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CONTENTS

Commentary

Case Review

EDITORIAL

In the year 2019, Kabarak University Law School launched the inaugural edition of the *African Journal of Commercial Law* as a platform for intellectual discourses on commercial legal themes of relevance or significance to the African continent. I am excited to present to our readers the second volume of the AJCL. In this volume, we have a rich collection of articles on varying topics.

In the first article, Harrison Otieno Mbori, discusses trade remedies in relation to African states. In this regard, he makes two broad arguments. Firstly, that trade remedies would only be more meaningful for African states only if implemented at the level of regional economic communities. Secondly, he argues for the elimination of trade remedies at the multilateral level. These two arguments are based on the fact that trade remedies have traditionally been abused to serve protectionist goals and that there exists an asymmetry in the capabilities of countries in the global North and South to effectively employ trade remedies in global trade relations.

Augustus Mutemi Mbila and Edmond Shikoli review the jurisdiction of the East African Court of Justice (EACJ) to hear and determine trade and investment disputes within the East African Community (EAC). In so doing, they highlight the manner in which the jurisdiction of the EACJ has been constrained through the creation of parallel dispute settlement mechanisms. These actions, in their opinion, have significantly minimised the role of the EACJ as the principal judicial organ of the EAC.

Julius Edobor brings the Economic Community of West African States (ECOWAS) voice to this volume. He looks at the legal limitations placed on the rights of individual persons to enforce the right to establishment in the

ECOWAS through the ECOWAS Court of Justice (ECCJ). He urges the ECCJ to strengthen the role played by private persons in the integration process by seeking inspiration from the courageous approaches of the East African Court of Justice (EACJ) and the Southern African Development Community Tribunal that have innovatively interpreted their regional legal frameworks so as to positively develop the law by allowing Community citizens an enhanced access.

Priscah Wamucii Nyotah looks at the manner in which Covid-19 containment measures have affected enjoyment of the right of establishment within the EAC. She argues that due to lack of an elaborate regional policy on the employment of protection of public health as a limitation to the right of establishment, EAC Partner States have, in an uncoordinated and non-transparent fashion, introduced restrictions that have adversely affected the right of establishment.

Moses Antony Odhiambo and Tomasz Milej deal with the hackneyed topic of how to decolonise the economies of African states. Specifically, they discuss the manner in which the Agreement Establishing the African Continental Free Trade Area (AfCFTA) could be used in the context of trade and investments to create Regional Value Chains that will transform the commodity structure of exports from Africa by minimising overreliance on primary goods and overprotection of foreign investors.

Hanningtone Amol shines the spotlight on EAC's legal and institutional framework on non-tariff barriers (NTBs). He decries the tendency of continued prevalence and emergence of new NTBs in the EAC and points at various weak points in the legal and institutional framework. He argues that NTBs in the EAC have significantly contributed to the decline of intra-EAC trade.

In my article, in a summary manner, I have looked at the ongoing Kenya-USA negotiations on a Free Trade Area (FTA) Agreement. Once completed, the USA hopes to use the Kenya-USA FTA Agreement as a model for negotiations with other African states. In this article, I have argued for the adoption of a gender-responsive approach as a way of ensuring that the resultant FTA Agreement contributes to the promotion of meaningful participation of women in the economy.

Three more authors have contributed short case commentaries on significant cases that have impacted various aspects of commercial law in the period under review. Abdullahi Ali reviews the Commissioner of Domestic Taxes (Large Taxpayers Office) and Barclays Bank of Kenya (now trading as ABSA Bank) judgements before the High Court and Court of Appeal of Kenya. He engages with the central issue in these cases, the literal interpretation rule in tax adjudication, and wonders whether there is cause for abandonment of the literal interpretation rule, and more so, its effects on tax obligations into the future.

Cedric Kadima reviews the *Kampala International University v Housing Finance Company Limited* case in relation to its central controversy, privity of contract and assignment of arbitration. Kadima explores the problems that arise when a third party to a contract is assigned rights in the contract and then go ahead to enforce an arbitral award in its favour. He argues that such an approach can reward contractual misconduct and proposes three standards to be met before courts accept validity of assigned rights to arbitration.

Finally, John Nyanje reviews the incredulous case of *Process & Industrial Developments Limited v Federal Republic of Nigeria,* a matter that went to arbitration in London and is currently under challenge before the English courts. In this case which produced the single largest arbitral award in the sum of $6.597 billion with interest at the rate of 7% starting from 20 March 2013. It later emerged that the arbitration was a case of 'match fixing' with counsel for Nigeria having been bribed to poorly defend the case and thus lead to the incredulous outcome. Nyanje explores the obvious concerns for advocate misconduct, corruption and the legal hurdles the challenge before English courts must overcome. He concludes by raising concern that such unabashed collusion is sadly not the exception in Africa and that African states must take greater caution with commercial agreements that can lead to huge losses in international arbitration.

Compared to the first volume, in terms of outlook, this volume has stronger continental and regional features. We hope that we can develop this trend further with subsequent editions so that commercial law issues affecting all parts of Africa can be discussed. Scholarship has a very important role in

championing and galvanising the African agenda and we pledge to play our part in supporting scholarly work in this regard.

I wish to express my gratitude to all persons who contributed to the success of this edition in various capacities such as authors, editors and peer-reviewers.

Omolo J.A.
Editor-in-Chief
March 2023

TRADE REMEDIES AS EMANCIPATORY MECHANISMS FOR COMPETITIVE PRICE DIFFERENTIATION CHALLENGES WITHIN AND OUTSIDE THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

Harrison Otieno Mbori*

Abstract

The question of whether international trade remedies remain economically, politically, and legally efficacious and relevant in the 21st century is still a lingering one. This paper makes two broad arguments in addressing this critical question. The first is that while trade remedies can have positive externalities for individual African states, African states should implement these actions through their larger regional trading arrangements and blocs, especially at the continental level within the African Continental Free Trade Agreement (AfCFTA). The second argument is embedded in the view that trade remedies, from an economic viewpoint, should first be eliminated at the multilateral level. But since the current international trading regime's political economy and geopolitical structures might not easily allow this anytime soon, the paper assumes that trade remedies as structured in the World Trade Organisation (WTO) are here to stay. The author, thus, argues that for the first objective of regional implementation of regional trade agreements (RTAs) to work appropriately, then African states should eliminate trade remedies internally. They should thereafter focus on alternative

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means of addressing the negative consequences of free trade through the creation of free trade areas (FTAs) and custom unions (CUs) such as a continental competition policy. Importantly, however, these two arguments take for granted that the current international trading system is fair and ensures economic justice for African states and the peoples of Africa. The paper begins by tracing the immiseration that the current international trading system causes in order to paint a Third World Approach to International Law (TWAIL) backdrop for the two arguments presented.

Keywords: trade remedies, TWAIL, anti-dumping measures, countervailing measures, safeguard measures, World Trade Organisation, AfCFTA.

1.0 Introduction

The World Trade Organisation (WTO) seeks to liberalise trade by eliminating and reducing tariff and non-tariff barriers to trade.[1] The WTO's objectives include: raising the standards of living and ensuring full employment by 'entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and eliminating discriminatory treatment in international trade relations'.[2] The WTO has been mostly successful in eliminating tariffs on industrial goods (mostly traded by developed countries) through reciprocal tariff mechanisms provided under the General Agreement on Tariffs and Trade (GATT).[3] Developed countries have had a 40% cut in their tariffs on industrial products, from an average of 43.8% to 3.8% since 1 January 1995.[4] Even before the WTO was established, average tariffs in industrialised countries had plunged from 40% to 6.3%.[5] Despite this development, the WTO is not only concerned with tariff liberalisation. The WTO, 1994, permits (but does not require)[6] a member state, in certain circumstances, the opportunity to impose import restrictions in the form of higher tariffs or quotas to address the harm caused to its domestic country industry from imports.[7]

The term trade remedies in international law refers to three types of permissible national laws that impose import restrictions under specified circumstances.[8] The three forms of trade remedies are anti-dumping measures,

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[1] Marrakesh Agreement on the Establishment of the World Trade Organisation [15 April 1994] LT/UR/A/2, para 5.

[2] Marrakesh Agreement on the Establishment of the World Trade Organisation, para 1.

[3] General Agreement on Tariffs and Trade [15 April 1994] LT/UR/A-1A/GATT/2, art II.

[4] The WTO, 'Tariffs: More bindings and closer to zero' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm> accessed 1 July 2019.

[5] Raj Bhala, 'Rethinking antidumping law' (1995) 29 *George Washington Journal of International Law and Economics* 1, 3.

[6] Willemien Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' in Anton Bösl, Gerhard Erasmus *et al* (eds), *Monitoring regional integration in Southern Africa,* TRALAC, 2009.

[7] James J Nedumpara, *Injury and causation in trade remedy law: A study of WTO law and country practices*, Springer 2016, 1.

[8] Alan O Sykes, 'International trade: Trade remedies' in Andrew T Guzman and Alan O Sykes (eds), *Research handbook in international economic law*, Edward Elgar, 2007, 62.

countervailing measures, and safeguard measures. The WTO system does not, therefore, offer a blank check for liberalisation of trade in goods and services without concern for harm that such liberalisation may portend for domestic industries. Governments use trade remedies as trade policy tools for remedial actions against imports that cause injury to domestic industries.[9]

Consequently, states under WTO law are allowed to take the triumvirate actions as trade remedies identified above unilaterally.[10] An anti-dumping (AD) action is taken when a foreign exporter sells a product in the foreign market at a price lower than its home market price and consequently injures the domestic industry.[11] It normally takes the form of duties/tariffs in addition to ordinary duties that are imposed to counteract the price undercut by the foreign company that eventually injures or threatens to injure domestic producers of like or directly competitive products.[12] A countervailing duty (CVD), also known as an anti-subsidy action, may be filed against foreign exporters or producers who benefit from a government subsidy in their home market, and as a result, injures the like industry in the foreign market.[13] Safeguard measures are temporary trade restrictions, typically tariffs or quotas, which are imposed in response to import surges that cause or threaten to cause serious injury to a competing industry in an importing nation.[14] Safeguards are, however, not trade remedies, strictly speaking, since they provide temporary relief from import surges under 'fair' rather than 'unfair' trade conditions.[15]

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[9] Gerhard Erasmus, 'Are trade remedies important for achieving the AfCFTA goals' TRALAC, 2018 <https://www.tralac.org/discussions/article/12764-are-trade-remedies-important-for-achieving-the-afcfta-goals.html> accessed 1 July 2019.

[10] General Agreement on Tariffs and Trade [15 April 1994] LT/UR/A-1A/GATT/2, Articles VI and XII; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [15 April 1994] LT/UR/A-1A/3; the WTO Agreement on Safeguards [15 April 1994] LT/UR/A-1A/8.

[11] Nedumpara, *Injury and causation in trade remedy law* 1.

[12] Ousseni Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO' (Fifth Biennial Global Conference, University of Witwatersrand, June 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799553> accessed 1 July 2019.

[13] Nedumpara, *Injury and causation in trade remedy law* 1.

[14] Sykes, 'International trade: Trade remedies' 62.

