfCFTA Trade in Goods Protocol, AfCFTA State Parties also concluded several trade – related protocols during the period under consideration. The following sub-section 1.1 will limit itself to three trade-related protocols, i.e. the Digital Trade Protocol, the Intellectual Property Protocol, and the Women, Youth and Trade Protocol. The objective of the sub-section is to analyse salient provisions of the trade-related protocols and provide an assessment of their legal nature in terms of their coming into force.

1.1 Latest trade and trade related AfCFTA Protocols.

1.1.1 AfCFTA Protocol on Digital Trade

The Digital Trade Protocol was concluded in February 2024 in Durban, South Africa, having been negotiated between 2022 – 2023. The general objective of the Digital Trade Protocol is to establish harmonised rules and standards that enable and support digital trade.[9] As a start, the Protocol defines a digital product as constituting "an electronic programme, text, video, image, sound, recording, or any other product that is digitally encoded, that is produced for commercial sale or distribution, and that can be transmitted electronically except for a digitised representation of a financial instrument, including money".[10] While this definition is limiting in terms of scope, AfCFTA Members' purpose is to adopt an Annex on Rules of Origin for digital products. [11]

The Digital Trade Protocol adopts the same approach as the World Trade Organisation (WTO) e-commerce moratorium by restricting State Parties from imposing customs duties on digital products transmitted electronically.[12] It also incorporates within its framework the standard Most-Favoured Nation (MFN) and National Treatment obligations, restricting State Parties from discriminating between imported and locally produced digital products. It permits State Parties to engage in digital trade preferential arrangements with Third Parties so long as such trade arrangements do not frustrate or impede the objectives of the Digital Trade Protocol.[13]

9 AfCFTA Digital Trade Protocol, Art. 3.

10 Ibid Art. 1.

11 Ibid Art. 5.

12 Ibid Art. 6.

13 Ibid Art. 7(3).

The Digital Trade Protocol addresses trade facilitation concerns in Part II of the protocol. Article 10 of the protocol mandates State Parties to accept electronic versions of trade administration documents as the legal equivalent of the paper version of such documents. In practice, it includes documents such as bills of lading, manifests, certificates of origin, and export and import licences. In order to facilitate online transactions, State Parties are to adopt laws and regulations to support electronic authentication for payments,[14] and permit contracts to be concluded electronically.[15]

The protocol also requires State parties to support cross border payments through the promotion of interoperability between digital payments and settlement systems.[16] To bring this into operation, an initiative spearheaded by the African Export-Import Bank, the Pan-African Payment and Settlement System (PAPSS) was launched in January 2022. [17] PAPSS is an online, cross border financial market infrastructure enabling payment transactions across the continent. PAPSS took effect before the Digital Trade Protocol was finalised. A more detailed discussion on PAPSS and its operation is captured later in Section 1.3.

The protocol recognises that digital trade finds anchorage in infrastructure. To this end, Article 18 of the Digital Trade Protocol obligates State Parties to promote the development of digital infrastructure through for example, fostering partnerships between governments, investors, financial institutions and development partners. Additionally, State parties are to support logistics and last mile delivery through the enhancement of the regulatory environment for the operation of logistic companies, establishment of transport coordination mechanisms among themselves, promoting international multimodal transport and interconnectivity between different modes of transports, among other things. [18]

The Digital Trade Protocol also regulates non-trade related issues which may arise in the course of cross border digital trade. Article 14 of the protocol, for example, requires AfCFTA State Parties to adopt and maintain digital identity regimes for both natural and juridical persons. Part IV of the protocol speaks to data governance. Specifically, Article 21 of the protocol expects State Parties to adopt or maintain data protection laws and regulation for both natural persons involved in digital trade.

14 Ibid Art. 9.

15 Ibid Art. 12.

16 Ibid Art. 15.

17 See for the launch of the Pan- African Payment and Settlement System, Afreximbank, 'Pan-African Payment and Settlement System Launched by President Akufo-Addo Foreseeing $5 billion Annual Savings for Africa', Press Release, 13 January 2022 <https://www.afreximbank.com/pan-african-payment-and-settlement-system-launched-by-president-akufo-addo-foreseeing-5-billion-annual-savings-for-africa/>

18 AfCFTA Digital Trade Protocol, Art. 11.

1.1.2 AfCFTA Competition Policy

Ordinarily, competition law seeks to safeguard competition in markets by prohibiting anti-competitive behaviour such as abuse of dominance, and regulating mergers and acquisitions with the aim of reducing the risk of monopoly. The inclusion of competition law chapters in FTAs or as separate protocols to FTAs is to ensure that the expected benefits from trade liberalisation are not countered by the effects of anti-competitive behaviour of entities operating in the liberalised market.[19]

The AfCFTA Competition Policy was adopted in February 2023, adding another layer to the already existing, five regional competition regimes. The five pre-existing competition regimes include the East African community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the Central African Economic and Monetary Union (CEMAC), and the Economic Community of West African States (ECOWAS). [20] The Competition Policy applies to economic activities by persons or undertakings within or having significant effect on competition in the market or conduct with continental dimension and having significant effect on competition in the market.[21] The Competition Policy takes cognisance of the fact that a number of State Parties have their own national competition regulations. Therefore, it restricts its application from extending to matters within the respective jurisdictions of the national competition authorities.[22] Moreso, the Competition Policy expressly excludes labour-related issues aimed at advancing employment terms and conditions as well as employees collective bargaining agreements from the scope of its application.[23]

Part II of the Competition Policy regulates anti-competitive business practices and conduct. The section outlaws corporate practices such as abuse of dominance, imposition of minimum resale prices by undertakings, collusive tendering and mergers and acquisitions that are likely to result in preventing, restricting or distorting competition in the market among others. The policy mandates the notification of mergers and acquisitions that have continental dimensions.[24] The exact threshold for notification is to be set in a regulation. The AfCFTA Competition tribunal is established in Article 24 of the policy to handle implementation of the policy.

19 Willard Mwemba, 'The African Continental Free Trade Area Competition Protocol: A Necessity or an Overzealous Endeavour?' (2003) Competition Law International, Vol. 19 (2), p. 186.

20 Vellah Kedogo Kagwiri and Tom Buthe, 'The Spread of Competition Law and Policy in Africa : A Research Agenda' (Fall 2020) African Journal of International Economic Law, Vol. 1, pp. 56-61.

21 AfCFTA Competition Policy, Art. 3.

22 Ibid Art. 3(2).

23 Ibid Art. 4.

24 Ibid Art. 10.

1.1.3 AfCFTA Protocol on Intellectual Property

Intellectual property is integrally linked to trade in goods and services, protection of investment and regulation of competition law. Intellectual property rights may restrict the importation of goods and services from one country to another because of their territorial nature.[25] Perhaps this is what the drafters of the Intellectual Property Protocol had in mind, as the objective of the Protocol as captured in the preambular section is to "harmonize the rules and principles on intellectual property rights to boost intra-African trade in line with the objectives of the Agreement Establishing the African Continental Free Trade Area and promoting economic growth and development within the continent".[26] Just like the Competition Policy, the AfCFTA Intellectual property protocol takes the stage in an already fragmented intellectual property architecture alongside the sharp disconnect between regional aspirations and sub-regional realities.[27]

The AfCFTA Intellectual Property Protocol was adopted in February 2023 in Addis Ababa, Ethiopia. The protocol aligns with the objective of Article 4(3) of the AfCFTA Agreement which states that, " state parties shall cooperate on investment, intellectual property rights and competition policy". Additionally, Article 7 of the AfCFTA Agreement mandates AfCFTA Members to enter into Phase II negotiations on these three topics. The AfCFTA Agreement recognises the protocols together with their annexes and appendices as constituting integral parts of the Agreement.[28]

The scope of application of the protocol includes plant variety protection, geographical indications, marks, patents, utility models, industrial designs, undisclosed information including trade secrets, layout designs (topographies) of integrated circuits, copyright and related rights, traditional knowledge, traditional cultural expressions, genetic resources, emerging technologies and other emerging issues. [29] The AfCFTA intellectual property rights cover products that have been introduced into the African market by the intellectual property rights holder or with their consent.[30]

The Protocol delegates the enforcement mandate to the AfCFTA State Parties.[31] Although the Protocol establishes an intellectual property office, its mandate, structure and composition is to be established by the AfCFTA Council of Ministers.

25 Alexander Peukert, 'Territoriality and Extra-territoriality in Intellectual Property Law' in G. Handl and J. Zekoll, J (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Nijhoff, 2012), pp. 189-228.

26 AfCFTA Protocol on Intellectual Property, Preamble, see also Art. 2(1).

27 Titilayo Adebola, 'Mapping Africa`s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol' (Fall 2022) African Journal of International Economic Law, Vol.1, p. 235.

28 AfCFTA Agreement, Art. 8.

29 AfCFTA Protocol on Intellectual Property, Art. 3.

30 Ibid Art. 7.

31 Ibid Art. 25.

1.1.4 AfCFTA Protocol on Women, Youth and Trade

The Women, Youth and Trade protocol corresponds to the objective of the AfCFTA Agreement to promote and attain sustainable and inclusive economic development, gender equality and structural transformation of the State Parties.[32] Further to this, the AfCFTA Agreement substantively warrants State Parties to mobilise resources to improve the export capacity of both formal and informal service suppliers with particular attention to micro, small size, women and youth suppliers. [33] This same obligation to State Parties is reiterated in the AfCFTA Protocol on Trade in Services,[34] and the AfCFTA Digital Trade Protocol.[35]

The Women, Youth and Trade Protocol defines a women or youth-led business to be one that is at least twenty-five percent owned by one or more women or youth, or whose management and control lie with one or more women or youth who make important strategic and operational decisions of the business.[36] In terms of ownership, the protocol qualifies a women or youth-owned business as one that is more than fifty percent owned by a woman or a group of women, or by a youth or a group of youth.[37] The Protocol designates the age limit for youths to be between that of above the age of majority and below thirty- five.[38]

Substantively, the Women, Youth and Trade Protocol seeks to guarantee affirmative action by State Parties towards women and youth-led (and owned) businesses in order to facilitate their participation in international trade. In this regard, it contains several state obligations including, elimination of non-tariff barriers, provision of access to finance, protection of intellectual property, enhancement of digital trade, etc. The protocol retains State Parties` rights to introduce new regulations on trade activities relating to women and youth. However, State Parties have a five-year period from the time of entry into force of the protocol to align their national laws, regulations and policy with the protocol.[39]

Comments on the trade-related protocols.

