AfCFTA AS AN ANTI-COLONIAL PROJECT: SOME ASPECTS OF TRADE AND INVESTMENT

Moses Antony Odhiambo* and Tomasz Milej**

Abstract

With the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) in place, the continent looks forward to significant transformation in its international economic relations, hoping for a shift from specialisation in export of primary commodities to competitive diversification of exports. The question, therefore, becomes how AfCFTA envisions trade and investment in Africa within a non-colonial context. The following article, first, demonstrates the problem with the prominence of primary commodity exportation from Africa through the theory of unequal exchange. Second, the article seeks to establish how creation and integration of regional value chains (RVCs) will transform this non-profitable commodity structure of exports from African economies. Third, the article will also investigate the role of the AfCFTA in attracting investment flows to African economies without overprotection of foreign investors while promoting intra-African RVCs. The article establishes that colonial underpinnings have imposed on Africa the role of producer of raw materials in a manufacturing global economy. The AfCFTA can therefore been seen as an anti-colonial project that envisages increase in value-addition activities. Hence, it is anticipated that the establishment of a single market under the AfCFTA would reduce the hitherto high cost of intra-African trade.

Keywords: AfCFTA, trade and investment, international economic relations, African economies, investor protection

* LLB(Kenyatta), LLM (Candidate) (Strathmore); mosesantonyodhiambo@gmail.com.

** LLB LLM (EUV Frankfurt/Oder and UAM Poznań) Dr iur (Cologne) Dr iurhabil (Cologne); Kenyatta University, milej.tomasz@ku.ac.ke.

1.0 Introduction

The Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) contemplates a transformation of the nature of international economic relations between Africa and the developed industrial economies. In so doing, it makes a significant contribution to the process of decolonisation which we understand, following Mohammed Bedjaoui, as 'a fundamental policy of eliminating inegalitarian links'.[1] According to this eminent African scholar, the colonial past produced links of domination, which persisted even after the African states acquired formal independence, turning such independence 'into no more than a mirage'.[2] Bedjaoui explains that 'fictitious political independence and effective economic subordination are […] the characteristics par excellence of the state of underdevelopment in which neo-colonialism and imperialism try to maintain many of the countries of the Third World'.[3] AfCFTA may contribute to decolonisation by addressing issues of international trade and investment which are determinants of the still persisting 'effective economic subordination'.

The implementation of the AfCFTA Agreement potentially presents an opportunity to transform Africa's role in international trade from specialisation in export of primary commodities to competitive diversification of its exports.[4] In the long run, the AfCFTA Agreement also has the potential to transform the investment patterns and make the regulatory framework for foreign investment better aligned to the Sustainable Development Goals (SDGs).[5] In this regard, however, much will depend on the shape of the AfCFTA Investment Protocol.[6]

---

[1] Mohammed Bedjaoui, *Towards a new economic order*, UNESCO, 1979, 82.

[2] Bedjaoui, *Towards a new international economic order,* 2019, 78.

[3] Bedjaoui, *Towards a new international economic order,* 81.

[4] Vera Songwe *Intra-African trade: A path to economic development inclusion*, Brookings institution, 2019.

[5] United Nations Economic Commission for Africa (UNECA), 'Towards a common investment area in the African continental free trade area', *Levelling the playing field for intra-African investment* (2021) 92; Katrin Kuhlmann and Lisa Akinyi Agutu, 'The African new legal model for trade and development' 51 *Georgetown Journal of International Law* (2020) 785; Talkmore Chidede, 'The right to regulate in Africa's international investment law regime' 20 *Oregon Review of International Law* (2019) 449.

[6] UNECA 'Towards a common investment area in the African continental free trade area' 93; Gerhard Erasmus (ed), *How will the AfCFTA investment protocol work?* Tralac Blog, 16 April 2021.

This article seeks to account for how the AfCFTA envisions trade and investment in Africa in a non-colonial context in the following ways. First, as detailed below, it demonstrates the extent to which the prevalence of trade in primary commodities on the continent emanates from colonial heritage as explained by the theory of unequal exchange. Second, it demonstrates how the creation and integration of regional value chains (RVCs) could change the commodity structure of exports from African economies. Third, with regard to change in investment patterns, this article enumerates the role of the AfCFTA Agreement in empowering the continent to secure investment flows in a non-colonial context without overprotection of foreign investors while creating a conducive environment for intra-African investments. While focussing on the trade and investment patterns, the present article also acknowledges that the benefits of AfCFTA go beyond these two aspects. AfCFTA has been conceptualised as a comprehensive integration model focusing on sustainable development and other areas, such as intellectual property and competition law.[7] It reclaims African agency by establishing a trading block with a strong bargaining power capable of translating the uniquely local experience from national systems and African regional economic communities (RECs) into impulses towards innovation of public international law.[8]

2. Trade in primary commodities from African economies

2.1 Focus on primary commodities as a colonial heritage

Africa's positioning in the global economy during the colonial period accounts for the disarticulation of its international economic relations.[9] In this position, the continent was deprived of the multiplicity of interrelated economic sectors (such as the extractive, manufacturing and services sectors) which is required to stimulate multi-sectoral development, as is the case in

7 Kuhlmann and Agutu, *The African continental free trade area*, 753.

8 Kuhlmann and Agutu, *The African continental free trade area*, 763.

9 Ian Taylor, 'Sixty years later: Africa's stalled decolonisation' 19(4) *Vestnik RUDN international relations* (2020) 42.

developed economies.[10] Since then, Africa's specialisation in the global economy as the provider of raw materials to its former colonial powers could not be beneficial in the long-term despite progressive improvements in the terms of trade.[11] Instead, African economies have relatively deteriorated as opposed to the developed economies that have continued to benefit from these long term conditions of trade improvements.[12]

The continent's efforts towards decolonisation of its international economic relations have for a long time stalled as most of Africa's low-value surplus is transferred overseas without any value addition.[13] Over time, this has restrained economies on the continent from accumulating the much-required capital to propel themselves into auto-centric growth. Today, the nature of 'international division of labour' emerging from the colonial period that had placed Africa in a disadvantageous position has interfered with the economic structures on the continent and, thus, hindered African development. It is this 'international division of labour' that has seen African economies placed at the periphery of the global marketplace.[14]

In addition, the protection of agriculture in industrialised countries coupled with population growth in Africa in the post-colonial period had contributed to the reduction in export prices for agricultural products.[15] This also led to a decline in food production, which in addition to the increased population in the continent meant that less commodities were available for export.[16] Even though initially beneficial to African economies, trade in commodity exports no longer bears the same utility.[17] This is attributable to the loss of a signifi-

---

[10] Samir Amin, 'Accumulation of a United Nations Economic Commission for Africa world scale' 5(4) *Journal of Contemporary Asia* (1975) 478.

[11] Hans W Singer, 'The distribution of gains between investing and borrowing countries' 40(2) *American economic review* (1950) 481.

[12] Ian Taylor, 'Dependency redux: Why Africa is not rising' 43 *Review of African Political Economy* (2016) 9.

[13] Taylor, 'Sixty years later: Africa's stalled decolonisation' 42.

[14] Stephen Ocheni and Basil C Nwankwo, 'Analysis of colonialism and its impact in Africa' 8(3) *Cross-Cultural Communication* (2012).