[15] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

Accordingly, trade remedies are strategic tools for governments to reduce the political cost and domestic pressure involved in opening domestic markets to international trade.[16] National governments have been authorised, but are not required, to unilaterally, under various GATT 1994 and WTO agreements, implement such laws and set up procedures through which domestic industries and/or workers initiate petitions and use trade remedy laws' provisions.[17] Many African governments have, however, not enacted such laws nor set up such domestic procedures.[18] There is, therefore, a scarcity of the use of trade remedies in Africa as compared to other parts of the world generally, and the Global South specifically. Only Egypt, Morocco, South Africa, Kenya, Madagascar, Zambia, and Tunisia had by 2022 set up functional and operational remedy authorities and some cases employed their use to protect domestic industries.[19]

Many reasons have been offered for this state of affairs: complex rules and regulation involved in the system of trade remedies; lack of expertise, knowledge, and financial and legal capabilities to implement such rules; the predominance of agricultural goods over industrial products in Africa;[20] the availability of substitute instruments; weakness, lack of awareness and poor organisation of local producers; and domestic political factors.[21] These demerits are couched on the assumption that trade remedies ensure a level playing field in international trade by ensuring the protection of domestic industries against unfair practices and, thus, function as safety valves that encourage countries to engage in trade liberalisation.[22] This view ignores the arguments against trade remedies as flying in the face of principles of free trade and

[16] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

[17] Chad P Bown, 'Trade remedies and World Trade Organisation dispute settlement: Why are so few challenged?' (2005) 34(2) *The Journal of Legal Studies* 515, 516.

[18] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

[19] Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[20] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43-44.

[21] Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[22] Müslüm Yilmaz, 'Introduction' in Müslüm Yilmaz (eds), *Domestic judicial review of trade remedies: Experiences of the most active WTO members,* Cambridge University Press, 2013, 2; Terry Collins-Williams, 'The evolution of anti-dumping in a globalizing economy', in Terence P Stewart (ed), *Opportunities and obligations: New perspectives on global and US trade policy*, Kluwer Law International, 2009, 119.

efficient allocation of resources at the global level[23] and that they should be eliminated, at least, in preferential trade agreements (PTAs).[24]

Since multilateral, bilateral, and unilateral trade remedy actions are permissible under WTO law, and seeing that Africa is now entering a robust epoch in its regional trading arrangement with the coming into effect of the African Continental Free Trade Area (AfCFTA), the most pertinent question is how the implementation of trade remedies can 'improve the standards of living of Africans; ensure full employment and a large and steadily growing volume of real income and effective demand, and the optimal use of the world's (Africa's) resources in accordance with the objective of sustainable development'?[25] Simply put, can trade remedies as protective instruments ensure distributive justice for the peoples of Africa? If this question is answered appropriately, then African states, through their implementation of the trade remedies regime, would contribute towards fulfilling the emancipatory objectives of the WTO and thus promoting the multilateral system of trade through robust regional trading arrangements.[26]

This paper aims to tackle this question at two levels. The first is on the desirability and efficacy of trade remedies among individual African states. Here, there are two wide views that have emerged among international trade commentators and scholars. The first is that trade remedies promote the liberalisation of trade and thus fulfil the objectives of the WTO, while the second is that trade remedies stifle the liberalisation of international trade and thus undermine the aims of the WTO. Because of the difficulties that African states have faced and continue to face in the implementation of trade remedies, this paper argues that while trade remedies can have positive externalities for

[23] Claude Barfield, 'Anti-dumping reform: Time to go back to basics' (2005) 28 *The World Economy* 719, 720.

[24] Angela T Gobbi Estrella and Gary N Horlick, 'Mandatory abolition of anti-dumping, countervailing duties and safeguards in customs unions and free-trade areas constituted between World Trade Organisation members: Revisiting a long-standing discussion in light of the Appellate Body's *Turkey — Textiles* Ruling' (2006) 40(5) *Journal of World Trade* 909; *see* Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43-74.

[25] Marrakesh Agreement on the Establishment of the World Trade Organisation, para 1.

[26] General Agreement on Tariffs and Trade, Article XXIV:4; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) [28 November 1979] L/4903.

individual African states, they should focus on implementing these actions through their larger regional trading arrangements and blocs especially at the continental level with the AfCFTA.

On the second level, the concern has been on whether trade remedy actions should be eliminated in PTAs or RTAs. Here, this article argues that in order for the first objective of regional implementation of RTAs to work appropriately, African states should eliminate the implementation of trade remedies internally and focus on alternative means of addressing the negative consequences of free trade through the creation of FTAs and CUs such as a continental competition or anti-trust policy. This second argument is embedded on the view that trade remedies, from an economic viewpoint, should also be eliminated at the multilateral level.

But since the political economy and geopolitical structures of the current international trading regime might not easily accept this anytime soon, the paper assumes that trade remedies as structured in the WTO are here to stay. Importantly, however, these two arguments take for granted that the international trading system as currently constituted is fair and ensures justice for African states and the peoples of Africa. This would be an inaccurate and contested proposition. This article begins by tracing the immiseration that the current international trading system causes in order to paint a backdrop for the author's theoretical understanding of the international trade law as currently structured.

2.0 International trade law and the immiseration of Africa

The WTO specifically and the international trade law system generally do not adequately and effectively protect the interests of developing countries despite being founded on the ideas of juridical equality of states, operating a rule of consensus decision-making system, and allowing economically small countries to challenge even the economically largest members through a dispute resolution that has been termed the crown jewel of the international dispute adjudication systems.[27] The WTO, thus, in the guise of creating a rules-

[27] John Linarelli, Margot E Salomon, and Muthucumaraswamy Sornarajah, *The misery of international law: Confrontations with justice,* Oxford University Press, 2018, 100-144; Richard

based multilateral system, institutionalises inequality between the developed countries and the developing countries of the world by applying neo-liberal market principles.[28] The WTO and the Bretton Woods Institutions (the World Bank Group and the International Monetary Fund) disguise contemporary imperialism as permissible neo-liberal globalisation.[29] The economic reasons for this are historical: first, this view is tied to and strongly agrees with Friedrich List's historical lessons on economic policy. List argued that leading economic powers in the Global North accepted the internationalised liberal trading system only after years of benefiting from protectionism themselves. The second reason is also historical and is tied to colonialism and its continuities[30] that make the juridical equality of states in a consensus-based decision-making system only illusory.

Friedrich List, using the historical approach to economics, argued for a three-stage process of the lessons we can learn from the history of international trade policies.[31] First, that historically, navigation and manufacturing power (trade) have been contingent upon a free society, and nations should adopt free trade with advanced nations as a means of raising themselves from a state of barbarism.[32] Second, countries must then put up commercial restrictions (in other words, protectionism), then lastly, after reaching the highest degree of wealth and power, they can revert to free trade.[33] List argues, therefore, for infant industry protection and protectionism as a means towards economic

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Peet, *Unholy trinity: The IMF, World Bank, and WTO*, (2nd edn) Zed Books, 2009, 178-243; James Smith 'Inequality in international trade? Developing countries and institutional change in WTO Dispute Settlement' (2004) 11(3) *Review of International Political Economy* 542-573.

[28] Antony Anghie, *Imperialism, sovereignty, and the making of international law* Cambridge University Press, 2005, 258-262 (likening the international financial institutions conditionalities to the 19th century system of capitulations); Hibourbe A Watson, 'Liberalism and neo-liberalism capitalist globalization: Contradictions of the liberal democratic state' (2004) 60(1) *GeoJournal* 43.

[29] Antony Anghie, *Imperialism, sovereignty, and the making of international law* 258-262; Jessica Whyte, *The morals of the market: Human rights and the rise of neoliberalism,* Verso, 2019.

[30] Kwame Nkrumah, *Neo-colonialism: The last stage of imperialism,* International, 1996.

[31] Friedrich List, *The national system of political economy*, Longmans, Green and Co, 1909, Chapter X <https://oll.libertyfund.org/titles/list-the-national-system-of-political-economy > accessed 8 March 2021.

[32] *See also* Alexander Hamilton, 'Report on manufacturers' (5 December 1791) available at <https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007> accessed 8 March 2021. (Providing another classical argument on this view of infant industry protectionism).

[33] Hamilton, 'Report on manufacturers.'

development and shows how countries such as Britain and the United States of America (USA), today's leading proponents of liberal economic policies, themselves practiced little of 'free trade' as they were in their developing country stage.[34] List also argues that free trade was beneficial among countries at similar levels of industrial development.

Against the current contemporary orthodoxy, the WTO is an organisation that cannot succeed or, more specifically, cannot achieve its stated objectives for developing countries, according to List. In other words, trade liberalisation as currently conceptualised cannot lead to the objectives of the WTO of raising standards of living, ensuring full employment and a large and steady growing volume of real income, and sustainable development listed in the preamble to the WTO Agreement. Thus, according to List, arguments based on the use of sovereign equality, consensus, and an accessible dispute resolution system for all, would only amount to developed countries preaching nationalistic purposes cast as a generalistic language for economic development or gain.

List's ideas have greatly influenced Ha-Joon Chang's theory on 'Kicking away the ladder'[35] and the 'Bad Samaritan theory'.[36] Chang argues that trade liberalisation is one of the prominent aims of the WTO. The WTO members are encouraged to use this as a set of 'good policies' as part of the package of the Washington Consensus for economic development.[37] Yet, when current developed countries were themselves developing, they used protectionist measures such as high tariffs, infant industry protections, lack of intellectual property protections, and export subsidies to reach their current level of eco-

[34] Hamilton, 'Report on manufacturers.'

[35] Ha-Joon Chang, *Kicking away the ladder: Development strategy in historical perspective*, Anthem Press, 2002.

[36] Ha-Joon Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism,* Bloomsbury Press, 2007.

[37] John Williamson, 'A short history of the Washington Consensus' in Narcis Serra and Joseph E Stiglitz (eds), *The Washington Consensus reconsidered: Towards a new global governance,* Oxford University Press, 2008, 14-30; Joseph E Stiglitz and Andrew Charlton, *Fair trade for all: How trade can promote development*, Oxford University Press, 2005 (arguing that the Washington Consensus included policies such as privatisation, fiscal discipline, trade liberalisation, and deregulation. In the 1990s these policies were vigorously advocated by several powerful economic institutions located in Washington, including the International Monetary Fund, the World Bank, and the US Treasury. These policies blithely exhorted developing countries to liberalise their markets rapidly and indiscriminately and thus did not cause economic development).

nomic development.[38] Countries such as Britain, USA, Germany, France, Sweden, Belgium, Korea, Japan, and China have all used protectionist measures that are now anathema in the WTO rules to achieve economic development.[39] The WTO is, thus, an institution that, under the guise of sovereign equality, consensus decision-making, and a so-called 'rules-based' dispute settlement system, perpetuates inequality by making it even more difficult for developing countries to reach the economic development of the developed countries.