In terms of enforcement, all the trade related AfCFTA Protocols mandate that any dispute arising from the Protocols shall be settled in accordance with the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes. While this can be seen as a step in the right direction, this provision is not pragmatic for the AfCFTA Protocol on Women, Youth and Trade. This is because a majority of the state obligations in the Protocol are best endeavour clauses, dependent

32 AfCFTA Agreement, Art. 3(e).

33 Ibid Art. 27(2)(d).

34 AfCFTA Protocol on Trade in Services, Art. 27(2)(d).

35 AfCFTA Protocol on Digital Trade, Art. 31.

36 AfCFTA Protocol on Women, Youth and Trade, Art. 1.

37 Ibid.

38 Ibid.

39 Ibid Art. 26(2).

majorly on availability of economic resources and provision of technical assistance to State Parties. Notwithstanding this, the best endeavour clauses could still be utilised by State Parties in aligning their national laws with international best practices.

One other issue that this paper calls to attention is the legal effect of the finalisation of the AfCFTA trade-related protocols. All these protocols simply have a clause to the effect that they shall be open for signature and ratification by state parties, in accordance with their respective constitutional procedures.[40] The aforementioned clauses provide an entry into force sub-clause that ordinarily makes reference to Article 23(2) and Article 23(3) of the AfCFTA Agreement. Article 23(2) of the AfCFTA Agreement provides that the AfCFTA Protocols on Investment, Intellectual Property and Competition Policy and any other instrument within the scope of the AfCFTA Agreement shall enter into force thirty days after the twenty-second ratification by a State Party. No updates have so far been provided on the State Parties who have ratified the trade related protocols that have been finalised. This is unlike the AfCFTA Agreement that has ratification status list that is periodically updated to reflect the latest AfCFTA State Parties.
This therefore puts to question the legal effect of the finalisation of the 2022-2023 trade-related protocols.

1.2 The AfCFTA Investment Protocol (AIP)

The crucial importance of the AfCFTA Investment Protocol to the AfCFTA project cannot be underestimated. Investment plays a highly significant role in the economic development and prosperity of States and regions. Yet, despite the well-known examples of South African and Nigerian companies investing in retail, banking, telecommunications, energy and other sectors in various African countries[41], the volume of intra-continental investment in Africa has been significantly low compared to that in other regions of the world (eg. Asia, Europe and North America). Increasing the volume of intra-African investment has therefore long been seen as an important goal of African economic integration, with huge potentials of strengthening the economic resilience of the continent.

Hence with the goal of promoting, facilitating and protecting intra-African investments, the AfCFTA Investment Protocol (hereafter AIP or Investment Protocol) was adopted by the 36th Ordinary Session of the AU Assembly of Heads of State and Government held in Addis Ababa in February 2023. The Protocol which is expected to boost intra-African trade by more than 81 percent in the

40 See for example Article 47 of the AfCFTA Digital Trade Protocol, Article 26 of the Women, Youth and Trade Protocol.

41 See, for example, Yash Ramkolowan, Stephanie Craig and Samantha Munro, 'The Dynamics of South African Investment in the Rest of Africa', Global Economic Governance Africa, Discussion Paper, October 2018 <https://saiia.org.za/wp-content/uploads/2018/10/GA_Th3_DP-Ramkolowan-Craig-Munro_20181023.pdf>; Edwin Agwu, 'Foreign Direct Investments: A Review from the Nigerian Perspective' (2014), Research Journal of Business & Management (RJBM), Vol.1(3) <https://ssrn.com/abstract=3122352; GA_Th3_DP-Ramkolowan-Craig-Munro_20181023.pdf (saiia.org.za) >

next decade[42] will enter into force 30 days after the deposit of the 22nd instrument of its ratification. The text of the Protocol adopted in February 2023 is currently not made public. However, the January 2023 draft,[43] which is not expected to differ from the draft adopted in February 2023, reveals notable features of the Protocol which include:

- an enterprise definition of investment (in other words, a definition that makes the establishment, acquisition or expansion of a company in a host African State a condition for an allocation of resources to qualify as an investment promoted and protected by the Protocol. This enterprise definition aligns with the view of many African States that the establishment of an enterprise in a host State makes more tangible and lasting contribution to the development of the State and local industry than portfolio investments (such as the ownership of government bonds or company stocks). The latter are more short-term and speculative in nature and are infact explicitly excluded from the scope of investments covered by the Protocol (Article 1),

- a duty of African States to promote and increase awareness of Africa as the preferred investment destination and to provide financial and other incentives that would attract investments – including low carbon investments – to the continent (Articles 6, 7 and 8),

- the establishment of a Pan-African Trade and Investment Agency as a technical institution of the AfCFTA secretariat to assist governments, their investment promotion agencies and private sector in their investment activities (Article 42),

- the innovative provision in the Protocol for national focal points that will support investors from other State parties by providing them with relevant information on legal, policy and institutional frameworks governing investments in the host State (Article 9),

- a strong emphasis on sustainability as well as the Protocol's leveraging of best practices and "decades of investment policy reform"[44] contained in global and African instruments such as the Pan-African Investment Code, the investment instruments of Africa's pre-existing regional economic communities (RECs), national investment laws, bilateral investment treaties (BITs) concluded by African States, as well as other relevant international investment instruments (preamble and provisions),

42 Baker Mckenzie, 'Africa: The African Continental Free Trade Area Investment Protocol - The Start of a New Era in Sustainable Trade and Investment', 14 March 2024 <https://insightplus.bakermckenzie.com/bm/international-commercial-trade/africa-the-african-continental-free-trade-area-investment-protocol-the-start-of-a-new-era-in-sustainable-trade-and-investment>

43 African Union, Protocol on Investment to the Agreement Establishing the AfCFTA (AfCFTA Investment Protocol) (2023), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5114/afcfta-investment-protocol-2023->

44 Danish, Hamed El-Kady, Makane Moïse Mbengue, Suzy H. Nikièma and Daniel Uribe, 'The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and What's Next for the Continent?' (International Institute for Sustainable Development, Investment Treaty News, 1 July 2023) <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/>

- investor protections, namely national treatment, most favoured nation treatment, "administrative and judicial treatment", "physical protection and security", protection against expropriation, and the ability to transfer funds in and out of the country. As evidence of its focus on investment policy reform, the Protocol explicitly clarifies that "administrative and judicial treatment" replaces "fair and equitable treatment"(a broadly phrased catch-all clause found in older generation investment treaties, which has been controversially used by investors to challenge almost any State measure to the perceived detriment of States). Also "physical protection and security" replaces the more expansive term "full protection and security" found in older investment treaties (Articles 12 - 23), a balancing of investor protections with investor obligations towards African host States and communities, including "investment-related human rights" (Articles 31 - 40),
- an affirmation of the right of African States to take, in accordance with international law, regulatory measures that may affect investments inorder to safeguard certain public goals (including sustainable development, climate action and essential security interests); also, a clarification that such regulatory action can neither give rise to compensation claims by investors nor, when taken by an African State party to comply with other relevant treaty obligations, constitute a State breach of the AIP (Article 24).
- a definition of the "investor" national whose investments are protected by the Protocol by reference to the criterion of effective or dominant nationality (for individuals/natural persons with dual African nationality) as well as by reference to the twin criteria of incorporation/registration in the "Home" African State and maintenance of a statutory seat together with substantial business activities in that "Home State" (for companies or legal persons). Since the Protocol defines an investor as "a national of a State Party" investing "in the territory of another State Party", its reformist[45] stipulation that a dual national must be deemed to be exclusively a national of his/her country of effective nationality or place of ordinary/permanent residence helps clarify which nationality/place of residence will be used to determine whether a dual national is investing in "another State party" - and thus entitled to investor protections - when (s)he invests in an African State whose nationality (s)he possesses (Article 1).

1.2.1 Comments on the AfCFTA Investment Protocol

The existence of a plethora of African agreements regulating investment naturally raises questions as to the added value of the AIP as well as the future relationship between the Protocol and these already existing African agreements (which as at 2022 include as many as 173 intra-African bilateral

45 See Javier Garcia Olmedo, "Dual Nationals in Investment Treaty Arbitration: An Emerging Field of Inconsistent Decisions" (EJIL Talk! Blog, 27 July 2023) <https://www.ejiltalk.org/dual-nationals-in-investment-treaty-arbitration-an-emerging-field-of-inconsistent-decisions/> for the controversy surrounding situations where an investor possesses the nationality of both the respondent investment-hosting State and another contracting State. With this stipulation in the AIP, a dual national whose effective nationality is that of the State (s)he has invested in will arguably not qualify as an investor "in the territory of another State Party" (in line with the AIP's primary goal of boosting investment between rather than within African States).

investment agreements[46] as well as several agreements with investment provisions adopted under the auspices of the RECs). An obvious added value of the Protocol is that it provides an investment framework that covers the entire continent, thus uniting African countries which even if already parties to bilateral investment treaties signed between two African States (intra-African BITs), have not signed intra-African BITs or REC agreements containing investment provisions between themselves. However, the Protocol itself points to an added and crucial significance it has for future investment relations on the African continent and beyond.

The relevant provision is Article 49 which remarkably provides for the Protocol's replacement of all existing bilateral investment treaties concluded between AfCFTA Member States five years after the coming into force of the Protocol, together with any survival clauses contained in those BITs (i.e clauses which heighten stability of commitments made under an agreement by providing for continued applicability of certain provisions beyond the agreement's termination). The provision also prohibits AfCFTA State Parties from concluding new BITs between themselves "after the adoption" of the Protocol. It, further, requires them to make "best endeavours to review and revise" relevant existing investment agreements adopted by the RECs inorder to achieve alignment with the Protocol within 5-10 years of the latter's entry into force. Lastly, the provision goes on to prescribe what should be the approach of the parties to the Protocol in their future investment relations with third parties or countries outside Africa. It states that AfCFTA State parties "may take into account" the contents of the Protocol when negotiating new international investment agreements and reviewing existing international investment agreements with such third Parties.

From the foregoing, it is evident that the Protocol has the added value of harmonizing investment policy in the AfCFTA single market (an aim given added significance by the Protocol's reform-oriented protections). Thus, in the case of existing intra-African BITs, the "replacement principle" of the Investment Protocol would apply to end future application of BIT provisions that are inconsistent with or overlap with the Protocol's provisions. While the best efforts duty of State parties to align investment agreements concluded under the auspices of the RECs with the Protocol paves way for reconciling conflicts and overlaps between the Protocol and relevant REC agreements (which remain in force since Article 5 AfCFTA treats the RECs and their agreements as building blocks of the AfCFTA).

Lastly, Article 49's stipulation that State parties "may take into account" the contents of the Investment Protocol when negotiating new international investment agreements and reviewing existing international investment agreements with third Parties brings the added value of ensuring that Africa as much as possible "speaks with one voice" in its investment relations with the outside world. This is because while the use of the word "may" implies they are not bound to take the Protocol into account in their extra-African investment relations, African States are nonetheless

46 Thomas Kendra, Lédéa Sawadogo-Lewis and Georgia Crawford, 'Zooming in on the Investment Protocol to the AfCFTA: A New Era for Investment Disputes across Africa?' (Hogan Lovells, Engage: Legal Insights and Analysis, 20 June 2023) <https://www.engage.hoganlovells.com/knowledgeservices/news/zooming-in-on-the-investment-protocol-to-the-afcfta-a-new-era-for-investment-disputes-across-africa>

encouraged by the provision to rely on the Protocol – which represents a common African position on investment – in negotiating and revising their investment agreements with non-African parties. Therefore, a non-African country or entity seeking to negotiate a new investment treaty with an African country or to revise an existing one can expect the AIP and its reform-oriented provisions to shape negotiations.