[15] Taylor, 'Sixty years later: Africa's stalled decolonisation' 44.

[16] Issa Shivji, *Accumulation in an African periphery: A theoretical framework*, Mkuki na Nyota Publishers, 2019, 55.

[17] Taylor, 'Dependency redux: Why Africa is not rising' 10.

cant portion of this share of the global market to industrial states between the 1965 and the 1980s when realities within the continent (such as the accelerating population growth) and protectionist practices in industrial states would not allow Africa to retain dominance over this share of the global market.

2.1.1 The 'inconsequential' effect of trade in primary commodities

The market power exuded by the core economies (the major world powers) implies that industrialised states enjoy the economic benefits incidental to progress in technology as opposed to the producers in the periphery. Hence, this affirms that Africa's comparative advantage emanating from the specialisation in primary commodities only bore Africa short term gains. M. Bond reiterates that the nature of primary products is such that they are price-and-income inelastic as opposed to manufactures that register high income elasticity of demand.[18] This implies that the rise in income in an economy creates increased demand for manufactured goods.

On the other hand, the low price elasticity in primary products means that a reduction in their prices would not register any significant impact on their demand.[19] Hence, in the prevailing state of affairs in global trade, high-value products tend to exhibit higher demand elasticity based on their relatively stable prices compared to food and other raw materials.[20] Consequently, a decline in prices of raw commodities means less income for African exporters, since the drop in prices is not compensated by higher demand for the products. This is why Ian Taylor views the volatility in raw commodity prices as a risk to African development.[21] At the same time, due to low price elasticity, the economic growth in the Global North does not translate into equivalently higher demand for raw commodities from Africa. The shrinking share of African agricultural exporters in world trade is, therefore, accounted for by

[18] Marian Bond, 'An econometric study of primary commodity exports from developing country regions to the world' 34(2) *International Monetary Fund* (1987) 192.

[19] Robert Gemmill, 'Prebisch on commercial policy for LDCs' 44(2) *Review of Economics and Statistics* (1977) 199.

[20] Bond, 'An econometric study of primary commodity exports from developing country regions to the world' 192.

[21] Taylor, 'Dependency redux: Why Africa is not rising' 18.

their failure to diversify into products that are in high demand in the world economic environment.[22]

Today, the agricultural sector in industrial states and other core sectors of their economies are subjected to heavy protection and subsidisation, even though the most trade-distorting support programmes which include payments to producers contingent on the production output have decreased in the recent years.[23] This has made a greater portion of Africa's major market for agricultural products, the European Union, increasingly independent in a wide range of agricultural commodities.[24] Further, the late industrialisation by emerging market economies such as China must have also temporarily empowered African economies towards retaining their comparative advantage as primary product exporters owing to the resulting primary commodity price boom in emerging economies.[25]

However, it would be myopic to cement Africa's 'comparative advantage' as supplier of primary commodities as it was at the onset of independence in the 1960s. In this way, the 'colonial umbilical cord'[26] linking Africa as primary commodity supplier to former colonial masters would be replaced by a similar cord linking it with China as well as other related emerging market economies. According to the UN Food and Agriculture Organisation (FAO),[27] the growth potential in Africa lies in tapping the growing demand for agricultural products within the continent, especially given that Africa has become an importer of food. But even here, FAO says, the success will depend on the progress of agro-industrial development.

---

22 Bond, 'An econometric study of primary commodity exports from developing country regions to the world', 193.

23 For a recent comparison of US and EU subsidies see R Schnepf, 'EU agricultural domestic support: overview and comparison with the united states' Congressional Research Service Report, 2021.

24 Paul Goodison, 'What is the future for EU-Africa agricultural trade after CAP reform?' 34(112) *Review of African Political Economy* (2007) 279.

25 Miria Pigato and Wenxia Tang, 'China and Africa: expanding economic ties in an evolving global context', *Investing in Africa Forum* (2015) 7.

26 Hippolyte Fofack, 'Making the AfCFTA work for 'The Africa we want' *Africa Growth Initiative at Brookings Working Paper* (2020).

27 Food and Agriculture Organisation, 'More regional trade in agricultural products can lift Africa's economies', News article, 26 September 2018.

Recent research confirms that perpetuating the 'colonial umbilical cord' was a deliberate policy envisaged by the founding fathers of the European Economic Community (EEC), a predecessor of today's European Union (EU).[28] The relationship between the newly-founded EEC (1957) and the colonies was to be based on the acquisition of affordable primary commodities necessary for the development of European industries. The relationship was referred to as 'Euroafrica'.[29]

Interestingly, this was precisely what one of the founding fathers of African integration warned against. Writing in 1963, Kwame Nkrumah observed that the Europeans would view attaching of African economies to the European Common Market as a 'keynote to success' of Europe;[30] yet a 'keynote to success' for Africa, Nkrumah argued, would be an African Common Market. 'Our trade, however,' – he wrote – 'is not between ourselves. It is turned towards Europe and embraces us as providers of low-priced primary materials in exchange for the more expensive finished goods we import.'[31] Contrary to Nkrumah's warning, this type of exchange has been thriving since decolonisation at the expense of intra-African trade.[32] It has perpetuated the power structures and clefts between exploiters and exploited, centre and periphery and development of some and underdevelopment of others.[33]

[28] Peo Hansen and Stefan Jonsson, Eurafrica: History of European integration, "compromise" of decolonisation' *15 Europe Now. A Journal of Research and Art* (2018).

[29] Hansen and Jonsson, 'Eurafrica: History of European integration, "compromise" of decolonisation'.

[30] Kwame Nkrumah, *Africa must unite*, Heinemann, London, 1963, 161.

[31] Nkrumah, *Africa must unite,* 160.

[32] Olabisi D Akinkugbe, 'A critical appraisal of the African Continental Free Trade Area Agreement' in Franziska Sucker and Kholofelo Kugler (eds), *International economic law from a (South) African perspective*, JUTA, 2021, 12.

[33] It is those divisions that gave rise to the quest for the new international economic order in the 1960s and 1970s. See Bedjaoui, *Towards a new international economic order,* 24.

2.1.2 The theory of unequal exchange: The protected colonial domination

According to Taylor, African economies are not undeveloped.[34] Based on empirical evidence, he argues that this would only be the case if the resources in the continent were not well utilised. Rather, he infers that African economies are underdeveloped since the continent is endowed with resources that are only exploited for the benefit of external economies and not African economies. Pierre Jalee accounts for this plight of Africa's disadvantageous comparative advantage in the global economy by adducing the theory of unequal exchange that he advances as follows. That owing to the variation in the price of labour between the developed and African economies, the latter end up producing and exchanging goods that are relatively undervalued in exchange for manufactured goods from the developed world that are overvalued, hence, resulting in an unequal exchange.[35] With this, he draws the analogy that if coffee or cocoa that is produced in Africa were produced in Europe, then they would attract much higher prices than they do in Africa.