The very foundation of the system, trade liberalisation, did not make and is yet to make any country economically developed, at least not in the style of the currently developed states.[40] How it is now the main orthodoxy of the international trading system shows how developed countries are kicking away the ladder of economic development from the reach of developing countries after achieving economic development for themselves.[41] Developing countries that have turned the tide, like China, South Korea, and Singapore have done it mainly by using the same protectionist measures of the Global North before later joining the WTO.[42] It is also important to mention that List's link of economic development to freedom (presumably, political freedom) has currently been disproved by China's rise to economic and manufacturing power under a political system that is not a liberal democracy or Republican or even based on the kinds of political freedoms List (or the so-called "fathers" of political liberalism like John Locke) would have expected or predicted.[43]

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[38] Williamson, 'A short history of the Washington Consensus' 14-30; Stiglitz and Charlton, *Fair trade for all*.

[39] Williamson, 'A short history of the Washington Consensus' 14-30; Stiglitz and Charlton, *Fair trade for all*, chapter 2.

[40] Chang, *Kicking away the ladder: Development strategy in historical perspective*.

[41] Chang, *Kicking away the ladder: Development strategy in historical perspective*.

[42] Chang, *Kicking away the ladder: Development strategy in historical perspective*; Inderjeet Parmar, 'The US-led liberal order: Imperialism by another name?' (2018) 94(1) *International Affairs* 151-172; Muthucumaraswamy Sornarajah, *International law on foreign investment* (3rd ed) Cambridge University Press, 2010, 2 (arguing that 'though initially it was thought that these states achieved prosperity by the adoption of liberalisation measures, this view has since been queried, with many holding the view that astute interventionist measures by the state combined with selective liberalisation measures and regulation of foreign investment were the reason for the growth.')

[43] Stefan Halpher, *The Beijing Consensus: How China's authoritarian model will dominate the Twenty-First Century*, Basic Books, 2012.

The relationship between imperialism and sovereign equality of states sanctioned through international law is ignored in many discourses of international law.[44] The prevalent view in modern international law is that sovereign states are equal and have sovereign power over their own territory, which includes internal jurisdiction and immunity from other states' jurisdictions.[45] In the colonial times (from the 16th to mid-20th century), this sovereignty was allegedly extended to colonised states, many of whom are today's developing countries. The apogee of this extension was the mass decolonisation of African countries in the 1960s that ushered these countries into the "international society."[46] With this view, colonialism and imperialism are things of the past that have been defeated by the equalising power of the United Nations (UN) system.

Antony Anghie has persuasively shown how international law has been used and continues to be used as an instrument for perpetuating the 'civilising mission'.[47] He uses the dichotomising conceptual framework termed the 'dynamic of difference' to offer this explanation. He defines this dynamic of difference as: 'the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilised and the other as 'particular' and uncivilised, and seeking to bridge the gap by developing techniques to normalise the aberrant society.'[48] This dichotomising concept can be compared to Mahmood Mamdani's concept of defining citizen and subject[49] and Boaventura De Sousa Santos' abyssal line: the line dividing metropolitan and colonial realities.[50] It is this dichotomy that has created the binary between developed

[44] Antony Anghie, 'The evolution of international law: Colonial and postcolonial realities' (2006) 27(5) *Third World Quarterly* 739; James T Gathii, 'Imperialism, colonialism, and international law' (2007) 54 *Buffalo Law Review*, 1013; BS Chimni, 'Capitalism, imperialism and international law in the Twenty-First Century (2012) *Oregon Review of International Law*, 17.

[45] Samantha Besson, 'Sovereignty', *Max Planck Encyclopaedia of International Law* (2011) para 2.

[46] Hedley Bull and Adam Watson (eds), *The expansion of international society*, Oxford University Press, 1984.

[47] Anghie, 'The evolution of international law' 739.

[48] Anghie, 'The evolution of international law' 4.

[49] Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, 1996.

[50] Boaventura de Sousa Santos, 'The resilience of abyssal exclusions in our societies: Toward a post abyssal law' (2017) 22 *Tilburg Law Review* 237-258.

countries on the one hand, and developing and least developed countries on the other hand. Thus, while juridically states are supposed to be equal in the WTO, the history of imperialism, colonialism, and their current continuities make it impossible for developing countries to benefit from any real semblance of sovereign equality, especially from an economic viewpoint.

2.1.0 Trade remedies in Africa and maintaining immiseration

The WTO Agreement on Implementation of Article VI/WTO Anti-Dumping Agreement (AD Agreement),[51] the Subsidies and Countervailing Agreement,[52] and the Safeguards Agreement[53] require members to notify the WTO of their domestic procedures that govern the initiation and conduct of the respective investigations. As of 25 June 2019, fourteen (14) African countries had notified the WTO of their trade remedy legislation.[54] Of the fourteen (14), some have comprehensive legislation which provides the precise procedure to be followed in anti-dumping, subsidies, and safeguards investigations. These include South Africa,[55] Morocco,[56] Egypt,[57] Madagascar,[58] Kenya,[59] and Mauritius.[60] On the other hand, some of the notified legislation only provides

[51] The WTO Agreement on Implementation of Article VI, Article 16.5.

[52] The WTO Agreement on Subsidies and Countervailing Measures [15 April 1994] LT/UR/A-1A/9, Article 12.6.

[53] The WTO Agreement on Safeguards, Article 3.

[54] Data compiled from WTO Documents online <https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_009.aspx?TopLevel=1435#/> accessed 25 June 2019.

[55] South Africa, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (20 January 2004) G/ADP/N/1/ZAF/2 and G/SCM/N/1/ZAF/2.

[56] Morocco, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (1 March 2013) G/ADP/N/1/MAR/3, G/SCM/N/1/MAR/3 and G/SG/N/1/MAR/2.

[57] Egypt, Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements (22 August 2008) G/ADP/N/1EGY/2/Rev.1+Rev.1/Suppl.1; G/SCM/N/1/EGY/2/Rev.1+Rev.1/Suppl.1, and G/SG/N/1/EGY/Rev.1+Rev.1/Suppl.1.

[58] Madagascar, Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements (20 November 2018) G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1 and G/SG/N/1/MDG/2.

[59] Kenya, Notification of Kenya on Trade Remedy Act 2017 (21 May 2019) G/ADP/N/1/KEN/3, G/SCM/N/1/KEN/3, G/SG/N/1/KEN/2.

[60] Mauritius, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (25 March 2019) G/ADP/N/1/MUS/3 and G/SCM/N/1/MUS/3.

that trade remedy duties may be imposed but do not include procedures to be undertaken in such investigations.[61] WTO members are required to notify the respective committees upon initiation of trade remedy investigations[62] and imposition of measures, including preliminary measures.[63]

Outside of the WTO rules, which embody an emanation of the globalist neo-liberal model, the question for African states' usage, or non-usage of the trade remedies should be assessed against the backdrop of trade liberalisation and its effects on African states. Between 1970 and 2000, the period covering the triumph of neo-liberalism and the founding of the WTO, real income growth in Sub-Saharan Africa (SSA) failed to keep pace with population growth.[64] In 2000 the growth of income per capita in SSA was at a similar level as 1970 at 0.7%. In the past 20 years, there has been a relative growth largely led by an increase in commodities trade (between 1.6 to 1.8%). In 1960, Africa's share of world poverty was 15%. In recent years (2016-2020), approximately more than 40% of people in Africa live below the poverty line of US dollar (USD) 1.90.[65]

The former UN Special Rapporteur on extreme poverty, Phillip Alston, has severely criticised this international poverty line by the World Bank as seriously flawed.[66] He argues that 'the international community mistakenly gauges the progress in eliminating poverty by reference to a standard of miserable subsistence rather than an even minimally adequate standard of living.'[67] He strongly cautions against the pre-Covid-19 pandemic triumphalism that extreme poverty has been eradicated, pointing out that the international poverty line by the World Bank relies on a measure that has been misappro-

[61] See, for example, Zambia, Notification of Laws and Regulations under Article 18.5 of the Agreement (27 April 1995) G/ADP/N/1/ZMB/1.

[62] The Agreement on Safeguards, art 12.1.

[63] The WTO Agreement on Implementation of Article VI, art 16.4; the WTO Agreement on Subsidies and Countervailing Measures, art 25.11 and the WTO Safeguards Agreement, art 12.1.

[64] Jomo Kwame Sundaram and Rudiger von Arnim, 'Economic liberalization and constraints to development in Sub-Saharan Africa' (2008) DESA Working Paper No. 67.

[65] Zachary Donnenfeld, 'What is the future of poverty in Africa' (*Institute for Security Studies*, 2 March 2020).

[66] Human Rights Council, 'The parlous state of poverty eradication' Report of the Special Rapporteur on Extreme Poverty and Human Rights (3 July 2020) A/HRC/44/40.

[67] Human Rights Council, 'The parlous state of poverty eradication.'

priated for a purpose it was never intended for.[68] He shows that if a more realistic yardstick is used, it will reveal that extreme poverty has only marginally decreased in the past 30 years and that billions all over the world still face few opportunities, countless indignities, unnecessary hunger, and preventable death: remaining too poor to enjoy basic human rights.[69] Thus, speaking about inequality, Harry Frankfurt has argued 'that inequality itself is not objectionable, what is objectionable is poverty.'[70] He argues that the focus should be on reducing poverty and excessive affluence.[71]

While the trade world was optimistic with the possibility of the Doha Development Agenda in 2000, the Cotonou Agreement spear-headed by the European Union (EU) in 2001, and the African Growth and Opportunity Act (AGOA) in 2000, in 2020 at the height of the Covid-19 pandemic, the situation of many African states is still bleak. For international trade, the United Nations Economic Commission for Africa (UNECA) has shown that while Africa's exports and imports expanded more than fourfold over twelve years (as of 2013), it was nonetheless sobering to note that the bulk of the expansion in imports and exports has stemmed from a price effect, rather than a volume one.[72] By volume, the growth of exports was increasingly outpaced by imports. Additionally, over the last 10-15 years, Africa's main exports have been commodity products, and in sectors where African countries display a revealed comparative advantage, African producers are often relegated to low-value-add products.[73]

Thus, if international trade among African states remains at the low-value commodity levels and intra-African trade remains low, the use of trade

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[68] Human Rights Council, 'The parlous state of poverty eradication.'; Steven Pinker, *Enlightenment now,* Penguin/Random House, 2018, 116.

[69] Human Rights Council, 'The parlous state of poverty eradication.'; Pinker, *Enlightenment now* 116.

[70] Harry G Frankfurt, *On inequality,* Princeton University Press, 2015.

[71] *Also see* Frankfurt, *On inequality.*

[72] United Nations Economic Commission for Africa (UNECA), 'Building trade capacities for Africa's transformation: A critical review of aid for trade' (2013) <https://repository.uneca.org/bitstream/handle/10855/22153/b10717808.pdf?sequence=1&isAllowed=y> accessed 11 March 2021.

[73] United Nations Economic Commission for Africa (UNECA), 'Building trade capacities for Africa's transformation'.

remedies to counter trade liberalisation will not change much of the economic and social development situation in Africa. Despite this bleak view of trade liberalisation generally and trade remedies specifically, the next section proceeds to argue from a legal formalistic and economic angle that the use of trade remedies can be enhanced to marginally benefit African countries. But this will not in any way engender the kind of economic development that African states would want to see in the near future.