The future of intra-African BITs as prescribed by Article 49 echoes the EU's years long campaign to terminate intra-EU investment treaties within its territory, which achieved its most public expression in the landmark ruling of the European Court of Justice in Achmea[47] that reverberated across Europe as well as the Multilateral Agreement for the Termination of All Intra-EU Bilateral Investment Treaties signed in May 2020 by 23 EU member States.[48] It remains to be seen whether the member States of the African Union in deciding to terminate all intra-African BITs will encounter the same legal questions faced by the EU with regard to its termination of intra-EU BITs. One such question is whether the termination of an intra-continental BIT and/or its survival clauses validly operates to nullify any rights an investor may have acquired prior to such termination.[49]

1.3 The Pan-African Payments and Settlement System (PAPSS)

PAPSS was developed by the African Export-Import Bank (Afreximbank) in collaboration with the African Continental Free Trade Area (AfCFTA) Secretariat and formally launched in January 2022. The system enables businesses in Africa to receive and make payments for intra-African trade transactions instantly and in their local currencies.[50] This centralized simple, risk-controlled payment clearing and settlement system for intra-African trade[51] partly realises the broader vision of a Pan-African monetary union which formed part of early discussions on the AfCFTA[52] and which though ultimately not adopted in the Agreement, continues to capture the imagination of many on the continent.

47 Slowakische *Republik v Achmea* BV, European Court of Justice, Judgment of 6 March 2018 (Case C-284/16) [GC].

48 See European Commission, 'EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties', 5 May 2020

<https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en>

49 See Natalie Colin, Gregorio Pettazzi, Alexandre Alonso and Florence Frühling, 'The EU's Campaign to End Intra-EU Investor-State Arbitration: Pushing Investor Creativity' (Freshfields Bruckhaus Deringer, 2024), <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2024/eu-campaign-to-end-intra-eu-investor-state-arbitration-pushing-investor-creativity/>; also Art 70 (1)(b) of the Vienna Convention on Law of Treaties where it states: Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

50 Mike Ogbalu III, 'Boosting the AfCFTA: The Role of the Pan-African Payment and Settlement System: A Commentary'(The Brookings Institution, 11 February 2022) < https://www.brookings.edu/articles/boosting-the-afcfta-the-role-of-the-pan-african-payment-and-settlement-system/ >; Pan-African Payment and Settlement System, 'Afreximbank and AfCFTA announce the Operational Roll-out of the Pan-African Payment and Settlement System (PAPSS)' (Cairo and Accra, 28 September 2021)

<https://papss.com/media/afreximbank-and-afcfta-announce-the-operational-roll-out-of-the-pan-african-payment-and-settlement-system-papss/>

51 See Pan-African Payment and Settlement System, 'About PAPSS' <https://papss.com/about-us/>

With money being the lifeblood of any economy – including a regional economy like AfCFTA – and a well-implemented payment infrastructure being its circulatory system[53], the importance of PAPSS for facilitating the operation and smooth running of the AfCFTA cannot be underestimated. Before PAPSS, African businesses and their local banks used correspondent banks – often outside of Africa – to settle payments between two African countries, in a third and external currency, usually dollars or euros, This arrangement entailed currency conversion costs amounting to as much as 5 billon US dollars annually as well as foreign exchange and liquidity requirements for individual African central banks involved in the process.[54] With PAPSS, which works in conjunction with African central banks to facilitate direct transactions among the more than forty currencies used throughout the continent, African currencies will be convertible without a need to rely on external currencies.[55] Businesses will be able to pay and receive payment instantly via their local bank accounts in their local currencies. This would save businesses across the continent billions in transactions costs each year.

The first phase of PAPSS' implementation took place in 2022 and in that phase African central banks and the PAPSS connected with 25 of the largest commercial banks in Africa, including Djibouti's Saba African Bank, Nigeria's United Bank for Africa and Ghana's GCB Bank. In the second phase of PAPSS' roll out in 2022, fintech companies such as MFS Africa joined PAPSS, with MFS thereby extending its reach to over 320 million people across 35 African markets.[56]

Amidst the calls in Africa for monetary union and considering strong reservations regarding the African continent's readiness for a full blown monetary union,[57] PAPSS stands out as the mechanism that best satisfies the immediate monetary system needs of the continent-wide market place now established under the AfCFTA.

52 Julia Conrad, 'What We learn from WAEMU for Regional Integration on the African Continent' (Harvard Growth Lab, 15 August 2022)

< https://growthlab.hks.harvard.edu/blog/what-we-learn-waemu-regional-integration-african-continent#16>

53 Mike Ogbalu III (note 50)

54 United States International Trade Administration, 'Pan-African Payment and Settlement System', 5 November 2022, <https://www.trade.gov/market-intelligence/pan-african-payment-and-settlement-system >

55 Zainab Usman and Alexander Csanadi , 'Latest Milestone for the African Continental Free Trade Area: The Pan-African Payment and Settlement System' (Carnegie Endowment for International Peace, 7 February 2022) < https://carnegieendowment.org/posts/2022/02/latest-milestone-for-the-african-continental-free-trade-area-the-pan-african-payment-and-settlement-system?lang=en>

56 Tyler Pathe, 'MFS Africa Joins PAPSS in a Massive Step Forward for Intra-African Trade' (The Fintech Times, 17 February, 2022) <https://thefintechtimes.com/mfs-africa-joins-papss-in-a-massive-step-forward-for-africa>

57 See for example, Célestin Monga, Africa Isn't Ready for Currency Unions (CGTN, 26 February 2020) <https://news.cgtn.com/news/2020-02-26/Africa-isn-t-ready-for-currency-unions-Onpo4LNene/index.html>; Giuseppe Fontana and Mohamed Sheriff Hamid Kamara, Towards Monetary Union in the Economic Community of West African States (ECOWAS): Better Policy Harmonisation and Greater Intra-Trade are Needed' (2003) Journal of Policy Modeling, Vol. 45 (1), pp. 58-73

1.4. AfCFTA and Economic (Trade and Investment) Partnership Agreements

In the backdrop of the finalisation and operationalisation of the AfCFTA Agreement and its protocols, AfCFTA State Parties have negotiated, or are in the process of negotiating Economic Partnership Agreement with Third Parties. While some African countries are negotiating such EPAs as individual State Parties, others are doing so collectively as members of a regional trade agreement. This section of this paper highlights the growth and development of Economic Partnership Agreements between African countries and Third Parties between 2022-2023 and how such trade arrangements fit into the overall AfCFTA framework.

1.4.1 The Prevalence of Economic Partnership Agreements between African and Third Parties

Economic Partnership Agreements (EPAs) are essentially treaties that envisage the creation of a Free Trade Area between two or more countries. Based on the principle of reciprocity, countries in an EPA commit not to charge duties on goods imported and exported between them. EPAs ordinarily cover trade in goods and services and also beyond the border issues such as competition, government procurement, intellectual property and trade facilitation.[58]

Trade agreements between developing and Least Developed Countries (DCs and LDCs) on one hand and developed countries on the other hand, can either be under the Enabling Clause framework, the Generalised System of Preferences or the general Article XXIV GATT on the formation of Customs Unions and Free Trade Areas.

The Generalised System of Preferences (GSP) was granted in 1971 at the request of certain developed countries. Its origins can be traced to the 1964 United Nations Conference on Trade and Development (UNCTAD).[59] Essentially, the GSP allows developed countries to grant trade preferences to developing countries and LDCs, without extending the same to all other GATT Contracting Parties.[60] The Enabling Clause re-enacted the terms of the 1971 GSP decision, albeit on a permanent basis. It is a product of the Tokyo multilateral trade round. The formal name of the Enabling Clause is the 1979 "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries".[61]

58 Marieke Meyn, 'Economic Partnership Agreements: A 'Historic Step' Towards a 'Partnership of Equals'?' (2008) Overseas Development Institute, Vol. 26, p. 4.

59 Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community GSP Programme' (2013) Journal of International Economic Law, Vol. 6 (2), p. 508.

60 Ibid.

61 Lawrence E. Hinkle and Maurice Schiff, 'Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective' (2004) The World Economy, Vol. 27 (9), p.1324.

According to the conditions attached to the Enabling Clause, the differential treatment of developing countries must accordingly be designed to promote and facilitate the trade of developing countries, and must not create obstacles for the trade of countries not parties to the preferential arrangements.[62] The commonality between GSP and preferences granted by the Enabling clause is that they are both granted on a voluntary basis.

At the moment, a number of trade preferences are granted by developed countries to LDCs and developing countries under the premise of the Enabling Clause. These include the Everything But Arms Initiative, granted by the European Union, and the Africa Growth Opportunity Act (AGOA). The Everything But Arms Initiative removes all restrictions, tariffs and non-tariff quotas, on virtually all exports, except for arms from thirty-three LDCs to the European Union. [63]AGOA on the other hand provides trade preferences to Sub-Saharan African exports of eligible products to the United States.[64] This essentially means that all countries in the AGOA eligibility list are able to export certain products to the United States, quota free or duty free.

Unlike trade arrangements made under the Enabling Clause, EPAs are legally binding bilateral contracts that operate on a reciprocal basis, meaning that in a given number of years, the developing country or LDC will open its markets to the developed country`s goods and services. As of end of the last quarter of 2023, the European Union was at that time negotiating 79 EPAs with countries in the African, Caribbean and Pacific (ACP) regions.[65]

In December 2023, Kenya signed an EPA with the EU. The EU-Kenya EPA aims to implement the provisions of the EU-East African Community (EAC) EPA that was concluded in 2014. The scope of the agreement includes trade in goods, fisheries and agriculture. In the agreement, Kenya commits to liberalise 82.6% percent of imports from the EU, with the remainder to be liberalised between 15-25 years. Other African countries still in the negotiations phase of an EPA with the EU include Comoros Madagascar, Mauritius, Seychelles and Zimbabwe. The United Kingdom (UK) also concluded its first EPA with its first African country, Nigeria between 2022-2023.

The 2022 - 2023 period also saw the commencement of talks for the renewal of the AGOA Initiative which is set to expire in 2025. The talks were initiated after the conclusion of the 20th AGOA Forum that took place in South Africa.[66] If extended, which is more likely to be the case, the initiative

62 Abdulqawi A. Yusuf, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) Journal of World Trade Law, Vol. 14 (6), pp. 488-507.