This problem was similarly identified by Mohammed Bedjaoui.[36] Bedjaoui deplores that in the early sixties, a Tanzanian producer had to sell 7.5 kilograms (kg) of coffee to cover a purchase of a Swiss watch. This amount rose to 14.2 kg by 1974. Under 2021 market prices for coffee in United States Dollars (USD) 1.75 per kg, 14.2 kg of coffee would be selling at USD 24.85. While it cannot be excluded that there are indeed Swiss watches available at USD 24.85, it is doubtful, if this is the quality product Bedjaoui had in mind writing in 1979. Bedjaoui concluded that with time, more primary commodities would be needed to buy a manufactured product and that consequently, 'the Third World has to work harder all the time to buy the same tractor or watch from the advanced States'.[37] Problems with the balance of payments and debt overhang are a further consequence.[38] This can be, however, extend-

---

[34] Taylor, 'Sixty years later: Africa's stalled decolonisation', 43.

[35] Evans David, 'Unequal exchange and economic policies: Some implications of neo-Ricardian critique of theory of comparative advantage' 11(5) *Economics and Political Weekly* (1976) 149 cited in Pierre Jalee, *How capitalism works,* Monthly Review Press, New York, 1977, 15.

[36] Bedjaoui, *Towards a new international economic order,* 35.

[37] Bedjaoui, *Towards a new international economic order,* 36.

[38] Fofack, 'Making the AfCFTA work for 'The Africa we want'.

ed to imply that Africa is better positioned to generate manufactured commodities that are highly competitive in the global market in terms of price owing to the relatively lower value of labour on the continent.[39] This is where comparative advantage should be sought.

3. Creation of RVCs: The new developmental tool for the developing world

3.1 The need for change in commodity structure of exports from African states

The unequal and non-beneficial trade in primary products in the global economy has left various African economies in debt.[40] According to Marian Bond, these economies may only be delivered from this menace through recapturing their share in primary commodities markets that was lost between 1960 and the 1980s.[41] However, this solution is dependent on factors such as the reduction of protectionism in the primary commodities markets which is out of Africa's sphere of influence.[42] Further, according to Bond, this is also dependent on change in the processes that encourage domestic production in other ways, in addition to pushing for the reduction of protectionist policies in the Global North.[43] This depicts an intervention that is within Africa's sphere of influence in the form of inspiring the creation and integration of value chains within the continent.

With Africa's position as the producer of raw materials in a manufacturing world, the continent benefits the least owing to the lack of value addition,

39 Jalee, *How capitalism works*, 22.

40 Swaray B Raymond, 'Primary commodity dependence and debt problem in less developed countries', 5(4) *Applied Econometrics and International Development* (2008).

41 Marian E Bond, 'An econometric study of primary commodity exports from developing country regions to the world', 34(2) *International Monetary Fund Staff Papers* (1987) 193.

42 Bond, 'An econometric study of primary commodity exports from developing country regions to the world', 223.

43 Morris Goldstein and Mohsin Khan, 'The supply and demand for exports: A simultaneous approach', 60 *Review of Economics and Statistics* (1978) 276.

and trade in primary products that are vulnerable to global price shocks.[44] The time has come for the continent to change its economic structure and improve its position in the global economy. The timeliness of its demographic dividend, endowment with raw materials and the availability of a potentially large market qualifies the current rush to establish a single market. As of 2012, drawing from its low diversification index, the United Nations Conference on Trade and Development (UNCTAD) confirmed that primary commodities made up 80% of revenue from African exports.[45] This leads to the conclusion that Africa is not the greatest consumer of what it produces and not the greatest producer of what it consumes.[46]

3.2 What it means to create and integrate value chains through the AfCFTA

The effect of globalisation has been the transformation of the nature of commercial transactions between states, businesses and labourers through the internationalisation of production processes. Different states, firms and workers in different parts of the world possess unique comparative advantages that are manifested through different value-addition activities in what is referred to as the 'international division of labour'.[47] Therefore, it is not the primary commodities, but manufactured goods with high technological content that create the greatest trade potential.[48] As a result, globalisation has led to production of goods and services through outsourcing across borders.[49] This internationalisation of production linking producers, workers and businesses across borders creates a global network of value chains that have become the main

[44] Akinkugbe, 'A critical appraisal of the African Continental Free Trade Area Agreement' 6.

[45] United Nations Conference on Trade (UNCTAD), *The state of commodity dependence,* Geneva, 2012, 11.

[46] Taylor, 'Dependency redux: Why Africa is not rising' 14.

[47] Timothy Shaw, *Towards a political economy for Africa: The dialectics of dependence*, Macmillan, 1985,104.

[48] Fofack, 'Making the AfCFTA work for "The Africa we want"', 3.

[49] Gereffi Garry, *Global value chains and development: Redefining the contours of 21st century capitalism*, Cambridge University Press, 2018, 43.

mechanism of trade and production in the global economy today.[50] Hippolyte Fofack describes this phenomenon as the diversification of sources of growth and trade through the development of RVCs and transition from resources-dependent economies to more diversified and knowledge-based economies.[51]

Value chains are created as a result of globalised production and are integrated through mechanisms such as regional economic communities.[52] The lack of diversification of production in Africa arises from the low manufacturing and value addition to primary commodities within the continent. The AfCFTA anticipates to avert this through the creation of a single market.[53] As such, the AfCFTA anticipates the creation of value chains through the linking of value-addition activities among Member States depending on their respective comparative advantages. This in turn will increase African manufacturing where African states retain their surplus primary commodities by targeting markets within the continent and generating manufactured goods, within Africa. The rest of the world the becomes target markets of African finished goods.[54]

The AfCFTA contemplates the stimulation of intra-African trade and investment through the establishment of a single market.[55] The Agreement is based on the hope that it shall create a continental framework that promotes product complementarity, eliminates the cumbersome custom procedures, influences flexible rules of origin and promotes the development of infrastructure. The foregoing are seen as the outstanding challenges fettering intra-African trade.[56] Even so, the benefits of intra-African trade to the continent is

---

[50] Donatella Alessandrini, 'Global value chains (GVCs), trade and inequalities' *Afronomicslaw.org*, 10 November 2020.

[51] Fofack, 'Making the AfCFTA work for 'The Africa we want', 23.

[52] Ramdoo Isabelli, 'Developing value chains: what role for regional integration?' 3(7) *Great insights* (2014).

[53] Patrick N Osakwe, Paulino Santos, Amelia U and Dogan Berna, 'Trade dependence, liberalization and exports diversification in developing countries', 5(1-2) *Journal of African Trade* (2018).

[54] Vera Songwe, 'Intra-African trade: A path to economic diversification and inclusion', *Brookings* (2019).

[55] Mene Wakeel, 'The African Continental Free Trade Area (AfCFTA): Boosting intra-Africa trade', 51(751) *Georgetown Journal of International Law* (2020).

[56] Won Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', *George Washington International Law Review* (2018) 567.

contingent upon the production and trade in complementary and diversified products.[57] AfCFTA, therefore, anticipates to inspire deeper trade commitments among African states by contemplating negotiations and arrangements that would contribute to the insertion and upgrading of African firms into global value chains. This should catalyse the realisation of what the 1991 Abuja Treaty conceptualised as an African Economic Community by enhancing border cooperation for faster movement of goods across the continent.[58]

However, such insertion into global value chains is preconditioned on the willingness by states to make adequate liberalisation commitments. The evidence from African RECs shows that the liberalisation of tariffs does not suffice. When it comes to boosting intra-African trade, eliminating non-tariff barriers (NTBs) may prove to be many times more effective.[59]

The success of regional value chains is also contingent upon the establishment of regulations that facilitate and improve trade in services, hence, the Protocol on Trade in Services. It is important that the free movement of goods within Africa's single market is complemented with free movement of services.[60] This is because services are embedded in every stage of value addition activities.[61] As the AfCFTA contemplates multilateral negotiations to facilitate intra-African trade, it is apparent that these negotiations may take a while. For these reasons, Donatella Allesandrini encourages the adoption of a negative listing approach, as opposed to the positive listing approach, where states commit to fully liberalise all sectors as a general rule but identify specific sectors to which their commitments do not apply.[62]

---

[57] Mene, 'The African Continental Free Trade Area (AfCFTA): Boosting intra-Africa trade'.