3.0 The undesirability of maintaining unilateral trade remedies in Africa

To determine the undesirability of the unilateral imposition of trade remedies by African states, the question of the role played by these actions in international trade law should be revisited. For many WTO Member States, the only legitimate weapon in the quiver of protectionism was and remains to be tariffs. Since the use of tariffs has progressively waned over the years, only a few weapons for protectionism remain in the quiver. And the economically powerful states are able to use them more readily than developing and least-developed states. From the data presented above, African countries use the weapon of unilateral trade remedies sparingly. There are also few, but slowly growing number of countries in Africa setting up national laws on trade remedies. By the 1980s, developed countries were already actively using trade remedies (anti-dumping, specifically) as a potent weapon for protectionist purposes.[74] By 1988, the use of anti-dumping actions by developed states was described as the emerging chemical weapon of the world's trade wars.[75] In this regard, the WTO Agreement on Implementation of Article VI (AD Agreement was described as undesirable in the following terms:

> [The AD Agreement] will add new layers to the arbitrary rules governing the use of anti-dumping measures but will do little to assuage the concerns of exporters and import-competing industries alike about the abuse of trading rules. Indeed, as these changes promote the adoption of anti-dumping laws in more and more countries, the number of anti-dumping actions is likely to expand rapidly. This

[74] Raj Bhala, 'Rethinking antidumping law' (1995) 29 *George Washington Journal of International Law and Economics* 1, 4.

[75] 'The anti-dumping Dodge' *The Economist,* 10 September 1998, 77.

> will undoubtedly lead to more trade disputes among [World Trade Organization] trading partners. In short, the agreement provides a bandage to a festering sore of trade policy…[76]

This prophecy made before the birth of WTO while assessing the Uruguay Round negotiations seems to have been fulfilled in recent times. The current impasse in the WTO Appellate Body (AB),[77] which has seen '…the very existence of the dispute settlement system threatened by a decision of the [USA's] Trump Administration to block the appointment of any new members to the WTO's dispute settlement system's highest court, the Appellate Body.'[78] More trade disputes have arisen over trade remedies, and the USA has, since the inception of the WTO dispute resolution system, raised substantive concerns of the AB's interpretation of subsidies, anti-dumping (especially the zeroing cases), and countervailing duties.[79] According to Jennifer Hillman, a lion's share of the USA's complaints stem from decisions by the AB relating to trade remedy decisions – challenges to anti-dumping, anti-subsidy or safeguard measures.'[80] If such is the acrimonious nature of trade remedy-related disputes that they have been one of the causes of the demise of the AB through attrition,[81] then they should surely be undesirable for unilateral implementation among African states.

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[76] Effrey J Schott, *The Uruguay Round: An assessment,* Institute for International Economics, 1994, 12.

[77] Markus Wagner, 'The impending demise of the WTO Appellate Body: From centerpiece to historic relic?' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen, *The Appellate Body of the WTO and its reform,* Springer, 2019; Geraldo Vidigal, 'Living without the Appellate Body: Multilateral, bilateral and plurilateral solutions to the WTO dispute settlement crisis' (2019) 20 *Journal of World Trade & Investment* 862-890.

[78] Jennifer Hillman, 'Three approaches to fixing the World Trade Organisation's Appellate Body: The good, the bad and the ugly', Institute of International Economic Law, 2019 <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> accessed 4 July 2019.

[79] Office of the United Stated Trade Representative (USTR), 'The President's 2018 trade policy agenda', March 2018, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> accessed 4 July 2019, cited in Robert McDougall's, *Crisis in the WTO: Restoring the WTO dispute settlement function,* Centre for International Governance, Innovation Paper no 194, 2018.

[80] Terence P Stewart and Elizabeth J Drake, 'How the WTO undermines US trade enforcement', Alliance for American Manufacturing, 2017.

[81] The WTO Appellate Body is effectively inactive since December 2019.

Additionally, the AD Agreement and national anti-dumping legislation such as the USA's Title II, Subtitle A of the Uruguay Round Agreement[82] have failed to resolve 'the central crisis facing anti-dumping law [and possibly other trade remedies]: the abuse of the law by protectionists who use it as a non-tariff barrier to trade.'[83] There is absolutely no reason why African states will not soon ride on this bandwagon against each other. This would possibly be exacerbated with the entry into force of the AfCFTA and its implementation, as well as the race of African states putting up trade remedies legislation. Kenya, which has recently enacted the Trade Remedies Act, 2017,[84] for example, should have this vital consideration in mind moving forward. Economic theory predicts that anti-dumping action would increase when other protective barriers are introduced.[85] The elimination of tariffs and other restrictive regulations of commerce is one of the main consequences of entering into an FTA or CU.[86] Both this kind of regional reduction or elimination of tariffs and other restrictive regulations of commerce leave strong sectors of any country's economy exposed to regional competition.

3.1.0 The economic critique of maintaining trade remedies

In its widest sense, dumping can be characterised as international price discrimination.[87] The stricter and more recent definition of dumping is that it occurs when a product 'is introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'[88]

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[82] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4842-4901 (1994).

[83] Raj Bhala, 'Rethinking antidumping law' 1, 6.

[84] Kenya Trade Remedies Act (No 32 of 2017).

[85] Bruce Yandle and Elizabeth M Young, *Dumping, anti-dumping and efficiency,* World Bank Internal Discussion Paper Report No lDP-101987.

[86] General Agreement on Tariffs and Trade, Articles XIV(8)(a) and (b).

[87] Jacob Viner, *Dumping: A problem in international trade,* University of Chicago Press, 1923, 3.

[88] The WTO Agreement on Implementation of Article VI (AD Agreement), Article 2.

One of the main economic arguments, maybe even the only plausible one, in favour of anti-dumping is applied if the foreign company is involved in predatory pricing. Predatory pricing occurs when 'foreign firms dump their goods in an effort to drive their competition out of business, with the object of cartelising the market in their goods.'[89] While this process crystallises the anti-dumping duties, it also creates the possibility of a 'vicious trade remedies cycle.' This is because the state where the dumping is taking place now has an opportunity for subsidisation of the specific industry that is the target of the harm. This, in turn, irks the producers of the dumped products, who, with sufficient push, can lobby for countervailing duties from their home state or invoke a trade-based dispute resolution process. Thus, economists argue that apart from the predation of prices, dumping is 'basically harmless for the importing country.'[90]

Additionally, domestic producers have great incentives to use trade remedies for anticompetitive purposes. An example from the USA will suffice here:

> In the early 1990s, ferrosilicon producers in the United States, who had formed a price-fixing cartel faced an obstacle when Brazilian producers begun exporting the metal cheaply in the US. The US cartel members soon asked Brazilian exporters to join their cartel under the threat of an anti-dumping petition in which the former would argue that the latter had unfairly dumped their ferrosilicon in the US market. When Brazilian producers rejected the offer, the US producers successfully executed their threat. Upon the US producers' petition, the US government imposed anti-dumping duties on Brazilian ferrosilicon, effectively excluding all Brazilian ferrosilicon producers from the US market. This anti-dumping remedy was revoked only after a whistleblower later divulged the cartel's existence.[91]

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[89] Alex Hummer, 'Dumping: An evil or an opportunity', *Foundation for Economic Education,* 1 April 1989 <https://fee.org/articles/dumping-an-evil-or-an-opportunity/> accessed 4 July 2019.

[90] Alan V Deardorff, 'Economic perspectives on antidumping law', in Robert M Stem (ed) *The multilateral system: Analysis and options for change,* University of Michigan Press, 1993, 135; see also, Alan V Deardorff, *Economic perspectives on antidumping law* RSIE Post-Print Paper 7, 1989.

[91] Richard J Pierce Jr. 'Antidumping law as a means of facilitating cartelisation' (2000) 67 *Antitrust Law Journal* 726-728 cited in Sunjoon Cho, 'Anticompetitive trade remedies: How anti-dumping measures obstruct market competition' (2009) 87 *North Carolina Law Review* 359.

When states unilaterally impose anti-dumping duties, this kind of nefarious anticompetitive practice becomes possible. States are therefore allowed to 'neutralise the import price competitiveness under the euphemistic rhetoric of remedying unfair trade'.[92] This allows for two kinds of effects: the first is the *de facto* price fixing described above; the second is that the anti-dumping regime restrains trade through a strategy labelled 'non-price predation'.[93] There is, therefore, further tension between anti-dumping law and competition law.

So why have states maintained anti-dumping and other trade remedies laws domestically, regionally, and in the multilateral trading system? The answer to this question lies in the words 'unfair trade'. The idea here is that anti-dumping and countervailing duties are intended to create a 'level playing field' for domestic industries that face unfair import competition.[94] Subsidisation distorts resource allocation by diverting resources from higher-value to lower-value uses.[95] Anti-dumping and countervailing laws in these cases ensure a level playing field by offsetting artificial sources of competitive advantage.[96] Instead of fulfilling this theoretical aim, however, anti-dumping laws penalise foreign producers for engaging in commercial practices that are perfectly legal and unexceptionable when conducted by domestic companies.[97]

Literally, anti-dumping duties discourage foreign competition in order to maintain domestic protection. This is the very practice that competition law frowns upon domestically is now allowed and sanctioned by the state when foreign products are involved. The theoretical economic argument is, therefore, fundamentally flawed. It is surprising, from a purely economic angle and competition law-based angle, why states would keep this ostensibly illegitimate arrow in the quiver. The only plausible explanation seems to be that with the liberalisation introduced by the significant reduction or elimination of tar-

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[92] Bernard M Hoekman and Michael P Leidy, 'Antidumping and market disruption: The incentive effects of antidumping laws' (2000) 67(3) *Antitrust Law Journal* 725-743.

[93] Sunjoon Cho, 'Anticompetitive trade remedies' 360-361.

[94] Brink Lindsey and Daniel J Ikenson, *Antidumping exposed: The devilish details of unfair trade law*, Cato Institute, 2003, vii.

[95] Alan O Sykes, 'The economics of WTO Rules on Subsidies and Countervailing Measures' (2003) John M Olin Law & Economics Working Paper No 186.

[96] Lindsey and Ikenson, *Antidumping exposed*, vii.

[97] Lindsey and Ikenson, *Antidumping exposed,* ix.

iffs and other non-tariff barriers to trade, states still seek avenues for maintaining disguised protectionism. The protectionism, in this case, is unfortunately sanctioned by the WTO itself. And if the economically strong countries have incentives to set up these remedies, the immiseration of developing countries continues unabated even in the WTO.