63 Wusheng Yu and Trine Vig Jensen, 'Tariff Preferences, WTO Negotiations and the LDCs: The Case of Everything But Arms Initiative' (2005) The World Economy, Vol. 28 (3), p. 377.

64 Nathaniel PS Cook and Jason Cannon Jones, 'The African Growth Opportunity Act (AGOA) and Export Diversification', The Journal of International Trade & Economic Development (2015), Vol. 24 (7) p. 947.

65 See Trade Law Centre Africa (TRALAC), 'EU Economic Partnership Agreements resources' <https://www.tralac.org/resources/by-region/eu-epas.html >

66 Calvin Manduca, 'AGOA Renewal: Committing to trade and development in Africa' (Institute for Agriculture and Trade Policy, 31 January 2024) <AGOA renewal: Committing to trade and development in Africa | IATP>

would have a further lifeline of 16 years, extending the duty free and quota free market access of the 32 AGOA beneficiaries to the United States (US) market until the end of 2041. The AGOA Renewal and Improvement Act (2024) aims to expand its geographical scope beyond Sub-Saharan African countries to countries in North Africa in an effort to support the development of intra-African supply chains. At the moment, African countries are calling for an expansion of the product lines benefitting from the scheme, with the EAC specifically hoping for the inclusion of services in the trade deal.[67]

During the AGOA extension negotiations talks, the US in October 2023 removed Uganda, Gabon, Niger and the Central African Republic (CAR) as beneficiaries of the scheme. The US cited rule of law related reasons for withdrawing the preferences to Gabon and Niger. Uganda on the other hand was excluded on the ground of "gross violations of internationally recognised human rights".[68] The impact of this decision by the US on the four countries has been stated to be minimal as the four countries had a low utilisation rate of the AGOA initiative.[69]

Another EPA still in the pipeline in terms of negotiations between 2022-2023 is the Kenya – United States Strategic Trade and Investment Partnership (STIP). The US intends to use STIP as a blueprint for negotiating trade arrangements with other sub- Saharan African countries. The STIP is regarded by the two countries as a placeholder for an FTA. The overriding objectives of the STIP are to "increase investment, promoting sustainable and inclusive economic growth, benefiting workers, consumers, and businesses, and supporting African regional economic integration."[70] It covers topics such as digital trade, agriculture, trade facilitation, and customs procedures. Having highlighted the existence of a number of FTAs between African and Third Parties countries, the next sub-section of the paper analyses how the AfCFTA Agreement regulates such EPAs within its legal framework.

1.4.2 AfCFTA Provisions on Economic Partnership Agreements

Article 5 of the AfCFTA Agreement sets out a number of guiding principles that are to guide its implementation. One such principle that is important in the context of EPAs between African and Third Parties is the principle of transparency. Article 17(2) of the Agreement places an obligation on each State Party to notify other State Parties of any actual or proposed measure that is either material to the operation of the AfCFTA Agreement or substantially affects other State Party`s interest in the AfCFTA Agreement.[71] Article 17(3) AfCFTA Agreement additionally requires State Parties

67 Herald Aloo, 'EAC hopes Revised AGOA Deal will Include Services and Relax Visa Requirements' (The Africa Report, 5 June 2024) <https://www.theafricareport.com/350103/eac-hopes-revised-agoa-deal-will-include-services-and-relax-visa-requirements/>

68`Gloria Arado, 'US to Remove Uganda and Three other African Countries from Agoda Trade Deal' (BBC, 31 October, 2023) <https://www.bbc.com/news/world-africa-67236251>

69 Ohio Omiunu, 'US Suspends Four Countries from AGOA: Reassessing the Human Rights Trade Nexus' <https://www.afronomicslaw.org/category/analysis/us-suspends-four-countries-agoa-reassessing-human-rights-trade-nexus>

70 Office of the United States Trade Representative, 'Readout of the April 2-12 Negotiating Round Under the U.S-Kenya Strategic Trade and Investment Partnership', Press Release, Washington D.C, 15 April 2024, <https://agoa.info/images/documents/15754/readout-of-april-2-12-negotiations.pdf>.

71 AfCFTA Agreement, Art. 17(2).

to promptly provide information and respond to questions, pertaining to an actual or proposed measure, irrespective of whether or not the requesting State Party was previously notified of that measure. [72]

While both Articles 17(2) and 17(3) do not expressly refer to trade arrangements between AfCFTA State Parties and Third Parties, EPAs between AfCFTA State Parties and Third Parties are material to the operation and implementation of the AfCFTA Agreement and its protocols.

Such EPAs when negotiated on a reciprocal basis, grant market access to the entire African continent. In as much as Article 17(3) gives other AfCFTA State parties the right to raise questions pertaining to a potential or existing EPA between an AfCFTA State Party and a Third Party, no further provision exists as to the notification procedures for such a measure to the AfCFTA Secretariat, the nature of questions that are to be raised by the other State Parties and the overall effect of the questions on the potential existence or ongoing existence of such an EPA.

Article 18 of the AfCFTA Agreement partly also touches on EPAs between AfCFTA State Parties and Third Parties. It provides that State Parties to the AfCFTA shall accord to each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties.[73] Additionally, Article 18(2) requires a State Party to afford an opportunity to other State Parties to negotiate preferences granted to Third Parties prior to the entry into force of the AfCFTA Agreement and guarantees such preferences to be on a reciprocal basis. A reading of the Article 18 of the AfCFTA Agreement indicates that it does not apply to preferences granted by AfCFTA State Parties after the entry into force of the AfCFTA Agreement. This therefore excludes EPAs negotiated after 30 May 2019 from the scope of application of Article 18 of the AfCFTA Agreement. It is also important to note that neither of both the Protocol on Trade in Goods and the one on Trade in Services makes reference to trade agreements between AfCFTA State Parties and Third Parties.

2. Conflict and Trade/Investment on the Continent: From the Russia-Ukraine War to the Niger Coup

2.1 The Russia-Ukraine Conflict – One Year Later

The first year of the Russian "Special Military Operations" or full-scale invasion of Ukraine that began in February 2022 brought with it grain shortages and a rise is staple food prices in countries around the world, including African countries such as Egypt, Eritrea, Uganda and Tanzania (which prior to the conflict relied heavily on imported grain or vegetable oils from Russia and/or Ukraine). The mixed trade and diplomatic implications of the war soon became obvious as various interested parties/allies in the conflict – including Europe and the United States – vied for Africa's support (as the continent with the largest voting bloc at the United Nations (UN) General Assembly where the conflict had been tabled for resolution and as a trading partner whose future trade relations with

72 Ibid Art. 1

73 Ibid, Art. 18. 7(3).

the warring parties could shape the future of the conflict). With sanctions placed on Russian oil in the US and Europe, it was important for Russia to explore new markets for its oil products. At the same time, Europe needed new oil sources to fill the gap in its supply resulting from its ban within its territory of imports of Russian oil.

The increased diplomatic activity directed towards Africa since 2022 has led to increased economic relations between some African countries and key parties to the conflict. For eg., in May 2023, following a meeting with Russian Foreign Minister Sergey Lavrov in Nairobi, Kenya, Kenya announced plans for both countries to sign a comprehensive trade agreement which would foster increased trade exchanges and investment opportunities between the two countries. At the same time, Kenya's President Ruto emphasized the importance of resolving the Russia-Ukraine conflict through peaceful means.[74]

Notably, the Kenya-Russia bilateral meeting occurred on the heels of Ukraine's donation in March 2023 of 30,000 metric tons of wheat to Kenya.[75] Lavrov had visited Africa at least three times in 2023, while Ukraine's foreign minister Dmytro Kuleba travelled to African countries including Ethiopia, Rwanda and Mozambique the week before the Kenya-Russia meeting. Also, at the meeting, Ruto and Lavrov had agreed on an issue of strategic importance to Africa - the need for UN reform to meet the needs of the 21st century and the importance of African representation in the Security Council.[76] Kenya's approach of maintaining ties with the two warring parties and their allies (despite its UN envoy's strong condemnation of the Russian operations at the UN Security Council in February 2022) has been described in some quarters as "strategic ambiguity"[77] aimed at protecting the country's interests. However this approach aligns with a view among many African countries that continued engagement by third parties with both parties to the conflict has a better chance of bringing lasting peace. Indeed in June 2023, a historic African peace delegation consisting of South Africa, Egypt, Senegal, Congo-Brazzaville, Comoros, Zambia, and Uganda visited both Russia and Ukraine with a 10-point proposal for peace.[78]

Meanwhile, on the oil trade front and with gaps in European oil supplies resulting from the sanctions imposed on Russian oil, the war opened a new trade frontier for Morocco in the form of exports of gasoline and naphtha to Europe. Nigerian crude exports to oil refineries in Europe also increased (though the country simultaneously experienced drops in demand for its crude as countries like

74 See Bhargav Acharya, 'Kenya and Russia to Sign Trade Pact, President Ruto Says' (Reuters, 29 May 2023) <https://www.reuters.com/business/kenya-russia-sign-trade-pact-president-ruto-says-2023-05-29>

75 Susan Nyawira, 'Kenya Receives 30,000 Tonnes of Wheat From Ukraine' (AllAfrica, 20 March 2023) <https://allafrica.com/stories/202303200564.html>

76 Bhargav Acharya (note 74). Also, as at June 2024, Ukraine which had 10 embassies in Africa before the conflict (compared to Russia's 43) had opened six new embassies in Africa, including in Rwanda, Botswana and Mozambique, with four more being planned. See in this regard, Kate Hairsine, 'How Ukraine is Combating Russia's Influence in Africa' (Die Welt, 27 June 2024) <https://www.dw.com/en/how-ukraine-is-trying-to-combat-russias-influence-in-africa/a-6946187/>

77 Jeff Otieno, 'Russia-Ukraine war: Why Kenya is Now Playing Both Sides' (The Africa Report, 12 June 2023) <https://www.theafricareport.com/312267/russia-ukraine-war-why-kenya-is-now-playing-both-sides?>

78 Mayeni Jones, 'Africa's Ukraine-Russia Peace Mission: What was achieved?' (BBC News, 19 June 2023). <https://www.bbc.com/news/world-africa-65951350>

India reduced the volume of their Nigerian oil imports to make way for crude sold by Russia at discounted wartime prices). At the same time, refined oil exports from Russia to Africa increased 14-fold in just over a year to countries such as Tunisia, Nigeria, Morocco, Libya, and Egypt following a diplomatic "onslaught" on the continent by Russia and despite US attempts to dictate what Africa could buy from Russia (grain, yes; oil, no).[79]

Out of the Nigerian experience comes a notable development relevant to Africa's economic self-sufficiency, one of the goals of the AfCFTA. With the oil embargo on Russia, Nigeria's dependence on refined oil from two European countries which prior to the war imported large portions of their crude from Russia - the Netherlands and Belgium – meant a disruption in the supply of refined petrol to the country. The disruption brought renewed urgency to the need for a functional oil refinery in Nigeria. That need appears answered by the accelerated launch in May 2023 in Nigeria of the Dangote Refinery, Africa's biggest and the world's largest single-train refinery. The launch attended by many African Heads of State[80] looks set to end the decades-long dependence of Nigeria/Africa on refined oil products from Europe.