[58] Klavert Henrike, 'African Union frameworks for migration: Current issues and questions for the future', 108 *European Centre for Development Policy Management* (2011) 13.

[59] Fofack, 'Making the AfCFTA work for 'The Africa we want', 12.

[60] WTO, *Global value chain development report 2019: Technological innovation, supply chain trade, and workers in a globalized world*, World Trade Organisation, 2019.

[61] Lanz Rainer and Andreas Maurer, 'Services and global value chains: Servicification of manufacturing and services networks', 6(3) *Journal of International Commerce, Economics and Policy*, 2015.

[62] Alessandrini, 'Global value chains (GVCs), trade and inequalities.' However, the AfCFTA Protocol on Trade in Services takes the GATT-like positive list approach (see Article 19 with regard to market access and Article 20 with regard to the national treatment).

The negative listing approach compels States to understand the specific sectors upon which they wish to exercise trade protection.[63] Further, this approach is essential in understanding the comparative advantages of various AfCFTA State Parties and thus, a good starting point upon which to create, trace and link value chains within the continent.

Manufacturing Value Added (MVA) on the Gross Domestic Product (GDP) is a key indicator of progress towards diversified production. African economies have skipped from production of agricultural commodities to intensification in the services sector without going through the intermediate stage of industrialisation, a jump that some scholars consider detrimental to African growth.[64] This pattern of growth has been termed as irregular following the observation that other economies in the rest of the world experienced the expansion of manufacturing on their way to creating successful economies.[65] And since manufacturing has historically been the main source of technology learning,[66] the expanding service sector in Sub-Saharan states appears to be founded on low technology and low value activities. This is why the development of intra-African RVCs that would stimulate manufacturing in Africa is key to the development of economies within the continent.

In the upshot, this section of the article has already established that the nature of the demand for agricultural and other primary products in the global market is income inelastic. This implies that the demand for agricultural products in the world does not proportionally increase with increase in income in various market economies. Further, this section has also established that intra-African trade is more beneficial with regard to manufactured products compared to primary products. As such, one of the objectives of AfCFTA is to establish reasonable rules of origin that reverse this effect. This calls for a strategic approach towards establishing rules of origin that would be less

[63] Broude Tomerand and Moses Shai, 'The behavioural dynamics of positive and negative listing in services trade liberalization: A look at the Trade in Services Agreement (TiSA) negotiations,' in Sauvé Pierre and Roy Martin(eds), *Research handbook on trade in services: Research handbooks on the WTO series*, Edward Elgar Publishing, 2016.

[64] African Center for Economic Transformation, *African transformation report: growth with depth,* Accra, 2014, 60.

[65] Taylor, 'Sixty years later: Africa's stalled decolonisation', 11.

[66] Taylor, 'Sixty years later: Africa's stalled decolonisation', 11.

restrictive on manufactured goods with the effect of diverting African exports to the continent. Such an approach would redirect focus from trade in primary products and inspire trade in diverse manufactured goods, hence, promoting and facilitating intra-African trade through creation and integration of value chains. At the time of writing, the negotiations on the AfCFTA rules of origin were still taking place on sector-by-sector basis.[67] The objective should be to reroute trade from the post-colonial 'umbilical cord' and unequal exchange towards intra-African RVCs. This is what it would mean to decolonise trade. The following section will focus on investment.

4. Changing investment patterns through AfCFTA

4.1 The investment pattern in Africa

Today, Africa is caught in poor investment patterns that do not help it attain desired levels of development.[68] This is because they entail investments in raw material sectors, mainly extractives.[69] Such investments do not inspire diversification of African economies, contribute little to intra-African trade, create few jobs for the host state nationals and perpetrate inequalities between host states and foreign investors owing to overprotection of the latter.[70] The need by foreign investors to protect their investments from expropriation by newly independent African host states in the early 1960s led to the proliferation of bilateral investment treaties (BITs).[71] BITs favour the protection of foreign investors with obligations on host states to facilitate the establishment and operation of these investments. Further, BITs entitle investors to a higher, allegedly more predictable, legal order (a separate rule of law) that offers

[67] Tralac, 'AfCFTA rules of origin fact sheet (1)'.

[68] Rukia Baruti, 'Investment facilitation in regional economic integration in Africa: The Cases of COMESA, EAC and SADC', 14 *Journal of World Investment and Trade* (2017) 493, 500.

[69] Nicole Yazbek, 'Bilateral investment treaties: The foreclosure of domestic policy space', 17(1) *South African Journal of International Affairs* (2014) 103.

[70] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 528.

[71] Yazbek, 'Bilateral investment treaties: The foreclosure of domestic policy space', 105; Olabisi D Akinkugbe, 'Reverse contributors? African state parties, ICSID and the development of international investment law', 34(2) *ICSID Review* (2019).

levels of protection sometimes even higher than those in their home states.[72] Those arrangements also tend to exclude foreign investors from the scope of host states' domestic courts or, in some cases, even the reach of host states' regulatory measures that would affect investors' interests.[73] These arrangements incapacitate various domestic processes.[74]

Currently, only 10% of Africa's total foreign direct investments (FDI) comes from intra-African investment, with South Africa claiming half of this portion.[75] As such, the continent contemplates entrenching a common investment policy guided towards reducing the costs of intra-African economic relations that have artificially been kept more expensive.[76] Africa has the highest intraregional trade costs as compared to other developing regions.[77] The relatively higher costs of trade in Africa are as a result of the dilemma in which African states are caught in. They face a dilemma between liberalising the markets and protecting them out of fear of competition from other African states with stronger economies. However, such protection is misdirected, as argued by Kidane, to the extent that it denies African investors the courtesy that African states have accorded foreign investors before.[78] This need to think of an investment regime outside the scope of a colonial context is the basis for the upcoming AfCFTA Investment Protocol.[79] As of now, even the BITs

---

[72] Amsterdam law clinic, Memorandum regarding comparative research on investment protection standards and procedures (2021) <https://www.somo.nl/wp-content/uploads/2021/03/ALC-comparative-research-on-investment-protection-standards-and-procedures-1-1.pdf>on 28 August 2021.

[73] This is an example when an investor brings a claim for expropriation to vindicate its contractual rights "violated" by a change of legislation by the host state. See Jean Ho, 'Internationalisation and state contracts: are state contracts the future or the past?', in Chin L Lim (ed) *Alternative visions of the international law on foreign investment: Essays in honour of Muthucumaraswamy Sornarajah,* Cambridge University Press, 2016, 400.

[74] David Schneiderman, 'Investment rules and the rule of law', 8(4) *Constellations* (2001).

[75] FDI intelligence, *The Africa Investment Report 2015: An FDI destination on the rise,* 2015.

[76] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 540.

[77] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 540.

[78] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 565.