Fundamentally, therefore, since African states are in different economic positions in their levels of development and natural endowment,[98] competitive differences in prices in intra-African trade is inevitable. This explains, for example, the attractiveness of the use and the arguable success of the principle of variable geometry in African RTAs.[99] The need for the imposition of anti-dumping duties by African states against each other will soon emerge. But with this background, how then can comparative advantage-based competitive prices be fairly levelled, yet the idea of comparative advantage is the premium gas that fuels international trade. In that case, then, these differences cannot be levelled, and neither should states, especially African states who now have a renewed psyche for regional integration, be allowed to neutralise these prices through trade remedies. Since in international law, states are the main players, the idea of 'states not being allowed' is fallacious. It is only through effective state action either unilaterally by the states or through bilateral, regional, or multilateral that these actions can be implemented. The entry into force of the AfCFTA offers a perfect opportunity for African states to rethink their stance on trade remedies. Seeing that they are already the least users of these measures, there is ample opportunity to get it right. And while politically divisive, at least domestically, 'market economy forces dictate that domestic industries losing their competitive edges should give places in the market to more efficient and innovative competitors, be they foreign or domestic'.[100]

[98] Paul R Krugman, 'What do undergrads need to know about trade?', (1993) 83 *American Economic Review* 23.

[99] James T Gathii, *African regional trade agreements as legal regimes,* Cambridge University Press, 2011, 34-62.

[100] Sunjoon Cho, 'Anticompetitive trade remedies' 371.

3.2.0 Maintaining cooperative external regional trade remedy actions in Africa

At the onset, it is important to mention that the external imposition of trade remedies in PTAs is not a plausible alternative to the unilateral imposition of trade remedies by African states. It is a mere stop-gap measure necessitated by practical and political considerations to address the myriad challenges faced by African states mentioned in the first part of this contribution. African states have, therefore, faced tremendous difficulties in setting up trade remedy investigation agencies in order to impose unilateral trade remedy actions.[101] Since the world [international law][102] is not fair and trade remedies are arguably here to stay, African states will want to use trade remedies as the only remaining arrow in the quiver, not for legitimate purposes, but mainly for protectionist purposes. This is because developed states will continue their high usage of these actions. And while two wrongs do not make a right, WTO law allows such imposition.

Consequently, the argument here is that even though the economic rationale for trade remedies is skewed because developed states use these trade remedies as disguised protectionism,[103] African states can effectively and efficiently use these actions if employed in RTAs. It is important to understand that the argument here is for the external imposition of trade remedies against third parties (non-PTA members). This contribution reinforces the argument that trade remedies are part of Other Restrictive Regulations of Commerce that must be eliminated in PTAs pursuant to Article XXIV of GATT 1994.

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[101] Ousseni Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[102] Martti Koskenniemi, *From apology to utopia: The structure of international legal argument,* Cambridge University Press, 2006; Makau Mutua, 'What is TWAIL?' (2000) 94 American Society for International Law Proceedings 31, 40; James T Gathii, 'TWAIL: A brief history of its origins, its decentralised network, and a tentative bibliography' (2011) 3(1) *Trade Law & Development* 26.

[103] Michael J Finger, 'The origins and evolution of antidumping regulation' (2001) Policy, Research, and External Affairs Working Papers Series 783; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The law and economics of contingent protection in the WTO,* Edward Elgar, 2008.

The African RTAs terrain can currently be said to be a two-tracked terrain. Track-one consists of the traditional RTAs based on the Abuja Treaty of 1991,[104] while track-two consists of the wider emergent FTAs that seek to amalgamate the traditional Regional Economic Communities (RECs)[105] and to create a continental FTA.[106] The emergent FTAs consist of the COMESA-SADC-EAC Tripartite Free Trade Area (AfTFTA) that amalgamates three existing RECs: the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC), and the latter, the African Continental Free Trade Area (AfCFTA) that seeks to establish an FTA that covers the entire continent.

The traditional RTAs in Africa number approximately 30, which include both FTAs and CUs. As noted by United Nations Conference on Trade and Development (UNCTAD), continental integration has been a priority on the African agenda ever since African countries gained political independence and started deliberations on a united Africa in all spheres of society.[107] However, both the two-terrains can be said to be roads that will eventually merge to establish the African Economic Community (AEC), which is the main aim of the Abuja Treaty.[108] The COMESA, EAC, and SADC Tripartite areas have trade remedy provisions in their respective establishing instruments.[109]

Despite the economic-based arguments on the undesirability of trade remedies, a safeguard option in a trade agreement can facilitate greater tariff reductions and provide insurance against unforeseen developments.[110] With

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[104] Treaty Establishing the African Economic Community, 3 June 1991.

[105] East African Community, 'COMESA-EAC-SADC Tripartite' <https://www.eac.int/tripartite> accessed 14 March 2021.

[106] African Union, 'AfCFTA – African Continental Free Trade Area' <https://au.int/en/ti/cfta/about> 28 April 2017.

[107] UNCTAD, *Building the African Continental Free Trade Area: Some suggestions on the way forward,* United Nations, 2015, 7.

[108] Treaty Establishing the African Economic Community.

[109] Francis Mageni, 'Customised trade remedies in Africa: The case of the COMESA-EAC-SADC Tripartite Area' *TRALAC*, 15 August 2017.

[110] Meredith A Crowley, 'Why are safeguards needed in a trade agreement?' in Kyle W Bagwell, George A Bermann *et al* (eds), *Law and economics of contingent protection in international trade,* Cambridge University Press, 2010, 380-382; John H Jackson, *The world trading system: Law and policy of international economic relations,* (2nd edn), MIT Press, 1997.

the entry into force of the AfCFTA and the resultant trade liberalisation expected to occur, there will be a need for countries to set up safeguards. This, of course, contradicts this paper's position for the non-internal imposition of trade remedies. For safeguards, specifically, this is the dilemma that African countries must accept to deal with despite evidence that the safeguards in RTAs encourage greater tariff liberalisation. This dilemma can be resolved based on where the emergent FTA will be notified.

RTAs are legally acceptable or 'qualified' in the multilateral system under Article XXIV of GATT 1994, Article V of General Agreement on Trade in Services (GATS), and the GATT Council Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause).[111] Since Article XXIV of GATT 1994 requires the elimination of tariffs while Article 2(c) requires the mutual reduction or elimination of tariffs, the requirement of the Enabling Clause seems more tariff friendly. It is vital to note that the requirements under the Enabling Clause on the rubric of tariff elimination are generally less stringent than those in Article XXIV.[112] Thus, it is only when the emergent FTAs are notified under the Enabling Clause (they have not yet been notified to the WTO) that this safeguards dilemma easily rears its ugly head.

4.0 The case for elimination of trade remedies in African emergent FTAs: The case of the African TFTA & CFTA

Article XXIV of GATT 1994 titled Territorial Application – Frontier Traffic – Customs Unions and free-trade areas, contains the WTO's rules on regional trade exceptions. Essentially, members of the WTO are allowed to form regional trading blocs that conform with requirements of Article XXIV. In order to form such regional arrangements, WTO members are required to eliminate duties and other restrictive regulations of commerce (ORRCs) on

[111] James Mathis and Jennifer Breaton 'Regional trade agreements and the WTO: Implications for Eastern and Southern Africa' in TRALAC, *Cape to Cairo: Making the Tripartite Free Trade Area work,* TRALAC, 2011, 24.

[112] Harrison Mbori, 'Existing in the eternal twilight zone of WTO consistency: The case of the African Continental Free Trade Agreement' *Afronomicslaw Blog,* 25 January 2019.

substantially all the trade amongst the participating members of the arrangement. There has been debate whether the presence and application of trade remedies should be present within these arrangements or whether such provisions and applications should be eliminated as part of 'other restrictive regulations of commerce.' The next section argues that the case for elimination of trade remedies in regional trade arrangements is stronger than that for their retention. Additionally, for purposes of coherence and proper administration of such remedies, African states should act within their broader trading blocs such as the AfCFTA rather than at the sub regional and national levels.

Article XXIV (8)(b) of GATT 1994 provides for the formation of FTAs within the multilateral trading system. According to Article XXIV (8)(b), a free trade area is a group of two or more customs territories in which the duties and other restrictive regulations of commerce (ORRCs) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[113] The essence of FTAs is to facilitate trade between the parties by eliminating duties and other restrictive regulations of commerce amongst the parties. Article XXIV (8)(b) requires that duties and other restrictive regulations of commerce be eliminated for the formation of an FTA. The words 'duties and other restrictive regulations of commerce' have been frequently discussed, but neither the WTO Panels nor the AB has had opportunity to interpret their meaning.[114] Importantly, Article XXIV (8)(b) has a requirement of elimination that applies only to regulations that have a 'restrictive' effect on commerce.[115]

Anti-dumping and countervailing duties, which are adopted as trade remedies, are described under Articles II and VI of GATT 1994 as duties.[116] They are imposed in addition to ordinary customs duties with the intention of

[113] General Agreement on Tariffs and Trade, Article XXIV (8)(b).

[114] Nicolas Lockhart and Andrew Mitchell, 'Regional trade agreements under GATT 1994: An exception and its limits', in Andrew Mitchel, *Challenges and prospects for the WTO*, Cameron, May 2005, 236; *see also* Joel P Trachtman, 'The limits of PTAs' in in Kyle W Bagwell, George A Bermann *et al* (eds), *Law and economics of contingent protection in international trade,* Cambridge University Press, 2010, 138; *see also* Christian Delev, 'Straining the spaghetti bowl: Re-evaluating the regulation of preferential rules of origin' (2022) *Journal of International Economic Law*, 40.

[115] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 236.

[116] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 237.

restricting imports of specific products.[117] Safeguard measures have been described to involve the modification or withdrawal of a market access concession for imported goods, again with the intention of restricting imports. The panel in *Argentina – Footwear* assumed that safeguard measures are 'duties and "other restrictive regulations of commerce".'[118] While the AB reversed the Panel's finding on Article XXIV, it did not look into the question of safeguards as 'duties and other restrictive regulations of commerce'. Neither did it declare it to be an erroneous interpretation of Article XXIV.[119] Accordingly, trade remedies, whose intention is to restrict imports either in the form of duties or quantitative restrictions, should be considered as other restrictive regulations of commerce (ORRCs).[120] Trade remedies have also been found to be inefficient as they disadvantage importers, consumers, and exporters of the products on which they are imposed as well as importers, consumers, and industrial users of products in the countries imposing these remedies.[121] In this vein, parties desiring to enter into an FTA should arguably eliminate trade remedies as this is one of the conditions necessary for the formation of an FTA under Article XXIV(8) of GATT 1994.

Article XXIV (8)(b) provides for restrictions that may be maintained within the context of an FTA, where necessary, that is, the parenthesis provisions. The restrictive regulations of commerce that may be permitted within an FTA include those under articles XI, XII, XIII, XIV, XV, and XX.[122] Article VI on anti-dumping and countervailing duties, Article XVI on subsidies, and Article XIX on safeguards are not included in this list. Some scholars have argued that this list is merely illustrative, and thus, other restrictions such as trade remedies may be maintained in the context of an FTA.[123] This is because Article XXI, which is on security exceptions, has also been left out of the list. It is inconceivable that the drafters intended to bar contracting parties from

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[117] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[118] *Argentina – Safeguard measures on imports of footwear,* Report of the Panel (25 June 1999) WT/DS121/R [8.96] - [8.97].

[119] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[120] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[121] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[122] General Agreement on Tariffs and Trade, Article XXIV (8)(b).

[123] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

adopting and maintaining restrictions on trade in the interest of national security. It then follows from this argument that other restrictive regulations of commerce such as those in Article VI could be permitted within the context of an FTA.