2.2 The Niger Coup and its Economic Effects

On 26 July 2023, a group of military officers overthrew the civilian government of the West African State of Niger. Coming on the heels of similar military coups in Burkina Faso (January and September 2022), Guinea (September 2021) and Mali (August 2020), the coup sent shock waves through the continent,[81] with fears of a continued domino effect of coups sweeping through the region. In response to the coup, the 15 member Economic Community of West African States (ECOWAS) imposed various economic sanctions on Niger and suspended the country from ECOWAS. ECOWAS States (excluding Burkina Faso, Guinea and Mali which had also been suspended after coming under military rule) closed their borders with Niger, suspended commercial and financial transactions between their countries and Niger, and froze Nigerien assets in banks within their territories.[82] In addition, Nigeria (whose President Ahmed Bola Tinubu then held and still holds the rotating chairmanship of ECOWAS) cut off electricity supply to Niger acting in line with the sanctions decided by ECOWAS. Before the coup, Niger sourced 70% of its electricity from Nigeria.

79 See Charlie Mitchell and Rosemary Griffin, 'Russian Oil Product flows to Africa Jump following Western Sanctions (S&P Global, 4 July 2023); <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/070423-russian-oil-product-flows-to-africa-jump-following-western-sanctions>; Rodney Muhumuza, 'US: Africa can buy Russian grain but risks actions on oil'(Associated Press, 4 August 2022) <https://apnews.com/article/russia-ukraine-global-trade-united-nations-africa-c58713fe80a3bd0549501a08ed390640>

80 Emmanuel Addeh, Peter Uzoho, Dike Onwuamaeze and Yinka Kolawole, ' Game Changer: Seven African Presidents Join Buhari to Open Dangote Refinery' (Arise News, 22 May 2023) <https://www.arise.tv/game-changer-seven-african-presidents-join-buhari-to-open-dangote-refinery/>

81 Nnamdi Obasi, 'ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate' (International Crisis Group, 5 December 2023) <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate>

82 ECOWAS/CEDEAO, Final Communique – Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Political Situation in Niger (Latest Version) (Ecowas Commission Abuja, 20 July 2023) <https://www.ecowas.int/final-communique-fifty-first-extraordinary-summit-of-the-ecowas-authority-of-heads-of-state-and-government-on-the-political-situation-in-niger/>

The sanctions – intended to pressure the coup's leaders to free the country's civilian President Mohamed Bazoum (who they had placed under detention) and restore him to power – had serious economic repercussions for Niger. It also affected its sanction-imposing neighbours as well as Niger's foreign economic partners. Business operations and regional supply chains were disrupted as Nigerien businesses relying on electricity from Nigeria faced collapse and truckloads of agricultural produce were stuck at border towns between Niger and Nigeria. The disruptions affected millions who worked in the cross-border economy straddling the Nigeria-Niger border or relied on it for their food supply.[83] Benin and Togo, two countries that depend on transit trade in the region (with large volumes of trade passing through Benin's port of Cotonou being destined for Niger) were also affected. Also threatened was the US$13 billion Trans-Saharan gas pipeline project to transport gas from Nigeria, Niger and Algeria to Europe (fuelling 11 countries along the African coast on its way), which had been given fresh impetus by Russia's 2022 cutting of gas supplies to Europe in the midst of the Russia/Ukraine conflict.[84] In August 2023, a Chinese company suspended its construction of a hydroelectric dam in Niger after coup-related sanctions halted its access to funds.[85] Though Niger's new military rulers sued ECOWAS before the ECOWAS Court of Justice challenging the legality of the sanctions and its adverse effects on its citizens (including shortage of food, medicine and electricity), the Court declared the suit inadmissible. Its reasoning was that the military junta was an unconstitutional and unrecognized government, lacking standing to institute action before the Court.[86]

The coup and its aftermath have highlighted the importance of intra-African trade for economic stability and food security in the region. The coup also made West Africa a new case study for the old debate[87] in international law on economic sanctions, their legality and their humanitarian consequences. It raised questions about the propriety of and modalities for utilizing economic sanctions (a weapon used by powerful States to subdue adversaries/"rogue States" in faraway lands, with humanitarian consequences for civilian populations then described as "collateral damage") to resolve problems of democratic deficit arising within a region of States geographical proximate to each other and bound by centuries of political, historical, trade, cultural, post-colonial and ethnic ties. It also brought into focus popular resentment in Niger and some other coup-plagued countries about stagnant economies as well as perceived unequal economic relations with foreign

83 Nnamdi Obasi (note 81); Bruce Byiers, Poorva Karkare, Amanda Bisong and Martin Ronceray, 'Niger's Coup: Who Loses from ECOWAS Sanctions? (European Centre for Development Policy Management, 18 September 2023) <https://ecdpm.org/work/nigers-coup-who-loses-ecowas-sanctions>

84 Samuel Ajala, 'Trans-Saharan pipeline uncertain after coup: experts' (Gas Outlook, 15 September 2003) <https://gasoutlook.com/analysis/trans-saharan-pipeline-uncertain-after-coup-experts/>

85 Sofia Christensen et al, 'Construction of China Gezhouaba Group's Kandadji Dam in Niger Suspended Due to Coup – Company' (Reuters, 10 August 2023) < https://www.reuters.com/world/construction-china-gezhouaba-groups-kandadji-dam-niger-suspended-due-coup-2023-08-10/ >

86 See Ameh, Ejekwonyilo, 'ECOWAS Court rejects Niger junta's plea to lift regional sanctions' (Premium Times (8 December 2023) <https://www.premiumtimesng.com/news/top-news/649824-ecowas-court-rejects-niger-juntas-plea-to-lift-regional-sanctions.html> for reference to the court judgment which is yet to be available on the Court's website.

87 Cf: Yale Journal of International Law, 'Symposium: Third World Approaches to International Law (TWAIL) & Economic Sanctions', 20th June 2023. <https://www.yjil.yale.edu/symposium-third-world-approaches-to-international-law-economic-sanctions>

powers (whose economic presence/investments did not appear to significantly benefit the local population).[88] Popular disillusionment with the economy and the realities of seeming unfair terms of mining investment contracts signed with French entities were among factors said to underlie the considerable civilian support for the Niger coup. Many citizens speculated that military rule could be a solution to their socio-economic problems. The presence of French and other foreign military bases on Nigerien soil were also factors triggering popular resentment.

The mixed political and economic factors underlying civilian support for the coup in Niger, the humanitarian consequences of sanctions and the role of sustainable investment/trade in ameliorating economic challenges in the continent are together with the crucial importance of upholding democracy on the continent points for reflection for African leaders charged with devising solutions to coup d'états. Indeed, a balancing of these reflection points may explain ECOWAS' February 2024 lifting of most of the sanctions on Niger "on purely humanitarian grounds", while apparently maintaining the country's suspension from the bloc.[89] This was done regardless that Niger had not acceded to ECOWAS' demands but had instead, together with Mali and Burkina Faso, announced their withdrawal from ECOWAS (thereby creating what has been described as the biggest crisis for the bloc since its formation in 1975).

But withdrawal from ECOWAS also entails a loss of access to ECOWAS' large single market as well as the free movement privileges ECOWAS membership provides for the about 70 million strong combined populations of the three countries. This will have consequences for trading under the ECOWAS and ultimately the AfCFTA of which RECs like ECOWAS are building blocks. In addition, the AU's suspension of Niger and other African countries that have respectively fallen under military rule since 2019 (namely Guinea, Burkina Faso, Mali, Gabon and Sudan) raises questions about their participation in the ongoing operationalization of the AfCFTA (a flagship project of the AU) and the consequences any suspension-related non-participation will have for these countries populations and the rest of the continent. Notably, Art 30 of the Constitutive Act of the AU[90] states that governments which come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

To conclude, both ECOWAS and the AU will have to find innovative ways of resolving the tension in upholding both democracy and intra-regional trade, posed by the Niger coup and other coups. Addressing the underlying causes of coups (which often include bad governance and/or flawed elections) and devising "targeted" sanctions that affect coupists rather than entire populations are ways African leaders can fulfil their duty of safeguarding democracy and the stability necessary for

88 For eg., Niger at the time of the coup was France's third-largest supplier of natural uranium, mined in the country by the French multinational Orano. Yet decades of uranium exports had failed to boost Niger's economy, as is often the case with raw material mining without local processing. See in this regard, Gilles Yabi, 'The Niger Coup's Outsized Global Impact' (Carnegie Endowment, 31 August 2023) <https://carnegieendowment.org/posts/2023/08/the-niger-coups-outsized-global-impact?lang=en>

89 Cf: Felix Onuah, West African Bloc Lifts Sanctions on Junta-led Niger (Reuters, 26 February 2024). <https://www.reuters.com/world/africa/west-african-ecowas-bloc-mulls-new-strategy-towards-junta-states-2024-02-24/>

90 African Union, Constitutive Act of the African Union , 11 July, 2000 <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>

the undisrupted functioning of Africa's internal markets. The targeted sanctions approach which the ECOWAS is already adopting will protect intra-African trade while at the same time ensuring ECOWAS complies with the principle of "zero tolerance for power obtained or maintained by unconstitutional means" [91] enshrined in the ECOWAS treaties.