[79] Mbengue Makane Moïse, 'Somethin' else: African discourses on ICSID and on ISDS – An introduction', 5 *ICSID Review* (2020); Kuhlmann and Agutu, 'The African continental free trade area: Toward a new legal model for trade and development', 784.

concluded between African states follow the pattern of the BITs that those states concluded, or, as explained in the following paragraphs, were made to conclude, with the states form the Global North. For example, the Republic of South Africa-Morocco BIT[80] has all the clauses that are complained of as unduly restricting the domestic policy space:[81] These include unqualified Fair and Equitable Treatment Standard (Article 4), the protection against (undefined) indirect expropriation (Article 6), and investor's direct access to international arbitration.

Historical record suggests that international investment law was not made by African states.[82] Rather, the law was established as a tool that was to replace the colonial authorities in their role of protecting capital.[83] As such, the regime was not established on the foundation of reciprocity but that of imposition.[84] As much as historical accounts may differ, the fact of the imbalanced nature of the BITs can hardly be denied. According to Joost Pauwelyn for example, the investment law did not emerge as a plot of the West aiming at subjugation of former colonies, but rather as imposing gradual limits on the sovereign powers of both home and host states.[85] For Pauwelyn, the foreign investment law 'is largely the result of a historical accident, a series of discrete, small steps by both contract and treaty negotiators, international institutions and arbitrators which, taken together, germinated into the complex

---

[80] Agreement between the Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria for the reciprocal promotion and protection of investments. Retrieved from UNCTAD.org on 20 April 2022.

[81] Sonia E Rolland and David M Trubek, 'Legal innovation in investment law: Rhetoric and practice in emerging countries', 39 *University of Pennsylvania Journal of International Law* (2017) 359-361.

[82] Paolo Vargiu and Francesco Seatzu, 'Africanizing bilateral investment treaties (BITs): Some case studies and future prospects of a pro-active African approach to international investment', 30 *Connecticut Journal of International Law* (2015) 163.

[83] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 530.

[84] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code' 533; Antony Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge University Press, 2004, 216; and Schneiderman, 'Investment rules and the rule of law'.

[85] Joost Pauwelyn, 'At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed', 2 *ICSID Review* (2014) 388.

regime with which we are all familiar.'[86] Even Pauwelyn admits that that the BITs are 'de facto one way streets' and must be appreciated in the context of decolonisation, cold war, private capital needs and the need for capital in the newly independent colonies.[87] He also suggests that his account of the historical development does not mean that the current regime is power-neutral or normatively desirable. It means rather, that some States (form the Global North) were at some point in the history more successful in spreading norms that others.[88] Of course, the success in spreading one-sided, incapacitating regimes goes back to the unequal bargaining power in the early years of African states' independence.

The nature of the prevailing state of affairs in the global economy today is, however, not the same as it was during colonisation and during the emergence of international investment law. Also, the dynamics of power relations are not the same anymore. The AfCFTA Investment Protocol could be used as a platform to leverage the negotiating position of African states. It could be their powerful common voice. But based on what has been said, there is also a need to establish a 'made in Africa' model BITs that would guide the conclusion of the BITs by African states with the States of the Global North.[89] Such a model BIT ought to reflect realities of the continent's political economy and the objectives the continent intends to achieve which differ from those that were manifest six decades ago. For instance, with the motivation behind creating and integrating RVCs, the nature of the prevailing BITs should be motivated by the need to encourage the development of infrastructure in African economies; the need for diversification so as to shift the focus from investment in extractives and generation of primary commodities to investment in manufacturing; as well as strategies targeted towards debt relief and the need to harness the value of labour in the continent.

These factors (continental development objectives), among others, mirror the realities of the continent today that should motivate the approach that

[86] Pauwelyn, 'At the edge of chaos?' 386.

[87] Pauwelyn, 'At the edge of chaos?' 393.

[88] Pauwelyn, 'At the edge of chaos?' 385.

[89] See with regard to the Kenya-UK EPA, James Thuo Gathii and Harrison Mbori, 'Why Kenya's parliament must reject the UK-Kenya EPA', *Afronomicslaw.org* (2021).

is taken towards the establishment of an investment regime. They also include the prospects of the continent to achieve economic transformation through sustainable and inclusive development, digital transformation, as well as climate action and building resilience towards climate-related disasters.

The reality of these circumstances also implies that the conventional BIT arrangements barring host states form imposing local content provisions should be revisited,[90] so as to achieve the reality of the creation and integration of RVCs within the continent. Contrary to conventional belief, there is a declining essence of perceiving BITs as development tools for the Third World. As will be shown, this is because there is no persuasive evidence that BITs indeed contribute to attraction of foreign investments. More precisely, the kind of investments which bear positive impact on the host state's welfare, unlike, for example, some investments in extractives. Rather, it is the creation of RVCs that should assume a prominent position as the overriding developmental tool and to that the attention of continent ought to be directed.[91] Foreign direct investment is seen only as one of the factors that help to establish the RVCs. For example, the East African Community Industrialisation Policy 2012-2032 reports that the region 'lacks appropriate machinery and technical capabilities and knowledge to undertake high value addition/processing activities within linked regional value chains'[92] At the same time, the strategy deplores that the resources necessary to construct such value chains are exported away before any value addition.[93] Consequently, the foreign direct investment should be promoted only as far as it helps to create the RVCs and encourages value addition.

4.2.0 Objectives of investment policy

The value that African economies attach to sovereign concessions made to secure international investment agreements is a great concern today con-

[90] Local Content Bill, 2018 [Kenya].

[91] East African Community Industrialisation Policy 2012-2032, 15. See generally, Jonathan Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence,* International Institute for Sustainable Development, 2017.

[92] East African Community Industrialisation Policy 2012-2032, 15. See generally, Bonnitcha, *Assessing the impacts of investment treaties*.

[93] East African Community Industrialisation Policy 2012-2032, 15.

sidering that foreign investors have conventionally been offered more robust legal protection than the domestic investors.[94] This justifies the role that the upcoming AfCFTA Investment Protocol would serve by establishing a predictable continental legal order that even domestic laws will be subjected to. To this end, there would remain no such justification that would qualify the entitlement of foreign investors to higher 'rule of law' standards of protection. Rather, an investment policy would promote the realisation of a balanced approach that is cognisant of the host states' regulatory autonomy necessary to pursue the Sustainable Development Goals (SDGs) while securing a favourable environment without unfair advantage to the investor.[95]

The following section enumerates the factors that ought to inform the aims of the impending investment policy that would transform the current investment patterns in the continent.

4.2.1.0 Dealing with inequalities between foreign investors and states: towards the 'most-favouring law' principle

The pursuit for new standards of protection of foreign investments in Africa starts with dealing with a consideration of the overprotection of foreign investments. As established earlier, the colonial rationale based on the need to neutralise the effect of weak rule of law in African host states, in the present realities, is no longer tenable in justifying overprotection. Such transformation could be achieved based on a principle that ensures that foreign investments are not accorded higher protection than they could have received as domestic investors in their home states (if the weak-rule-of-law-in-host-state rationale

[94] This concern has been addressed e.g., by the South African Protection of Investment Act, 2015, which defines and investor as 'an enterprise making an investment in the republic regardless of nationality. South African protection of investment act, 2015. Retrieved from UNCTAD.org (accessed on 20 April 2022) and the underlying government position paper on the bilateral investment treaty policy framework review of 2009. Retrieved from PMG.org (accessed on 20 April 2022). According to Davis, the Act relies on the Calvo doctrine and one of its main objectives is to ensure that 'the foreign investor should not be entitled to any rights or privileges that are not accorded to nationals of the country in question'. Dennis M Davis, 'Bilateral investment treaties: Has South Africa chartered a new course?' *Studia Juridical* (2018) 11.