The exclusion of Article XXI on security exceptions from the bracketed list points to the view that the list is illustrative. However, pursuing a broad scope of restrictions that may be maintained within an FTA would make the realisation of Article XXIV's objective of facilitating trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories difficult.[124] The interpretation that the bracketed list is an exhaustive list complements the requirement in Article XXIV (5) on eliminating barriers to trade on substantially all the trade. This is further consistent with the AB's statement in *Turkey – Textiles* that the bracketed list allows parties to maintain measures 'otherwise permitted under Article XI through XV and under Article XX of GATT.'[125] This suggests that the AB would have read the bracketed list as providing an exhaustive list of other restrictive regulations of commerce that can be maintained in an FTA.[126] Furthermore, had the drafters of GATT 1994 intended to develop an inexhaustive list, they would have used drafting lingua to show this by employing words such as 'including Article XI…', as used all through the GATT, for example, in Articles V, VI, VIII, XX.

The question that would then arise is, what measures would be adopted to remedy injury to domestic industry in an FTA? Alternatives for trade remedies can be developed and employed within FTAs. The AD Agreement allows states to seek constructive remedies and to apply them prior to the application of anti-dumping duties where developing countries are concerned.[127] This speaks to the possibility of employing less restrictive means to remedy trade injury. Among the alternatives that can be sought include replacing trade remedies with a regional competition law regime, creating a regional investigation authority to implement country-specific safeguards, and creating a traffic-light system for a regional trade remedies regime.

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[124] General Agreement on Tariffs and Trade, Article XXIV (4).

[125] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

[126] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

[127] The WTO Agreement on Implementation of Article VI, Article 15.

There are several FTAs that have replaced trade remedies with a regional competition law regime. These FTAs include the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the European Free Trade Association (EFTA) - Chile Agreement, and the EFTA - Singapore Agreement. These FTAs prohibit parties from using anti-dumping laws but instead require the parties to use competition laws to remedy cases of dumping.[128] The creation of a common competition law or policy regime can be problematic in the case of Africa, considering the number of parties involved, who may have different competition law regimes. However, where the parties have a common objective on competition policy[129] or where there are similar business practices, as in the case of ANZCERTA, the creation of a competition policy might be quicker and easier.[130]

The creation of a competition law regime is easier where there are deep regional integration processes among the parties.[131] However, the creation of a competition policy is not a pre-requisite for the elimination of anti-dumping duties.[132] Africa should focus on deep integration, which is characterised by harmonised or common behind-the-border measures, arrangements that allow for the free(r) movement of capital and labour, monetary union or the adoption of a single currency, or political integration.[133] Another alternative available for FTAs in Africa is the creation of a regional investigation authority to implement country-specific safeguards.

Lastly, it is possible to create a traffic-light system for a regional trade remedies regime. Such a regime would determine what measure should be adopted for different cases of injury. In the case of anti-dumping, for example, the traffic-light system would determine, on the basis of an objective, verifiable criterion, which cases would be subject to anti-dumping measures and

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[128] Willemien Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[129] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 20.

[130] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 20.

[131] Ryan Farha, 'A right unexercised is a right lost; Abolishing anti-dumping in regional trade agreements', (2012) 44(1) *Georgetown Journal of International Law* 211.

[132] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[133] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa'; Thomas J Prusa, 'Antidumping provisions in preferential trade agreements' in Jagdish Bhagwati, Pravin Krishna and Arvind Panagariya, *The World Trade System,* MIT Press, 2017.

which ones would not. This would be similar to the approach in the Canada - Chile FTA, where the use of anti-dumping measures is prohibited save for exceptional circumstances.[134]

3.1.0 The case studies of PTAs where trade remedies are eliminated: Lessons for Africa

FTAs have traditionally dealt with the question of trade remedies in one of three ways. The first is through confirming and making reference to rights and obligations under WTO Agreements. The second is by eliminating the use of trade remedies against FTA parties. The third is through restricting the use of trade remedies against FTA parties.[135] Through confirming and making reference to rights and obligations under WTO Agreements, parties to these FTAs are allowed to use trade remedies against other parties in the FTA as they would in the absence of the FTA. Southern Common Market (MERCOSUR for its Spanish initials), EFTA - Korea FTA, and Association of South East Asian Nations (ASEAN) - India FTA, are examples of FTAs that adopt this approach.[136]

The Treaty Establishing the European Community eliminates all forms of trade remedies among its members.[137] The ANZCERTA, which entered into force in 1983, also eliminates trade remedies among its members. The 1983 Agreement allowed parties to use anti-dumping measures to remedy cases of dumping as against non-contracting parties.[138] In 1988, the Agreement was amended by the Protocol to the Australia New Zealand Closer Economic Relations - Trade Agreement on Acceleration of Free Trade in Goods (ANZCER-

[134] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements.'

[135] Yanlin Sun and John Whalley, 'China's anti-dumping problems and mitigation through regional trade agreements', CIGI Papers No 70, 2015, 6.

[136] Jean-Daniel Rey, 'Antidumping regional regimes and the multilateral trading system: Do regional antidumping regimes make a difference?' (2021) WTO Staff Working Paper, No ERSD-2012-22, 20.

[137] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[138] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

TA Protocol).[139] The Protocol eliminated the possibility of using anti-dumping measures on goods covered by the Agreement.[140] This evolution in anti-dumping measures has been attributed to deep integration among the parties to the Agreement.[141] On countervailing duties, the Agreement allows parties to employ countervailing duties but only 'when no mutually acceptable alternative course of action has been determined by the member states.'[142]

The FTA between the EFTA states and the Republic of Chile (EFTA - Chile Agreement), which entered into force on 1 December 2004, eliminates anti-dumping measures between the parties. In place of anti-dumping measures, the FTA requires the parties to use competition laws to remedy cases of dumping.[143] The Agreement recognises that the effective implementation of competition rules can address the economic causes that lead to dumping.[144] Similarly, the EFTA - Singapore Agreement, which entered into force on 1 January 2003, prohibits the use of anti-dumping measures among the parties through article 16.[145] Article 16 states that 'in order to prevent dumping, the parties shall undertake the necessary measures as provided for under Chapter V.'[146] Chapter V of the Agreement is on competition rules.

It has been argued that the degree of integration is an important factor in allowing for the abolition of anti-dumping measures in FTAs.[147] The level of integration can easily lead to the abolition of anti-dumping measures without necessarily necessitating the creation of common competition law or policy.[148] The China - Hong Kong, China FTA is another example of yet another FTA that eliminates the use of anti-dumping measures among the parties. This is also the case for the China - China Macau, China FTA. These FTAs do not

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[139] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[140] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[141] Rey, 'Antidumping regional regimes and the multilateral trading system' 30.

[142] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[143] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 16.

[144] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[145] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[146] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[147] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements' 211.

[148] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

prohibit the use of anti-dumping measures against third parties.[149] The Canada - Chile FTA, which entered into force on 5 July 1997, while prohibiting parties from using anti-dumping laws on the goods originating from the territory of the other party, allows parties, subject to consultation, to employ anti-dumping measures in exceptional circumstances.[150] In addition, the Agreement requires notification to an intra-FTA Committee on anti-dumping and countervailing measures and the application of the FTA-specific dispute settlement mechanism.[151]

While the FTA between New Zealand and China[152] does not eliminate anti-dumping measures, it restricts the use of these measures by requiring the parties not to use anti-dumping measures in an arbitrary or protectionist manner.[153] The North Atlantic Free Trade Agreement (NAFTA) between the USA, Mexico, and Canada provided for bilateral safeguards for a transitional period and independent bi-national panels to assess final determinations on anti-dumping and countervailing duties against domestic laws.[154] This is a measure that was suggested after an FTA between USA and Canada failed to successfully eliminate anti-dumping measures.[155]

The Singapore - New Zealand FTA does not completely eliminate anti-dumping measures.[156] Within this FTA, parties can employ anti-dumping measures against each other. However, there is a greater exercise of restraint to be followed when employing anti-dumping measures as against the other party.[157] The *de minimis* margin is raised, the definition of negligible is raised, and the duration for implementation of the measure is reduced for parties to

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[149] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[150] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements' 211.

[151] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[152] Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China (1 October 2008) <https://www.wipo.int/edocs/lexdocs/treaties/en/cn-nz/trt_cn_nz.pdf> accessed 14 March 2021.

[153] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[154] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[155] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[156] Agreement between New Zealand and Singapore on a Closer Economic Partnership (1 January, 2001), art 2.

[157] Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

the FTA.[158] Consequently, parties are restricted but not prohibited from taking anti-dumping measures against parties in the FTA.[159] The same approach is adopted for the Jordan - Singapore FTA.[160] In a similar approach, the Chinese Taipei - Nicaragua FTA, as well as the Chinese Taipei - Panama FTA, reduces the duration of the anti-dumping measure.[161]

The autonomy and independence of FTAs warrant the parties to the FTA to determine which provisions will guide their trade relations, including provisions on trade remedies. Economists have argued that trade remedies are almost invariably inefficient.[162] FTAs are entered into by parties with a common goal to liberalise trade between them.[163] This carrot rather than stick approach can give parties incentive to adopt alternatives that would be effective for the specific FTAs.

5.0 Conclusion

This article has made two broad arguments. Firstly, international economic law generally and international trade law specifically have worked more towards the immiseration rather than the emancipation of African peoples. Secondly, the paper has shown that with the current global fatalistic acceptance of poorly checked trade liberalisation and globalisation, trade remedies cannot in themselves remedy the immiseration that currently faces many of the peoples in Africa. Specifically, the article has argued that at the multilateral level, trade remedies (especially the anti-dumping regime) should be eliminated as they are not economically justifiable, have been used for protectionist purposes, and are one of the causes of the demise of the WTO AB in 2019. Due to the fact that at the multilateral level, there will be no serious reform or push in this direction, the article has argued that more energies for remedying this regime

158 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

159 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

160 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

161 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

162 Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

163 Kampel Kim, Options for disciplining the use of trade remedies in clean energy technologies, International Centre for Trade and Sustainable Development, 2017, 39.

should be done at the regional level. For Africa specifically, trade remedies should be eliminated at the national and sub-regional RECs, and a single trade remedies authority should be set up at the AfCFTA level.

This argument is embedded in the view that under Article XXIV of GATT 1994, trade remedies are 'other restrictive regulations of commerce' that ought to be eliminated in a WTO consistent FTA. This means that African states will not impose anti-dumping or countervailing duties against each other but will investigate and impose such duties on third parties who are not members of the AfCFTA. This is a compromise position for the imposition of trade remedies that balances the fact that even though they are undesirable at multilateral levels, they are permissible, and other countries will continue using them. Their elimination in AfCfTA (which has not been done) would have been more in tandem with the AfCFTA's goal of promoting intra-African trade. Their maintenance at the national and sub-regional levels shows the level of mistrust among African states, and the achievement of the Pan-African emancipatory economic goals will, in my view, remain a pipe dream. Unfortunately, for purposes of this article, without further rethinking and reforming of the African trade remedies regime, the AfCFTA, like the multilateral trading system, will perpetuate and not alleviate the immiseration of African peoples.