3. Africa and The Energy Transition: COP28

The 28th Conference of Parties to the United Nations Framework Convention on Climate Change (COP28) took place in Dubai, the United Arab Emirates from 30th November to 13th December 2023. It was the biggest of its kind (with about 85,000 participants in attendance, including over 150 Heads of State/Government, civil society organizations, businesses, indigenous peoples, youth and international organizations).[92] Like previous COP conferences, it was devoted to devising global solutions to climate change. Prior to COP28, The Government of Kenya and the African Union Commission (AUC) had hosted an inaugural Africa Climate Summit (ACS) in Nairobi, Kenya from 4 - 6 September 2023 at which African leaders unanimously adopted the Nairobi Declaration[93] as the basis for Africa's common position at COP28 and beyond. In addition, a COP28 African common agenda was negotiated and spearheaded by the African Group of Negotiators on Climate Change (AGN) and Civil Society Organizations (CSOs).[94] Among Africa's top-most priorities at COP28 as outlined by AGN Chair, Ephraim Mwepya Shitima were climate finance (that is, finance for climate actions including investment in renewable energy), operationalization of the "Loss and Damage" Fund (established at COP27 to provide financial support to vulnerable countries hardest hit by climate disaster), strengthening adaptation actions (i.e., actions to reduce vulnerability and boost resilience of populations and cities to negative effects of climate change), a special needs and circumstances status for Africa in the energy transition and a just energy transition.[95] These priorities echoed the demands of a wholly civil society-led African People's Climate Assembly which held in Kenya from 3 – 6 September (parallel to the government-organised Africa Climate Summit) but went even further to demand "system change not climate change", in other words, a radical, fundamental change of the "neoliberal, authoritarian, extractive, neo-colonial, racist, patriarchal systems and societies" that underlie climate change. The African People's Climate Assembly also demanded a rejection of "false solutions" like "carbon markets".[96]

91 Economic Community of West African States, Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security of 21 December 2001, Art. 1(c)

92 United Nations Framework Convention on Climate Change,'COP28: What Was Achieved and What Happens Next?' (United Nations Framework Convention on Climate Change, 12 January 2024) <https://unfccc.int/cop28>

93 African Union, 'The African Leaders Nairobi Declaration on Climate Change and Call to Action' <https://www.afdb.org/sites/default/files/2023/09/08/the_african_leaders_nairobi_declaration_on_climate_change-rev-eng.pdf>

94 Grace Mbungu, Edith Ogallo and Diana Rudic, 'Falling Short or Following Through? COP 28 Outcomes for Africa' (Africa Policy Research Institute, 12 February 2024) <https://afripoli.org/falling-short-or-following-through-cop-28-outcomes-for-africa>

95 Ibid.

96 See Port Harcourt Wakawaka (PHwakawaka), 'The Real Climate Summit People's Declaration!', PHwakawaka Blog, 6 September, 2023 <https://phwakawaka.home.blog/2023/09/06/the-real-climate-summit-peoples-declaration>; also Lauren Nel, The Gap Between The Africa Climate Summit and The "Real Africa Summit" (Natural Justice, 23 October 2023) <https://naturaljustice.org/the-gap-between-the-africa-climate-summit-and-the-real-africa-summit/>

The key outcomes of COP28 integrated many of Africa's concerns, though with shortcomings that stand to be ameliorated in the future. The key outcomes included the conclusion of the first-ever global stocktake of progress on implementation of the Paris agreement, a framework agreement on global adaptation (and adaptation finance) and agreement on climate change mitigation/reduction. Importantly, the outcomes included an agreement to operationalize the Loss and Damage Fund which was widely seen as one of the key measures of success of COP28 from an African point of view. However, the voluntary rather than mandatory nature of the Fund – which is in line with demands of developed countries – has been viewed by critics as among the shortcomings of the COP28 outcomes, just like the around 700 million US dollar worth of commitments made to the Fund at COP28 (which fell short of the trillions of dollars needed by African and other "developing" countries to deal with the negative effects of climate change). As critics point out, the voluntary nature of the Fund stands at odds with the climate justice demands of Least Developed Countries – the majority of which are African countries – and "Small Island Developing States" (SIDS) which include several African countries, that the main climate polluters (developed countries) should be fully responsible for paying for climate loss and damage.[97]

Also an outcome of COP28 that raises issues of climate justice is the landmark agreement of State parties for the first time in COP history to progressively transition away from fossil energy use – the predominant cause of climate change - by 2050. The statement in COP28's global stocktake conclusions that the transition must occur in a "just ... and equitable manner"[98] is a reminder of a climate justice-related view of many in Africa that rich/developed countries whose emissions are largely responsible for climate change should take the lead in transitioning away from fossil fuels. According to that view, African countries - which according to experts account for 0.01% of past emissions of approximately 266 years and 3 - 4% of emissions in the last few years[99] - deserve to temporarily exploit their natural resources and develop like rich countries (or be provided with alternative options, including renewables/climate finance, by the countries primarily responsible for climate change).[100] The March 2023 request of the UN General Assembly to the International Court of Justice for an Advisory Opinion on the Legal Obligations of States in Respect of Climate Change, and the attendant legal proceedings (at which the African Union, the Organization of the

97 Ibid.

98 United Nations Framework Convention on Climate Change, 'Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Fifth Session, United Arab Emirates, 30 November to 12 December 2023: Outcome of the First Global Stocktake (Doc FCCC/PA/CMA/2023/L.17), 13 December 2023, para. 28(d) <https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf>

99 For references to data on Africa's contributions to global carbon emissions, see for example, Hannah Ritchie, 'Who Has Contributed Most to Global CO2 Emissions?' (Our World In Data, Global Change Data Lab, 1 October 2019) <https://ourworldindata.org/contributed-most-global-co2>; also United Nations, 'Africa Climate Week 2023: Charting a Fresh Course for Climate Action', UN Climate Press Release, 4 September 2023 <https://unfccc.int/news/africa-climate-week-2023-charting-a-fresh-course-for-climate-action >

100 See for example, Yemi Osinbajo 'Yemi Osinbajo on the Hypocrisy of Rich Countries' Climate Policies' <https://www.economist.com/by-invitation/2022/05/14/yemi-osinbajo-on-the-hypocrisy-of-rich-countries-climate-policies> (The Economist, 14 May, 2022); Ridwan Karim Dini-Osman, 'COP28: African Nations Resist Fossil Fuel Phaseout, Citing Economic Realities (The World, 7 December 2023) <https://theworld.org/stories/2023/12/07/cop28-african-nations-resist-fossil-fuel-phase-out-citing-economic-realities>

Petroleum Exporting Countries and several African States will appear alongside their developed country counterparts as court-authorized participants) may assist in clarifying the division of responsibilities for a just and equitable energy transition.

4. Update on trade and trade-related disputes between African countries in regional courts.

This section paper highlights trade related disputes that have been filed before regional courts in Africa between 2022-2023. The objective of this section is to highlight the issues raised in the disputes and how they relate to regional integration in the continent. The number of trade disputes covered in the section is relatively low due to the fact that although the regional courts were primarily established as sub-regional courts/trade courts, the majority of them, save for the COMESA Court of Justice resolve human rights and democracy related cases. [101]

The first dispute the section focuses on is East African Court of Justice (EACJ) Reference No. 48 of 2023 *Attorney General of the Republic of Uganda v. the Attorney General of the Republic of Kenya.* This dispute relates to the freedom of transit of goods. The facts concern the geographical limitation of Uganda being a landlocked country. Uganda imports 90% of its refined oil products through the port of Mombasa in Kenya. The refined petroleum products are transported to Uganda through Kenya's pipeline. Traditionally, this has been done through Oil Marketing companies operating in Kenya.[102]

In 2023, Uganda made a policy shift, granting only the Uganda National Oil Corporation (UNOC) the sole power of importing refined petroleum products. To implement the policy, UNOC needed to transport the refined petroleum products through Kenya's infrastructure. Consequently, UNOC had to get authorisation from Kenya's Energy regulatory agency (EPRA).[103]

EPRA requested UNOC to fulfil several requirements so as to enable it to utilise the infrastructure. These included (a) incorporation of a subsidiary or registration of UNOC as a company branch in Kenya and, (b) application for an issuance of a licence by the regulatory agency. UNOC proceeded to register as a branch in Kenya with the sole purpose of obtaining the licence. On the first try, the application for the licence was rejected by EPRA on the basis that UNOC had failed to provide the following documents: (a) proof of annual sales of 6.6 million litres (b) ownership of 5 licenced retail petrol stations, (c) ownership of a licenced petroleum depot. [104]

101 James Thuo Gathii and Harrison Otieno Mbori, Reference Guide to Africa's International Courts An Introduction in James Thuo Gathii (ed.), *The Performance of Africa's International Courts* (Oxford University Press, 2020) <https://doi.org/10.1093/oso/9780198868477.003.0009>

102 EACJ Reference No. 48 of 2023: *Attorney General of the Republic of Uganda versus Attorney General of the Republic of Kenya*, Reference para. 4.1.

103 Ibid at para. 4.4.

104 Ibid at para. 4.9.

The Ministry of Energy in Uganda then proceeded to write to the Cabinet Secretary in charge of Energy in Kenya requesting a waiver of certain requirements on the basis that UNOC is not an Oil Marketing Company (OMC), it was merely seeking access to the petroleum transiting infrastructure. The Cabinet Secretary in charge of Energy indicated that he would present the request to the Kenyan Cabinet. The Cabinet`s decision regarding the issue was that it requested the regulatory authority to review the application in light of Uganda's new policy.

UNOC resubmitted the application. As the application was being reviewed for the second time by EPRA, a petition was filed before the Kenyan High Court in November 2023 challenging UNOC application for the licence. The High Court issued conservatory orders restraining the regulatory agency from granting UNOC a licence. Uganda then instituted this reference on the basis that Kenya`s High Court conservatory order restricting EPRA from processing UNOC's licence was a violation of the EAC Treaty and the United Nations Convention on the Law of the Sea. [105]

The dispute was ultimately resolved through diplomatic means in March 2024, when the two countries Uganda and Kenya signed an agreement authorising UNOC to import oil through the port of Mombasa. [106]Although the dispute is now moot, it is important to consider the claim raised by Uganda in the reference and how the same aligns with Kenya`s treaty obligations.

Comments on the case.

Uganda`s main claim was on Article 89(1)(b) and (e) and Article 93(d) of the EAC Treaty. In Article 89(1)(b) and (e) of the Treaty, EAC Partner States undertake to evolve coordinated, harmonised and complimentary transport and communications policies, improve and expand the existing transport and communication links and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the EAC. To achieve this, EAC Partner States undertake to construct, maintain, upgrade, rehabilitate and integrate critical infrastructure such as rail, road and pipeline.

Article 93(d) mandates coastal states to co-operate with the land locked Partner States and grant them easy access to port facilities and opportunities to participate in the provision of port and maritime activities. This paper holds the view that the two provisions, read together or independent of each other, contain good faith obligations, with no clear recourse on the part of a land-locked country whose freedom of transit has been restricted by a coastal state. Nonetheless, the case is still important as it is the first of its kind, at least within the African continent relating to the balance between freedom of transit and whether the same is enforceable on a practical level, against a costal or transit state.

105 Ibid at para. 4.20.

106 BDA Writer, 'Kenya resolves oil dispute with Uganda amid port shift' (Business Day Africa, 28 February 2024) <https://businessdayafrica.org/kenya-resolves-oil-dispute-with-uganda-amid-port-shift/>

The second trade dispute before a regional court is *Agiliss Limited v. The Republic of Mauritius.* This matter was instituted in 2019 before the COMESA Court of Justice. It continued all through 2022-2023. The Applicant in this case is Agiliss Limited, a company incorporated in Mauritius, importing oil from Egypt. The Respondent is Mauritius.[107]

The Respondent, through a letter notified the Secretary General of the COMESA Secretariat of its intention of imposing a safeguard measure on imports of edible oil origin from the COMESA region, pursuant to Article 61 of the Treaty. In response to this, the Applicant sought an order from the court restraining the Respondent from imposing customs duty of 10% on edible oil from COMESA countries which it alleges breaches several provisions of the COMESA Treaty.[108] These include Article 46 on restriction on the imposition of customs duties, Article 48 on Rules of Origin and Article 49 on the elimination of non-tariff barriers amongst other provisions.