[95] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 548.

is to stand).[96] However, the underlying challenge to this approach is the question of what, then, would incentivise the commitment by foreign investors to African economies going forward. Perhaps, alternative incentives such as lower manufacturing costs (without compromising on labour standards), taxation incentives and market access facilitation, among others that could be extended to foreign investors without necessarily resorting to outdated and overprotective instruments – such as the second-wave BITs concluded in the 1990s.[97] What is required is a shift away from overprotection of investors towards promotion and facilitation of investment.[98]

When it comes to seeking to promote intra-African investment flows, the underlying objective is to diverge African investment flows towards the continent. The role of an investment policy in this regard must be unique because there are no pre-existing weaker rule of law systems between the host state and the home states to justify unequal relationships.[99] Although this position may not be accurate, any discrepancy between the laws of the African host and home states could be mitigated by the following principle. That in the event there is a relatively weaker rule of law system in the host state, then, the nature of protection extended to the investor should be capped at the standard of protection that the investor would have been accorded in their home

---

[96] Farole Thomas and Winkler Deborah, (eds) *Making foreign direct investment work for sub-Saharan Africa: Local spillovers and competitiveness in global value chains,* The world bank, 2014.

[97] The first and initial wave of the BITs was driven by the motivation of capital exporting states to secure levels of protection for investments that go beyond the levels provided by the host states' institutions; the second wave that started in early nineties was fuelled by the neoliberal policies, the Washington consensus and the drive to meet the expectation of providing 'a sound, secure, and predictable investment climate for foreign investor', while the third wave or more balanced BITs set in the aftermath of the 1998-2000 East Asian and 1999-2002 Argentine crisis as the potential costs of the adherence to the BITs became clearer. Srividya Jandhyala, Witold J Henisz and Edward D Mansfield, 'Three waves of BITs: The global diffusion of foreign investment policy', 55 *Journal of conflict resolution* (2011) 1049-1050 and 1054. The categorisation largely coincides with the categorisation according to BIT 'generations', whereby the distinctive feature of the second generations BITs that emerged in the early nineties is the inclusion of the ISDS: the investor to state dispute settlement, see Pauwelyn, 'At the edge of chaos?' 399.

[98] Buruti, 'Investment facilitation in regional economic integration in Africa' 493.

[99] Yarik Kryvoi, 'Three dimensions of inequality in international investment law', British Institute of International Comparative Law (2020).

(African) state as a domestic investor.[100] Priority, however, should be given to enhancing the rule of law commitment and harmonisation of investment laws, so as to ensure equal treatment of all investors. This principle here is based on the need to reconcile state power and corporate power that have traditionally been in conflict. On the other hand, incentives to invest such as market access, tax incentives and special and preferential treatment should still subsist to the extent that they do not result in inequalities.

4.2.2.0 Push for reforms through the Pan-African Investment Code

The Pan-African Investment Code (PAIC) is a great achievement. To quote Professor Mbengue, one of the main actors during its drafting, the PAIC

> 'is the first continent-wide African model investment treaty elaborated under the auspices of the AU. It has been drafted from the perspective of developing and least-developed countries with a view to promoting sustainable development. The instrument contains a number of Africa-specific and innovative features, of which some are unique in investment treaty practice. Likewise, the PAIC solidifies a trend towards greater harmonization of approaches across the continent and fosters Africa as an investment rule maker. It has innovative features, such as the reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors.'[101]

Especially the restatement of African agency in terms of rule-making is an important point. As observed by Jandhyala, Henisz and Mansfield, the reason why the African states were signing the second wave BITs interests even between themselves, was the urge to demonstrate adherence to what they perceived as a global standard of investment protection.[102] What the PAIC did, is to terminate the perception that heavily skewed treaty frameworks imposed upon African states by represent such a standard. This is where PAIC's anti-colonial edge lies.

[100] Kryvoi, 'Economic crimes in international investment law.'

[101] Mbengue, 'Somethin' else: African discourses on ICSID and on ISDS', 3.

[102] Jandhyala, Henisz and Mansfield, 'Three waves of BITs: The global diffusion of foreign investment policy' 1049.

However, the Code's scope of application is limited. First, its guarantees are tailored to the intra-African investments.[103] And second, it focuses on liberating the regulatory space in the context of intra-African investment by imposing solutions that would only be more adequate in relation to foreign investors from core and industrial economies.[104] In other words, it provides for the intra-African investments such solutions, which would be more adequate to the third country (non-African) investors. The Code seems to be based on the assumption that the challenges posed by the regulation of investment coming from core economies (Global north) are similar to those that would arise or currently emerge out of intra-African trade.[105] However, the low prevalence of intra-African investment is already such a prominent problem for the continent that it ought to be met with measures that inspire the diversion of African investors into the continent. For instance, one of the key challenges that undermine intra-African trade and investment today is the low level of intra-African mobility of persons and labour combined with high levels of visa restrictiveness.[106] The Free Movement Protocol concluded in 2018 is a step in the right direction, but does not go far enough to adequately address this challenge.[107]

Various scholars are in agreement that the nature of the provisions of BITs no longer affects the prevalence of investment flows drawn into developing economies.[108] A decolonial approach to transforming Africa's international investment law regime would be different when it is intended to promote intra-African trade as compared to when its objective is to avert the unequal exchange between the Global north and Africa. As it stands, the role of the

[103] Draft Pan-African Investment Code, Article 2.

[104] Draft Pan-African Investment Code, Article 1.

[105] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 563.

[106] Africa Growth Initiative (Brookings), *Accelerating growth through improved intra-African trade*, January 2012.

[107] Tomasz Milej, 'Legal framework for free movement of people within Africa – A view from the East African Community (EAC)', 79(4) *Heidelberg Journal of International Law* (2019) 935.

[108] Aaron Cosbey, *International investment agreements and sustainable development: Achieving the millennium development goals,* International Institute for Sustainable Development, 2005.

Global north and the emerging market economies ought to yield the development of Africa's capacity beyond a mere provider of raw materials to the global economy. The imminent investment policy must aim to establish conditions that create the demand for intra-African investment: diversification of production; and complementarity of goods which should lead to the creation and linkage of value chains.

While it is not in contest that the improvements that PAIC intends to achieve are plausible, the extent to which they qualify as old solutions to new problems implies that they could have been better aligned to Africa's developmental strategies and alternatives that are changing with the nature of the current global economy. In the spirit of decolonisation of international investment law, Africa's priorities today lean towards inspiring intra-African trade. While PAIC represents a solution to the old problem of the dominance of investor protection, it falls short of providing a solution to the glaring problem of multilateral trade resistance within the continent.[109] From the lenses of RVCs as Africa's new developmental tool, it is anticipated that PAIC would establish regulatory mechanisms that promote intra-African investment. Even so, the following section explores these intra-African dynamics that, by transformation of the regime, would be essential in addressing the elephant in the room through the AfCFTA. That is, the low prevalence of intra-African investment.