JURISDICTIONAL OVERLAPS IN TRADE AND INVESTMENT DISPUTES SETTLEMENT IN THE EAC: REFLECTIONS ON THE EAST AFRICAN COURT OF JUSTICE'S ' CONSTRAINED JURISDICTION'

Augustus Mutemi Mbila* and Edmond Shikoli**

Abstract

This study seeks to examine the jurisdiction of the East African Court of Justice (EACJ) to hear and determine trade and investment disputes within the East African Community (EAC) in line with its principle of having a people-centred and market-based community. The research is anchored on the hypothesis that the jurisdiction of the EACJ to determine commercial disputes arising out of trade and investment activities within the region is constrained. The study establishes that there exist parallel dispute resolution mechanisms whose effect is to constrain the jurisdiction of the EACJ to hear commercial disputes within the EAC. This in turn affects both the consistency and predictability of trade and investment jurisprudence in the EAC. These mechanisms include the East African Committee on Trade Remedies, the EAC Competition Authority, arbitral tribunals within national

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jurisdictions of Partner States, and dispute resolution mechanisms of other regional economic communities (RECs) where EAC Partner States are also members. The study recommends treaty amendments to restate the Court's jurisdiction and also to accord it exclusive original and appellate jurisdiction in matters of relevance to trade and investment.

Keywords: regional integration, East African Community, East African Court of Justice, parallel jurisdiction, dispute resolution mechanisms, trade and investment

1. Introduction

Article 9(1)(e) of the Treaty Establishing the East African Community 1999, (the Treaty) establishes the East African Court of Justice (EACJ) as an organ of the Community. Article 23(1) states that the Court shall be a judicial body with the power to ensure adherence to the law in interpreting, applying and complying with the Treaty. The jurisdiction and role of the Court are stated in Article 27(2) of the Treaty.[1]

The EACJ has original jurisdiction over interpretation and application of the Treaty except where the Treaty confers such jurisdiction to national courts of Partner States.[2] Further, the EACJ has arbitral and advisory jurisdiction.[3] Article 32 of the Treaty gives the Court jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract or agreement.[4]

Through the 2015 Protocol to Operationalise the Extended Jurisdiction of the EACJ, the EAC Council of Ministers extended the jurisdiction of the EACJ to preside over disputes arising from the implementation of the Customs Union[5] and Monetary Union Protocols.[6] As such, the EACJ has jurisdiction over disputes arising from the implementation of other instruments created by the Treaty. For instance, the EACJ can determine disputes arising from the Protocol on the Establishment of the East African Customs Union (Customs Union Protocol) and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) since they are integral parts of the Treaty.[7]

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[1] Treaty Establishing the East African Community, 30 November 1999, 2144 UNTS I-37437, Article 27.

[2] EAC Treaty, Article 27.

[3] EAC Treaty, Article 32.

[4] EAC Treaty, Article 32(a).

[5] Protocol on the Establishment of the East African Customs Union Protocol 2004.

[6] Protocol on the Establishment of the East African Community Common Market, 2009 and the Protocol on the Establishment of the East African Community Monetary Union, 2013.

[7] Article 5(2) of the EAC Treaty states that '[i]n pursuance of the provisions of paragraph 1 of this Article, the partner states undertake to establish among themselves and in accordance with the provisions of this treaty, a customs union, a common market, subsequently a monetary union and ultimately a political federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the partner states to the end that

However, the Customs Union Protocol and the Common Market Protocol also provide for parallel dispute settlement mechanisms that compete with the jurisdiction of the EACJ to hear and determine trade and investment issues. It is in this regard that this paper seeks to examine the extent to which the jurisdiction of the EACJ in trade and investment is constrained by the presence of these parallel dispute resolution mechanisms in the Customs Union Protocol and the Common Market Protocol.

Neither the Treaty nor its additional Protocols define what 'trade and investment' means. However, this paper adopts the meaning that refers to cross-border trade and investment within the EAC. That is to say, all matters relating to sale of goods and services, investment, free movement of labour, goods, capital and services, and connected matters within the EAC.[8]

2.0 The concept of jurisdictional overlap

Jurisdictional overlap connotes a situation where a dispute can be submitted to more than one tribunal or institution for resolution.[9] In regional integration arrangements, just as is the case with national or global arrangements, parties to a trade agreement always have a choice between diplomatic or political channels, and legal means to solve any dispute arising from their transactions.[10] Karen Alter and Liesbet Hooghe opine that diplomatic or political dispute settlement mechanisms allow the parties to retain control of the settlement process.[11] Dispute settlement mechanisms of this nature include

there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.'

[8] Meaning given by Organisation for Economic Co-operation and Development (OECD), available at oecd.org, on 17 February 2022.

[9] Kwak Kyung and Marceau Gabrielle, 'Overlaps and conflicts of jurisdiction between the World Trade Organization and regional trade agreements', in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the world trade legal system,* Oxford University Press, 2006, 118.

[10] See, for example, Article 19 of the Treaty on the Functioning of the European Union which establishes the CJEU. See also article 5 of WTO dispute settlement understanding for an analysis on how states can make use of diplomatic or political channels in settling disputes.

[11] Karen J Alter and Liesbet Hooghe, 'Regional dispute settlement', in Tanja A Börzel and Thomas Risse (eds), *The Oxford handbook of comparative regionalism*, Oxford University Press, 2016, 1-23.

mediation, good offices[12] and negotiation. Legal means are more public in nature and the decisions made by the tribunals which are in charge of the dispute resolution processes are potentially binding on the parties. Arbitration and adjudication are the two well-known legal means of settling trade-related disputes.[13] In a regional economic integration setting, all these dispute resolution mechanisms are available to the parties to choose the most convenient option. This depends on the gravity of the dispute, the predictability and consistency of the decisions of the tribunal or institution, the proximity of the parties to the tribunal or institution, or the legal and institutional framework governing disputes of that nature.[14]

In Africa, it is common to come across countries that belong to more than one regional economic community (REC). This multiple membership enables the trading parties to have more fora in which they can file their disputes for settlement. For instance, Kenya is a member of the EAC, the Common Market for East and Southern Africa (COMESA), and the Intergovernmental Authority on Development (IGAD).[15] When a cross-border trade dispute arises between a party or entity within the EAC and another one within the COMESA, the parties may decide to submit the dispute to the EACJ or the COMESA Court of Justice, depending on the forum-choice parameters that appear more favourable to them.[16] The parties can also submit the dispute to

[12] Good offices are a diplomatic means for the settlement of disputes (Diplomacy; peaceful settlement of international disputes; judicial settlement of international disputes), per the definition given by the *Oxford Learners Dictionary*, available at oxfordlearnersdictionaries.com, on 17 February 2022.

[13] Herman Verbist, Schäfer Erik, and Imhoos Christophe, 'Settling business disputes: Arbitration and alternative dispute resolution', *International Trade Center,* Geneva, 2016.

[14] Verbist and others, 'Settling business disputes: Arbitration and alternative dispute resolution' 1-84.

[15] This is presently the case, but the agreement establishing a tripartite free trade area among the COMESA, EAC and the Southern African Development Community (SADC) of 10 June 2015 may soon cure this problem of overlapping membership as it seeks to establish a free trade area between the EAC, COMESA, and SADC. The agreement is, however, not yet in force as at May 2022.

[16] Desire Kayihura, 'Parallel jurisdiction of courts and tribunals: The COMESA Court of Justice perspective', 35(3) *Commonwealth Law Bulletin* (2010) 583-592. The author has served as registrar of the COMESA Court of Justice. The parameters informing the choice of the forum may include the proximity of the court to the parties, likelihood to obtain a favourable judgment, proximity to witnesses and evidence, among others.

alternative dispute resolution (ADR) mechanisms that are available to them.[17] In the event that these parties decide to use ADR or the COMESA Court of Justice, the EACJ is denied an opportunity to hear that dispute and its role in the economic integration of the region becomes peripheral.

Further, most Partner States to RECs in Africa are also parties to global trade instruments such as the Marrakesh Agreement Establishing the World Trade Organisation (WTO),[18] which have their own dispute resolution mechanisms. The result is that there is jurisdictional overlap between the institutions and tribunals that parties to trade can submit to.[19] Indeed, all EAC Partner States are also member states of the WTO.

RECs draw their mandate from Article XXIV of the General Agreement on Tariffs and Trade (GATT). Paragraph 12 of this Article empowers members to ensure the observance of the obligations in the covered agreements either through their regional or local territories. However, the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (Dispute Settlement Understanding) gives the WTO Dispute Settlement Body (DSB) some supremacy on disputes arising from obligations covered in its agreements. This, in essence, requires WTO Member States to submit their disputes to the DSB without exception. This brings about jurisdictional overlap and in the process denies other similar tribunals and courts the opportunity and chance to hear and determine such disputes.

[17] To further problematise this point, the African Continental Free Trade Agreement is in force. It has its own primary dispute settlement mechanism which, according to scholars, tends to also empower the RECs DSMs in such trade and investment matters, thus creating a further overlap of jurisdiction. In addition, EAC Partner States are members of the WTO, meaning, they are subject to the compulsory jurisdiction of the WTO DSM. What criterion would a partner state use to refer a matter to the WTO DSM and not AfCFTA DSM or EACJ?

[18] [Marrakesh] Agreement on the Establishment of the World Trade Organisation, 15 April 1994.

[19] Jennifer Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO: What should WTO do?', 42(2) *Cornell International Law Journal* (2009) 193.

3.0 Dispute resolution mechanisms within and across RECs

Parallel dispute resolution mechanisms exist within and across RECs around the world. The most notable institution charged with the responsibility of interpreting and applying instruments establishing the RECs is a court as established by the community's constitutive document. Every REC either has a regional court or a tribunal with the jurisdiction to interpret the treaty establishing the REC. The EACJ carries this responsibility for the EAC, while the COMESA Court of Justice is charged with this responsibility for COMESA. Whereas these regional courts have the power to hear and determine disputes regarding human rights, good governance, treaty interpretation, disputes between the community and its employees, and economic matters, some, for instance the EACJ, have other parallel tribunals established to deal with trade matters alongside it. This denies them an exclusive role which is useful for consistency in jurisprudence making.[20]

In addition to the existence of parallel institutions and tribunals established in the instruments, parties engaged in trade have the liberty to use alternative dispute resolution (ADR) mechanisms such as arbitration, good offices, mediation and negotiation. The regional courts are, therefore, denied the 'original' and/or exclusive jurisdiction to determine trade-related matters and their role in regional integration becomes either peripheral or diminished.

Whereas the multiplicity of dispute settlement mechanisms within a REC offers parties several options to use when they have disputes, Karen Alter and Liesbet Hooghe opine that permanent courts have several advantages over *ad hoc* dispute resolution mechanisms.[21] For instance, whereas permanent courts make decisions whose effect can be felt in subsequent disputes and decisions, arbitration tribunals, mediators, and negotiators are hired to decide particular disputes and the decisions need not affect subsequent disputes.[22] Likewise, whereas adjudicators in permanent courts are appointed to

[20] East African Customs Union, Common Market and Monetary Union Protocols have established other dispute resolution mechanisms. These protocols have not stated that the EACJ has jurisdiction over disputes arising from the implementation of those protocols.