The Respondent, through their statement of defence raised a preliminary objection citing that the Applicant was a legal person and as such, was required to exhaust the local remedies in Mauritius before initiating the dispute before the Court, as per Article 26 of the COMESA Treaty.[109] In response to this, the Applicant averred that it was not bound to pursue local remedies because of the Mauritius Supreme Court decision in *Polytol Paint & Adhesive Manufacturers Co. Limited v. the Minister of Justice SCJ 106.* In the aforementioned decision, the Supreme Court had held that it could only take cognisance of the provisions of the COMESA treaty to the extent that they have been incorporated into Mauritian law. [110]

The First Instance Division held that it did not have jurisdiction over the matter because the Applicant had failed to exhaust the local remedies. The court's reasoning was that the Applicant need not to have pleaded treaty infringement before the Mauritius national courts. Thus, the Respondent action could still be challenged as a purely administrative action. [111] The Applicant being dissatisfied with this outcome made an appeal to the Appellate Division of the Court.

The Appellate Division overturned the decision of the First Instance Division. It did find that the Applicant had established exceptional circumstances exempting it from complying with the exhaustion of local remedies rule. The Appellate Division additionally stated that although judicial review and injunction were remedies available to the Applicant, the Respondent had proved that there were effective remedies.[112]

107 COMESA Court of Justice Reference No. 1 of 2019 *Agiliss v. The Republic of Mauritius, First Instance Division*, Judgement, para. 9.

108 Ibid para.14

109 Ibid para. 15.

110 Ibid para. 75.

111 Ibid para. 93.

112 *Agiliss Limited v. The Republic of Mauritius and Others,* Appeal No. 1 of 2022.

Comments on the case

This is the first international trade law case focusing on the COMESA safeguard and subsidies regime. At the onset, the Respondent's measure was regarded as a safeguard but later on analysed by the Appellate Division as a subsidy program. While the First Instance Division did not analyse the legal nature of the Respondent's measure, the Appellate Division's examination devolved into an analysis of the legal nature of the program. The Appellate Division rightfully concluded that imposition of the 10 % supposed countervailing duty could not be legally justified under Article 52 of the COMESA Treaty as it was a local subsidy to a domestic Mauritian company, not concerning the importation of oil subsidised by another Member state and subsequently causing injury to the domestic oil industry in Mauritius.

Generally, the COMESA Treaty has a robust legal framework on all the three trade remedies. Article 51 of the Treaty relates to dumping while Article 52 of the Treaty applies to subsidies and authorises imposing countervailing duties on subsidised imports. Lastly, Article 61 of the Treaty provides for safeguards measures, which are subject to review and extension by the Council of Ministers.[113]

5. International Investment (Related) Agreements (IIAs) Involving African States

5.1 Bilateral Investment Treaties and Treaties with Investment Provisions

Because intra-AU BITs will remain in force until their termination 5 years after the AfCFTA Investment Protocol enters into force, BITs entered into between AU Member States will retain their relevance for at least 5 years to come. But considering the anticipated entry into force of the AfCFTA Investment Protocol, it is understandable that BITs signed by African States during the period under consideration have been signed mainly with 3rd States and regional integration organizations. According to the available data, eleven IIAs involving African States were signed during the period. Among them are the Kenya/EU Economic Partnership Agreement (18th December 2023), the Angola/China BIT (6 Dec 2023), Members of the Organisation of the African, Carribean and Pacific States/EU and EU Member States Partnership Agreement (15 Nov 2023), the Angola/Japan BIT(9 August 2023) and the Cabo Verde/Morocco BIT (9 May 2023).[114] The signing between 2022 – 2023 of at least one intra-African BIT - the Cabo Verde/Morocco BIT - may come as a surprise. This is considering that an AfCFTA Investment Protocol (AIP) to regulate investment for the whole continent was being negotiated during the same period, and also Article 49 of the AIP states that no new intra-African BITs shall be concluded after its adoption by its State Parties (i.e. by States that have ratified or acceded to the Protocol). One may speculate that

113 Jackson Okoth, 'Lethargic Sugar Sector Gets Lifeline as COMESA Issues Another Two-year Safeguard (The Kenyan Wall Street, 29 November 2023) <Lethargic Sugar Sector Gets Lifeline as COMESA Issues Another Two-year Safeguard - Kenyan Wall Street - African Business and Global Finance>

114 See United Nations Trade and Development (UNCTAD), International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> for its listing of 11 IIAs involving African States signed during the period. The remaining 6 of the 11 IIAs listed are the Belarus/Equatorial Guinea BIT (9 Dec 2023), the Angola/EU Sustainable Investment Facilitation Agreements (17 Nov 2023), the Brazil/Sao Tome and Principe BIT (27 Aug 2023), the Belarus/Zimbabwe BIT (31 Jan 2023), the Mozambique/United Arab Emirates BIT (7 February 2022) and the Angola/Cabo Verde BIT (14 March 2022). The listed 2022 Angola/Cabo Verde BIT may be a renegotiation of a pre-existing 1997 BIT between the two countries rather than a completely new BIT.

the signing of the Cabo Verde/Morocco BIT three months after the February 2023 adoption of the AIP was simply an end result of BIT negotiations that may have started long before the negotiation of the Investment Protocol. It may also be speculated that neither of the two signatories nor any other African State is yet party to the AIP and its prohibition of new intra-African BITs, because one of the Protocol's annexes is yet to be finalised.[115] From that perspective, the Cabo Verde/Morocco BIT may well be an interim arrangement entered into in favour of Cabo Verdean and Moroccan investors pending ratification of the AIP by both countries, and importantly, the coming into force of the AIP (whose date is uncertain since it depends on the ratification of 22 AfCFTA States).

5.2 The Investment Facilitation for Development Initiative

The Investment Facilitation for Development (IFD) is an initiative launched in 2017 by a group of developing and least-developed World Trade Organization (WTO) members with the aim of developing a global agreement on investment facilitation. The initiative is aimed at enabling participating countries - especially developing and least developed countries - attract foreign investment that advances their sustainable development objectives.[116]

Under the auspices of the initiative, the text of an Investment Facilitation for Development Agreement (IFDA) was finalised in November 2023 by 112 members[117] of the 164 member World Trade Organization after over five and half years of work and text-based negotiations.[118] Though originally intended by its initiators to be a multilateral agreement establishing obligations for all WTO members, the finalised IFDA is a plurilateral agreement that will bind only WTO members that accept it. As at December 2023, participants in the IFD initiative were WTO members from all continents. The participants represent all levels of development and include China, Chile, the European Union, The Republic of Korea Japan, the Russian Federation and at least 22 African countries (including Angola, Congo, Morocco and Nigeria). The participants aim to have the agreement incorporated into Annex 4 of the Marrakesh Agreement Establishing the WTO as a most-favoured-nation-based plurilateral agreement open to all members. [119]

115 See discussion in Section 5.3 of this article for reference to an annex to the Investment Protocol that is still to be finalised and made public.

116 World Trade Organization, Investment Facilitation for Development, 13th Ministerial Conference: Briefing Note, April 2024.
<https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/investment_facilitation_e.htm>

117 Karl P. Sauvant, 'The New WTO Investment Facilitation for Development Agreement', Columbia FDI Perspectives No. 363, 7 August 2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531684>

118 See World Trade Organization, 'Negotiations on Investment Facilitation for Development - Investment Facilitation for Development (IFD) Agreement' (Doc INF/IFD/W/52) (Restricted), 23 November 2023, available at Trade ß Blog
<https://tradebetablog.wordpress.com/wp-content/uploads/2024/01/2023-11-27_inf-ifd-w-52-final.pdf>. For the 2024 official language version of the agreement, see World Trade Organization, Investment Facilitation for Development Agreement <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W55.pdf&Open=True>

119 See World Trade Organization (note 118). The benefits of incorporation into the WTO rule book (which would require consensus among the entire WTO membership) include the setting up of a committee to oversee implementation and the subjection of the agreement to WTO dispute settlement. As at July 2024, the efforts of the IFDA's participants to have it included on the WTO rule book have not been successful. See in this regard, Peter Ungphakorn, '125 WTO Members Fail at 4th Attempt to Formalise Plurilateral Investment Deal' (Trade ß Blog, 24 July, 2024) <https://tradebetablog.wordpress.com/2024/07/22/128-fail-4th-try-plurilateral-investment/>

The finalized document emerging from the IFD initiative stands out among investment-related international agreements that involve African States because the WTO has not been the usual forum for negotiating investment facilitation provisions. Such provisions are usually integrated into bilateral investment treaties or feature as trade-related investment provisions in free trade agreements.[120] Notably, IFDA does not seek to regulate investment policy matters like market access and investor protection, but rather focuses on technical measures that would facilitate the flow of foreign direct investment between parties to the agreement. It imposes State obligations with respect to such technical measures with the aim of facilitating sustainable investments. Those measures include streamlining and speeding up administrative procedures, improving the transparency of State investment measures (by, for eg., making information about a State's investment framework available to investors), improving domestic regulatory coherence and improving cross-border cooperation between State authorities responsible for procedures related to investments.[121] IFDA's institutional arrangements include a Committee on Investment Facilitation that will, inter alia, monitor implementation progress and facilitate the sharing of information and experiences on investment facilitation by Parties.[122]

With both investment facilitation and sustainable investment already a focus in the AfCFTA Investment Protocol, analysts point to ways in which the Protocol and the IFDA despite their overlapping mandates in that respect can work together in the future to facilitate sustainable investment on the continent. First, IFDA which focuses broadly on global FDI flows can continue where the Protocol – which focuses on securing the flow of intra-African investment – stops, by facilitating the flow of investment from outside Africa into the continent and vice versa. In addition, the IFDA's more detailed provisions on investment facilitation can be regarded as minimum global standards for investment facilitation which can help accelerate intra-African investment.[123]

5.3 The Future of ISDS: Is there an (Emerging) African Perspective?

The years 2022 - 2023 witnessed an unprecedented development in the history of international economic law – the mass proposed withdrawal of a group of States from an international trade and investment agreement. In 2022, seven EU Member States (France, Germany, The Netherlands, Spain, Poland, Luxembourg and Slovenia) announced plans to withdraw from the Energy Charter

119 See World Trade Organization (note 118). The benefits of incorporation into the WTO rule book (which would require consensus among the entire WTO membership) include the setting up of a committee to oversee implementation and the subjection of the agreement to WTO dispute settlement. As at July 2024, the efforts of the IFDA's participants to have it included on the WTO rule book have not been successful. See in this regard, Peter Ungphakorn, '125 WTO Members Fail at 4th Attempt to Formalise Plurilateral Investment Deal' (Trade β Blog, 24 July, 2024) <https://tradebetablog.wordpress.com/2024/07/22/128-fail-4th-try-plurilateral-investment/>