4.3.0 The need for change: Towards intra-African investment promoting creation of RVCs

With the aim to link RVCs, it is time for Africa to regulate investment first by healing from the fever of its experience as a recipient of capital to its imminent experience as sender of capital[110] and the source of illicit financial flows towards the Global north.[111] However, the question begs, with the evolution in international investment law, should Africa deny its investors the

[109] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 563.

[110] Agnes Forere Malebakeng, 'The Agreement Establishing the African Continental Free Trade Area: Will it spur foreign direct investment in Africa?', 43 *ACTA Juridica* (2018) 43.

[111] O Nwoka, 'Combating illicit financial flows with whistleblowing in Africa', *Afronomicslaw.org* (2019).

courtesy it has historically accorded to Northern investors by overprotection? What is more to this question, though, is what approach is likely to promote the creation and integration of value chains by promoting intra-African investments. The underlying aim is to strike a balance between the protection of investor rights and the regulatory space (with the identity of the players in mind).[112] Hence, the question, what is the nature of the identity of African investors that requires us to give custom regards to them while establishing the regulatory framework to govern intra-African trade and investment? Here, the main objective is not to promote investment flow from the North, but to ignite the efficient flow of investments within Africa. Thus, what are the intra-African dynamics that should inform our approach towards decolonisation?

4.3.1.0 A standard of treatment that is unique to Africa

The lack of a clear-cut definition of fair and equitable treatment (FET) standards has prominently featured as one of the issues that have dominated investment disputes affecting African states.[113] Provisions on the standard have been omitted in PAIC. This was premised on the high number of successful claims against developing states based on the standard – due to its vague nature – that tends to disproportionally limit the regulatory space of the host state.[114] The alternative to abandoning the FET standard in an instrument governing intra-African investment, such as PAIC, would be to come up with a unique, African well-defined standard of treatment. Even though it is not clear whether the same issue would be the basis of future disputes emanating from intra-African investments, a clearer standard of treatment would have the effect of diverging African investments towards the continent.[115] This calls

[112] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 571.

[113] Eric De Brabandere, 'Fair and equitable treatment and (full) protection and security in African investment treaties between generality and contextual specificity', 18 *Journal of World Investment and Trade* (2017) 530-531.

[114] Makane M Mbengue and Stefanie Schacherer, 'The 'Africanization' of international investment law: The Pan-African Investment Code and the reform of the international investment regime', 18 *Journal of World Investment and Trade* (2017) 429-430.

[115] Stephan W Schill, 'General principles of law and international investment law,' in Tarcisio Gazzini and Eric De Brabandere (eds) *International investment law: The sources of rights and obligations*, Martinus Nijhoff Publishers, 2012, 133.

for a standard of treatment that makes it easier to link value chains; that promotes trade in complimentary products; that creates a market for them in the continent and; that which facilitates their consumption in Africa. It is also anticipated that a well-defined standard of treatment unique to Africa would exceptionally include competition and rules of origin issues that are likely to arise from the cross-border movement of goods and services in economies of scale, thus, linking the investment regulation to the upcoming AfCFTA Competition Policy Protocol.[116]

4.3.2.0 Dealing with retrogressive BIT provisions

A wide scope of empirical findings establishes that there is no guaranteed link between BITs and the increase in the prevalence of FDI flows to developing economies.[117] The quest towards establishing a regime that facilitates the creation and integration of value chains, therefore, does not have to be inclined on increasing investment from the core economies.[118] This approach has previously led to sovereign concessions that resulted in unequal exchange as demonstrated earlier in this article. Further, it has also been established that the active efforts by states to promote FDI through stringent investor protection is inconsistent with the commitments by African states to diversify their economies.[119] Considering the finding that investment rules have an impact on the ability of governments to regulate economic activities towards meeting their socioeconomic goals such as protection of human rights as well as the environment, the transformation of Africa's AfCFTA regime, should be inclined towards attracting investments contributing to these goals as opposed to merely increasing investment flows into the continent.[120]

---

[116] Sendra Chihaka, 'Covid-19: Africa's chance to take advantage of regional production', *Afronomicslaw.org* May 7 2020.

[117] Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence,* 2017.

[118] Kidane, 'Contemporary international investment law trends and Africa's dilemmas in the draft Pan-African Investment Code', 539.

[119] Padraig Carmody, 'Between globalisation and post-apartheid: The political economy of restructuring in South Africa', 28(2) *Journal of Southern African Studies* (2002) 267.

[120] Carmody, 'Between globalisation and post-apartheid.'

Even if a part of published empirical study by Bonnitcha suggests that investment treaties do have some impact on investment flows,[121] it is not guaranteed that increase in investment flows resulting from investment treaties is beneficial to the host states.[122] This is based on the findings of various literature that benefits from increased FDI flows vary depending on the sector of investment and the characteristics of the host country. For these reasons, it has been for example established that an increase in the FDI flows in the extractive sectors of a country with poor governance has a negative impact on that state.[123] This is in addition to other studies that find that investment treaties in Africa have only been associated with attracting investments in the extractives sector which are relatively less beneficial to the host states compared to the investors.[124] As such, the objective of transformation must be to go beyond merely increasing the quantity of investment flows. This especially applies to vulnerable sectors within the continent that require protection (for instance agroindustry, emerging technology start-ups) and those that have over time demonstrated not to be beneficial even in the event of increased investment flows, such as extractive industries discussed earlier.

Therefore, with the creation and integration of regional RVCs as the main developmental tool to go by, the greatest utility for investment arrangements such as BITs could be measured based on their impact on attracting inward FDI in high-tech manufacturing, or at least, some form of manufacturing.[125] In the meantime, most of the BITs and the investment chapters in the prevailing FTAs in the region do not necessarily target an increase in such investments that are actually beneficial for the host economies and likely to stimulate the creation and integration of value chains within Africa.[126] In this regard, bene-

[121] Jonathan Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence,* International Institute for Sustainable Development, 2017, 3. According to Pauwelyn, 'at best, BITs may help at the edges and only in rare situations will they make the difference between investing and not investing'. Pauwelyn, 'At the edge of chaos?' 407.

[122] Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence*, 4.

[123] Bonnitcha, *Assessing the Impacts of Investment treaties: Overview of the evidence*, 4.

[124] Liesbeth Colen and Andrea Guariso, 'What type of FDI is attracted by BITs?', in Olivier Schutter, Johan Swinnen and Jan Wouters (eds) *Foreign direct investment and human development: The law and economics of international investment agreements* Routledge, 2013, 4.

[125] Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence*, 4.

[126] UNECA, 'Investment policies and bilateral investment treaties in Africa: Implications for regional integration', (2016) 8.

ficial investments amount to such investments that have an impact on diversifying production, increasing manufacturing and value addition on primary commodities.[127] Based on the foregoing, the quest for change must deal with concerns about how African economies can explore RVCs as the new developmental tool through attracting such investments as inward FDI in high-tech manufacturing among others.

Finally, there is an emerging need to reconsider the regulation of portfolio investments that, even though covered in investment treaties, are not technically direct investments. This is based on the anticipation that the creation of integration of RVCs, apart from increasing the inflows of direct investment, is also likely to increase the inflows of portfolio investments that could be of more benefit to African economies than direct investments have been.[128]

It flows from the above that the quantity of investment inflows alone does not necessarily translate into positive effects for the host states and their require regulation in order to make a significant contribution to the SDGs. This is one of the reasons why the need to protect the regulatory space and to restore the power of African host states to exercise sovereignty therein must be considered as an important factor that informs the change of investment patterns. This is subject to making it custom that African states only negotiate agreements that reflect the national development objectives that they have sought to achieve in pursuit of such agreements.[129] Over time, investment flows to the continent have not been pursued with a view to realising the broader social issues and objectives that African states owe to the people. It was rather the inflow of investment in itself that was associated with the positive social change by providing the much-needed capital. The promise, however, remained largely unfulfilled. The regulatory trends on the continent started to change only recently the examples of which include, the PAIC (discussed already), the Economic Community of West African States (ECOWAS) Investment Code and the Southern African Development Community (SADC) model BIT. As long as FDI flows persist as one of the essential developmen-

---

[127] Bonnitcha, *Assessing the impacts of investment treaties: Overview of the evidence,* 4.

[128] Fredrick Ploeg, 'Natural resources: Curse or blessing?' 49 *Journal of Economic Literature* (2011) 381.

[129] Yazbek, 'Bilateral investment treaties: The foreclosure of domestic policy space', 104.

tal tools for the continent, it is important that BITs make outright provisions with effect to outlining the national (including constitutional) policy goals that the host states target with the quests for investment, in the preambles of the agreements.[130] This would limit the interpretative room left for international arbitrators to override the national policies and laws with the almighty "rule of law" of investment protection.

Further, the creation and integration of RVCs also implies affording domestic investors appropriate protection relevant for the achievement of this goal. The conventional international investment regime has merely had a coup effect with such outcomes as the preference by domestic investors to enlist in foreign stock-exchanges to benefit from the regime as foreign investors.[131] In other words, the investors are better protected as foreign investors than as domestic investors in their own jurisdiction based on the following.[132] First, BITs establish a 'rule of law regime' that proves to be superior to domestic laws and that establishes the highest standard of protection for foreign investors. Second, in the event these domestic investments suffer economic harm as a result of the overprotection accorded to foreign investors, they are deprived of the capacity to successfully invoke the protection of their domestic law before an international arbitral tribunal. To this end, it would suffice to infer that the prevailing regime in international investment is of a detrimental effect to the creation and integration of value chains.

The initial creation of value chains highly depends on the nature of the protection that shall be accorded to domestic investors and the extent to which they can be protected by national courts through the enforcement of national development policies and related laws. This approach towards prioritising domestic investments implies that the focus on FDI as the most prioritised developmental tool in African economies today is counterproductive to the capacity of the states to exercise sovereign power to pursue sustainable development

130 Yazbek, 'Bilateral investment treaties: The foreclosure of domestic policy space', 105.

131 Yazbek, 'Bilateral investment treaties: The foreclosure of domestic policy space', 105.

132 This has led to cases of "nationality planning" in which a domestic investor registers a company in a foreign state for the sole purpose of being subject to protection of a BIT between that state and his own state or even just to file a claim with an international tribunal under the ISDS provision of that BIT against his/her own state. See most prominently *Tokios Tokeles v Ukraine,* ICSID Case No ARB/02/18.

for the benefit of African nationals and domestic investors. Therefore, negotiating templates ought to be adjusted to confer more autonomy and liberate the regulatory space for the benefit of domestic investors. As already mentioned, this calls for the establishment of a continental BIT policy framework, including an African BIT template, that prioritise the protection of national policy spaces and developmental priorities as opposed to overprotection of foreign investors.

And what is the role of PAIC in this regard? As of now, it does not seem to have influenced the content of the BITs concluded between the African states and the states of the Global North. Ironically, Morocco, having concluded in 2016 with Nigeria a BIT whose spirit is very much in line with the PAIC,[133] concluded a BIT with Japan four years later (in 2020)[134] which is not much different from the typical BITs of the second wave. This shows that the unequal power relations still persist. Yet, the inequality can be remedied, if African States speak with one voice and in so doing increase their bargaining power. The PAIC could be such voice, since, as said, it is based on a broad consensus of African states and on their experience. The AfCFTA Investment Protocol is not likely to provide for such a boost of bargaining power, since, as it looks like now, it will apply to intra-African investments only.[135] Adopting PAIC as the source of inspiration for the Protocol would mean that investors from the non-African states that are parties to the first and second generation BIT would have an advantage over African investors, as the latter would be subjected to the investor obligations spelled out in PAIC (if incorporated into the Protocol) and would not benefit from the FET standard.[136]

In this article, we suggested that the AfCFTA Investment Protocol, if limited to intra-African investment, should provide for tailored solutions and

[133] Reciprocal investment promotion and protection agreement between the Government of the kingdom of Morocco and the Government of the Federal Republic of Nigeria of 3 December 2016. Retrieved from UNCTAD.org (accessed on 20 April 2022).

[134] Agreement between the Kingdom of Morocco and Japan for the promotion and protection of investment of 8 January 2020, UNCTAD.org (accessed on 20 April 2022).

[135] UNECA, 'Towards a common investment area in the African continental free trade area', 93.

[136] UNECA, 'Towards a common investment area in the African continental free trade area', 93.

unique African standards of treatment that would encourage such investment and emergence of RVCs. Such regulations would have to go beyond of what is provided for in the PAIC, especially in terms of investment facilitation. The Code would, however, be a particularly fitting starting point for the development of an African BIT template/African Model BIT, ideally annexed to the AfCFTA Investment Protocol and to be used in relation to non-African states. The recent UNECA report on investments in the AfCFTA suggests the minimum plan: The AfCFTA Investment Protocol should outline principles for engaging and disentangling existing treaty obligations.[137]

5.0 Conclusion

While painting the AfCFTA as an anti-colonial project, this article establishes the following. First, that Africa's position in the global economy as the producer of raw materials in a manufacturing world is based on colonial underpinnings. The trade in primary commodities has become economically "inconsequential" for economies within the continent considering that they are price and income inelastic compared to manufactures. The AfCFTA, therefore, envisages an increase in value-addition activities in the continent through the creation and integration of value chains to change the commodity structure of exports from African states.

Second, with regard to international investment, this article has also established that investment patterns in the continent today are marred with elements of overprotection which is founded on obsolete colonial justifications such as the need to protect foreign investments from newly independent African states that were characterised with unpredictable legal systems. Hence, it is clear that the establishment of a single market under the AfCFTA would not only create a predictable legal regime through an investment policy, but would also reduce the costs of intra-African investments that has overtime been expensive. Hence, dispensing with the need for overprotection of investors in the prevailing international investment regime.

[137] UNECA, 'Towards a common investment area in the African continental free trade area', 94.

Third, AfCFTA depicts a proper tool for rethinking trade as well as investment promotion and protection that befits Africa's realities. Therefore, as an anti-colonial project, the aim of AfCFTA should be to pursue protection mechanisms that protect African interests by averting inequalities attributable to overprotection of outsiders. With the overriding interests in the creation and integration of value chains, AfCFTA would be essential in protecting the following interests: the development of infrastructure that create the demand for value addition capital; promotion of diversification of production through intensification of manufacturing; protection against falling into the debt-trap; and more importantly, the protection of the value of labour in the continent.