120 Rashmi Jose, 'Investment Facilitation for Development Agreement: A Reader's Guide' (International Institute for Sustainable Development Published by the International Institute for Sustainable Development, 2024). p. 1 <https://www.iisd.org/system/files/2024-02/investment-facilitation-development-agreement-wto.pdf >

121 Ibid. See generally Arts. 1, 6-26 of the IFDA.

122 Ibid Art. 39; also Karl P. Sauvant (note 117).

123 See Teniola Tayo and Khalid Alaamer, 'How the AfCFTA and WTO can Work towards Sustainable Investment in Africa' (World Economic Forum, 1 December 2023) <https://www.weforum.org/agenda/2023/12/afcfta-wto-work-towards-sustainable-investment-africa/>

Treaty (ECT), one of the most widely litigated investment and trade treaties in the world. This was followed, amongst other proposed withdrawals, by a July 2023 proposal by the European Commission for a coordinated withdrawal of all EU Member States, the EU and the European Atomic Energy Community (Euratom) from the ECT (as well as the UK's February 2024 announcement that it intended to withdraw from the Treaty). The key reason for these developments was that the ECT's provisions on investor protection and Investor-State Dispute Settlement (ISDS) enable foreign investors to initiate international arbitral lawsuits challenging and demanding compensation for State measures taken in the fossil fuel sector (thereby inhibiting action to address climate change); also that the recent attempts to reform the treaty's provisions to align it with the Paris Climate Agreement goals and the European Green Deal had not yielded the desired reforms.[124]

The mass withdrawal from the ECT, as at September 2024 official for 5 EU countries - France, Germany, Luxembourg and Poland (as well as Italy which already withdrew in 2016)[125] constitutes a climax of an already existing global backlash against ISDS litigation before international arbitral tribunals (international ISDS). The reasons for the backlash include the limits a sizeable number of international ISDS awards have placed on the powers of States to regulate in the public interest as well as huge compensation awards rendered by some tribunals in favour of foreign investors and against States.[126] Examples of countries around the world that have either circumscribed the application of international ISDS to foreign investor disputes or rejected it totally, abound. One example within Africa is South Africa which passed national legislation to limit ISDS to mediation or arbitration via domestic adjudicatory bodies. Also examples are Tanzania which recently passed legislation excluding international ISDS and member States of the Southern African Development Community (SADC) who amended Annex 1 to the SADC Finance and Investment Protocol to replace international ISDS with the use of domestic courts and tribunals.[127] In addition, critics have

124 Regarding announcements of intentions to withdrawal from the ECT, see Christina Eckes, Lea Main-Klingst and Lucas Schaugg, 'Why a Coordinated Withdrawal From the Energy Charter Treaty is Inevitable' (Euractiv, 24 January 2023) <https://www.euractiv.com/section/energy/opinion/why-a-coordinated-withdrawal-from-the-energy-charter-treaty-is-inevitable/> ; European Commission, 'European Commission proposes a Coordinated EU Withdrawal from the Energy Charter Treaty', Directorate-General for Energy, News Announcement, 7 July 2023. <https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en>

125 Withdrawal from the ECT takes effect one year after written notification of withdrawal to the depositary of the ECT as required by Art. 47(1) - (2) ECT. The names of countries and organizations that have followed up their announcements of proposed withdrawal with official notifications, together with the dates their withdrawals will take effect can be found on the Energy Charter Secretariat website (<https://www.energycharter.org>). Russia, a non-EU member that opted for provisional application of the ECT rather than full membership, terminated provisional application in 2009. Because investments made before a termination of provisional application or withdrawal from the ECT remain protected for 20 years after the said termination or withdrawal by virtue of the ECT's sunset clauses, EU States are taking steps to nullify the application of the ECT's sunset clause in their mutual relations. See in this regard, Markus Burgstaller and Scott Macpherson, 'EU Member States reach agreement on ECT arbitration clause' (Hogan Lovells, Hogan Lovells, Engage: Legal Insights and Analysis, 1 July 2024) <https://www.engage.hoganlovells.com/knowledgeservices/news/eu-member-states-reach-agreement-on-ect-arbitration-clause>

126 For a list of reasons underlying the backlash, see for example, Stephan W. Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, Geneva, July 2015), p. 2 <https://pure.uva.nl/ws/files/2512304/163092_E15_Investment_Schill_FINAL.pdf >

127 Talkmore Chidede, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol', Tralac Blog, 11 December 2018. <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.htm>

counted at least 8 highly costly lawsuits[128] against African States that in their view justify an end to the use of international ISDS. One of those cases is *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria (hereafter P & ID No. 1).*[129] The case saw a hefty US$6.6 billion damages award with interest (i.e US$11 billion inclusive interest, as at 2023) made against the Nigerian State by an arbitral tribunal seated in London. It concerned a claim alleging that Nigeria had wrongfully repudiated a natural gas supply and processing contract with P & ID Ltd. Though the arbitral award was eventually set aside by a UK High Court on the basis that it was obtained against Nigeria by fraud and conduct contrary to public policy (including bribery of a witness), the case is widely considered in international circles as a lesson on the pitfalls of international arbitration for States. Notably, the valuation method used by the arbitral tribunal to decide the quantum of compensation awarded to P &ID – a method critiqued by both Nigeria and the High Court judge in *P & ID No.1* – echoed the method used to award compensation to the foreign investor in *Rockhopper v Italy.*[130] *Rockhopper* is a high profile 2022 Energy Charter Treaty arbitral award that generated controversy in Europe.

But despite the wide-spread criticism of the international ISDS system, the reality is that the practice of African States on the issue has been diverse, with an equally strongly favoured approach of African States being that of reform of ISDS and other investment treaty provisions posing a threat to the regulatory powers of States. This is evidenced by the Pan-African Investment Code, the 2016 Morocco-Nigeria BIT and even the AfCFTA Investment Protocol itself. The latter, as earlier noted in this article, clarifies that certain regulatory actions taken in the public interest or to fulfil international obligations can neither give rise to compensation claims by investors nor constitute a breach by an African State of the Protocol.

The advent of the AfCFTA Investment Protocol has provided an opportunity for the continent to develop a common African position on international ISDS. At first sight, the Protocol's dispute settlement provisions (Articles 44 - 46) seem to suggest that the parties to the Protocol, inspired by the ISDS reforms of countries like South Africa, opted to move away from international ISDS.

128 Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration against African States', October 2019 <https://www.tni.org/files/publication-downloads/isds_africa_web.pdf>

129 *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Final Award), 31 January 2017.

130 Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No. ARB/17/14, Final Award, 23 August 2022. The case concerned alleged violations of the ECT arising from an Italian government refusal to grant the claimants an oil production permit following Italy's re-introduction of a ban on oil and gas exploration within 12 miles of its coastline. This affected the claimants' investments in an oil rig for which they had expected to be awarded a production permit, having previously been granted a 6 year oil exploration permit by the government. In both *P & ID and Rockhopper,* the Tribunals in place of calculating compensation based on costs actually incurred by the investor (the "sunken" or "historic" costs method preferred by respondent States) opted for the discounted cash flows (DCF) valuation method proposed by the claimants. The DCF method awards compensation for expected future profits rather than actual costs incurred. Since the DCF method does not necessarily consider that the vagaries of the business environment make it uncertain that such future profits would actually have been realised, the method appears to turn ISDS into an insurance policy for future profits. For critiques of the DCF method in ISDS, see Tony Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (EJIL Talk! Blog, 19 January 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>; also *The Federal Republic of Nigeria v. Process and Industrial Developments Ltd,* Judgment of 23 October 2023 [2023] EWHC 2638 (Comm) *(hereafter P &ID No. 2)*, para. 398(3), and more generally paras. 365 – 399 for the discussion of the Tribunal's decision on compensation.

Those provisions provide for a right of States to make claims on behalf of their nationals through the exercise of diplomatic protection and for initial recourse of the investor to amicable dispute resolution mechanisms available in the host state. However, Article 46 (2)–(3) of the Protocol states that in the event an investor and a host State are unable to resolve a dispute amicably, they may rely on dispute resolution mechanisms that will be provided for in an annex that will be negotiated after the adoption of the Protocol.[131] This phrasing leaves open the possibility that ISDS could be one of those mechanisms. It therefore remains to be seen from the Annex – which is yet to be finalised and made public – whether international ISDS will have a future under the AfCFTA.

Conclusion

The 2022- 2023 period has been instrumental in the operationalisation of the AfCFTA. This two-year period, commencing four years after establishment of the AfCFTA has seen the development of the legal framework to support the implementation of the Agreement. These include the conclusion of important protocols including the protocols on intellectual property, competition, investment, and women and youth in trade. There have also been continued negotiations of relevant annexes to these protocols. In the midst of all these AfCFTA developments, the continent, just like the rest of the world, has been striving to get back to its feet after the Covid 19 pandemic, amidst other global challenges like climate change, coups and the Russia-Ukraine conflict. At the moment, Africa still remains committed on its path to establishing its continent-wide economic community, capable of charting the continent's development. To achieve this, the continent in the next phase must establish strong strategies in engaging with Third Parties, undertake significant review of national laws to align with the AfCFTA and accelerate commercially meaningful trade.

128 Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration against African States', October 2019 <https://www.tni.org/files/publication-downloads/isds_africa_web.pdf>

129 Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria (Final Award), 31 January 2017.

130 Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No. ARB/17/14, Final Award, 23 August 2022. The case concerned alleged violations of the ECT arising from an Italian government refusal to grant the claimants an oil production permit following Italy's re-introduction of a ban on oil and gas exploration within 12 miles of its coastline. This affected the claimants' investments in an oil rig for which they had expected to be awarded a production permit, having previously been granted a 6 year oil exploration permit by the government. In both *P & ID and Rockhopper,* the Tribunals in place of calculating compensation based on costs actually incurred by the investor (the "sunken" or "historic" costs method preferred by respondent States) opted for the discounted cash flows (DCF) valuation method proposed by the claimants. The DCF method awards compensation for expected future profits rather than actual costs incurred. Since the DCF method does not necessarily consider that the vagaries of the business environment make it uncertain that such future profits would actually have been realised, the method appears to turn ISDS into an insurance policy for future profits. For critiques of the DCF method in ISDS, see Tony Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (EJIL Talk! Blog, 19 January 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>; also *The Federal Republic of Nigeria v. Process and Industrial Developments Ltd,* Judgment of 23 October 2023 [2023] EWHC 2638 (Comm) *(hereafter P &ID No. 2)*, para. 398(3), and more generally paras. 365 – 399 for the discussion of the Tribunal's decision on compensation.

131 Art. 46 (3) states that the Annex shall be negotiated after the adoption of the Investment Protocol by the Assembly of Heads of State and Government of the Africa Union, and finalised within 12 months at the latest from the date of adoption of this Protocol.