[21] Alter and Hooghe, 'Regional dispute settlement', 1-23.

[22] See generally, Cesare PR Romano, Karen J Alter and Shany Yuval (eds) *Oxford handbook of international adjudication,* Oxford University Press, 2014.

office through mechanisms that the parties to the dispute do not take part in, in arbitration, negotiation, good offices and mediation, the parties have a role to play in choosing the adjudicators. Thus, the decision that the adjudicators arrive at may not strictly reflect the provisions of the law and precedents set in previous decisions.[23]

Alter and Hooghe note that whatever model for dispute resolution parties in a regional set up choose, there are advantages and disadvantages.[24] However, the most important thing is to ensure that there is consistency and that any dispute resolution mechanism that the disputing parties choose should be used not only to achieve the wishes of the Partner States and the disputing parties but also the objectives of the REC. For instance, where one of the objectives of the community is to promote trade and integration, the dispute resolution system should reflect this objective by encouraging the use of the community's court.

The continuity of the dispute resolution mechanism is also crucial in deciding trade disputes arising from such RECs across the globe. Cross-border trade is meant to integrate communities. Thus, whenever disputes arise, Joshua Karton recommends that the resolution mechanism should also follow the same integrationist perspective.[25] Regional courts are established by the treaties establishing RECs and they, therefore, continue to operate for as long as the REC is in place. They do not end after deciding one dispute as is the case with *ad hoc* mediators, arbitrators and negotiators, whose role in the particular dispute, in most cases, ends after determining the dispute. Thus, Alter opines that these regional courts should be given the original or exclusive jurisdiction to decide disputes arising from trade and investment activities.[26]

A major limitation to the role of these regional courts in economic integration is that private citizens and entities are barred from accessing them

[23] Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO', 193.

[24] Alter and Hooghe, 'Regional dispute settlement', 1-23.

[25] Karton Joshua, 'International arbitration culture and global governance' in Walter Mattli and Thomas Dietz (eds) *International arbitration and global governance*, Oxford University Press, 2014, 74-116.

[26] Karen J Alter, *The new terrain of international law: Courts, politics and rights,* Princeton University Press, 2014.

especially where the defendant is not a Partner State or an institution of the community.[27] Trade is not a preserve of states and intergovernmental organisations. Private entities and citizens are, in fact, the building blocks to complete economic integration in any given REC. It is private citizens who carry out much of the small and large-scale cross-border trade within their REC, as do corporate entities. The daily interactions between these private citizens and corporate entities may lead to disputes which need to be solved in a manner that preserves the relationships between the players in the industry, necessitating unfettered access to the court by both legal and natural persons.

The above analysis shows that regional courts have some advantages over quasi-judicial dispute settlement mechanisms. Judicial settlement mechanisms benefit from the institutionalised and judicialised nature of the systems, so that the decisions arrived at are consistent with the provisions of the treaty establishing the REC. On the other hand, decisions of *ad hoc* dispute settlement mechanisms only concern the parties at the time of delivering such decisions.[28] They neither have permanence nor elements of predictability for the future, and many of such tribunals obtain their power from instruments that support the main constitutive document. For example, the EACJ is bound by the EAC Treaty. Good Offices, mediators, negotiators, etc. are not bound by this Treaty.

4.0 EAC Treaty and the jurisdiction gap of EACJ in trade and investment disputes

The jurisdiction of the EACJ is conferred by the EAC Treaty and its Protocols. Article 23 of the EAC Treaty in particular states that the Court 'shall be a judicial body which shall ensure the adherence to law in the in-

[27] For instance, EAC Treaty, Article 30(1) and 32(a); Treaty Establishing the Common Market for Eastern and Southern Africa, Article 26, which states that '[a]ny person who is resident in a member state may refer for determination by the court the legality of any act, regulation, directive, or decision of the council or of a member state on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this treaty.' This means that parties other than a partner state or an institution of the community cannot be sued in the regional court.

[28] Alter and Hooghe, 'Regional dispute settlement', 1-23.

terpretation, application of, and compliance with this treaty'.[29] This position is further cemented by Article 27(1) of the Treaty which gives the EACJ power to hear and determine matters related to the interpretation, application and observance of the Treaty. In this regard, the EACJ is the custodian of all matters regarding the interpretation and application of the Treaty.[30] Yet, the jurisdiction conferred on the EACJ by Article 27 cannot be construed to include the determination of trade and investment disputes to the extent of issuing redress to applicants whose rights under the Treaty have been infringed. The jurisdiction over the interpretation and application of the Treaty is seen here as too narrow a jurisdiction to enable the Court to play any active role towards the facilitation of economic integration within the region and also to ensure that traders and investors find justice in the Court when their rights have been infringed.

In *Alcon International v Standard Chartered Bank of Uganda and 2 Others*,[31] the Applicant petitioned the First Instance Division of the EACJ to interpret and apply Articles 27(2) and 151 of the Treaty and Articles 29(2) and 54(2)(b) of the Common Market Protocol in a case that had stalled in Ugandan courts for over 14 years. The Applicant had obtained an arbitral award of USD 8,858,469.97, but appeals to the Court of Appeal and Supreme Court of Uganda by the Respondents had stalled the process of satisfaction of the award. The Applicant, therefore, requested the EACJ to interpret the provisions of the Treaty and the Common Market Protocol in a manner that enforces and enhances trade and cross-border investments and the resolution of disputes arising from such trade and cross-border investment activities within the EAC.

The Court held that the Treaty does not confer upon it such jurisdiction and that it was clear from the wording of Article 54(2)(a) of the Common Market Protocol that such a dispute was supposed to be determined by the Ugandan national courts. The Court also held that the first and third Respondents were not Partner States or institutions of the Community and could not, therefore, be

[29] EAC Treaty, Article 23(1).

[30] EAC Treaty, Articles 23 and 27.

[31] *Alcon International v Standard Chartered Bank of Uganda and 2 Others* EACJ (2010) Reference No 6 of 2010.

sued before the Court.[32] Article 54(2) of the Common Market Protocol states that disputes arising from the implementation of the Common Market Protocol shall be settled '[i]n accordance with their constitutions, national laws and administrative procedures and with the provisions of this Protocol.' This provision has been construed to mean that national dispute resolution bodies of the Partner States shall be used in solving disputes arising from the implementation of the Common Market Protocol, to the exclusion of the EACJ.

The EACJ had previously taken the same position in *Modern Holdings (EA) Ltd v Kenya Ports Authority,*[33] where the Claimant averred that the Respondent failed to clear its consignment due to the 2007/2008 post-election violence in Kenya. Thus, the Claimant approached the EACJ seeking a finding that the continued holding of the consignment by the Respondent and its agents was contrary to the spirit of integration within the EAC and also seeking damages from the Respondent as a result of the losses. The Court declined to entertain the reference on the finding that the Kenya Ports Authority was a parastatal of the Republic of Kenya and could not be sued under Article 30(1) of the Treaty. Article 30(1) states that '[s]ubject to the provisions of Article 27…, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.' Hence, other private or domestic public parties cannot be sued in the EACJ.

From the decisions of the EACJ thus far, the EACJ has declined to hear any commercial dispute even when the substratum of the matter is the interpretation and application of the Treaty as envisaged under Articles 23 and 27 of the EAC Treaty. It is instructive to note that the Court has, however, assumed jurisdiction to hear such other matters as human rights abuses even when the Court's jurisdiction to entertain such matters is not explicitly conferred in the Treaty. In *James Katabazi and 21 Others v Secretary General*

[32] Article 30(1) of the EAC Treaty provides that legal and natural persons can refer to the court the determination of the legality of acts, directives, regulations, or decision of a partner state or institution of the community.

[33] *Modern Holdings (EA) Ltd v Kenya Ports Authority* EACJ (2008), Reference No 1 of 2008.

of the East African Community and the Attorney General of the Republic of Uganda,[34] the Court conceded that Article 27 of the Treaty does not confer upon it the jurisdiction to hear human rights violations. However, the Court relied on Article 6(d), which provides for the adherence to the rule of law and the protection of peoples' rights and freedoms as articulated in the African Charter on Human and Peoples' Rights.[35] The Court also applied Article 7(2), which states that the Partner States should undertake to abide by the principles of good governance including the rule of law, adherence to democracy, maintaining the universally-accepted human rights principles, and also adhering to the principles of social justice.[36]

The finding of the Court in this regard affirms that it has jurisdiction over the interpretation and application of the Treaty in a manner that upholds the principles of the Treaty. Thus, there is nothing to show that the EACJ did not have the jurisdiction to hear and determine the commercial disputes discussed earlier in this paper. The explanation by the Court that the parties sued were neither EAC Partner States nor institutions of the Community was not satisfactory because both natural persons and corporate bodies are expected to engage in trade within the EAC and disputes are bound to arise. The same principles that provide for the commitment of the Partner States to adhere to the rule of law and the protection of human rights also provide for the commitment of Partner States to promote economic cooperation,[37] people-centred and market-driven cooperation,[38] and peaceful settlement of disputes.[39]

Apart from the Treaty, the jurisdiction of the Court has been extended by the Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice (the Protocol).[40] The Protocol was concluded by the EAC

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[34] *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* EACJ (2007) Reference No 1 of 2007.

[35] EAC Treaty, Article 6(d).

[36] *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda.*

[37] EAC Treaty, Article 7(1)(c).

[38] EAC Treaty, Article 7(1)(a).

[39] EAC Treaty, Article 6(c).

[40] According to the information obtained from the EAC secretariat at Arusha, Tanzania, during the collection of data for this paper.

Summit on its fifteenth session on 30 November 2013 where it approved the resolution of the Council of Ministers to extend the jurisdiction of the EACJ to cover trade and investment matters as a result of the conclusion of the Customs Union Protocol and the Common Market Protocol.[41] It was envisioned that the extended jurisdiction of the Court would also cover disputes arising from the implementation of the Protocol on the Establishment of the East African Monetary Union (Monetary Union Protocol).[42]

The Extended Jurisdiction Protocol is made up of six articles. Its objective as articulated under Article 2 is to extend the jurisdiction of the EACJ to cover trade and investment disputes arising from the implementation of the Customs Union Protocol, the Common Market Protocol, and the Monetary Union Protocol. Article 3(1) restates this extended jurisdiction, while Article 3(2) provides that this extended jurisdiction 'shall not extend to the jurisdiction conferred by certain bodies that are established by the Treaty or which exist in the laws of the Partner States.' Though the Protocol sets out to extend the jurisdiction of the Court to matters of relevance to trade and investments, it avoids or does not address the jurisdictional overlap that might occur when the Court and these other bodies as established under the Customs Union and Common Market Protocols have the power to hear and determine similar disputes. Further, the Protocol does not establish any appellate jurisdiction of the Court over the dispute resolution bodies established under the other protocols of the Community or those that are established under the laws of Partner States.

5.0 Arbitral jurisdiction of the EACJ

The EACJ has jurisdiction to hear trade and investment matters through arbitration. However, certain conditions must be met before the Court assumes jurisdiction to hear matters arising from arbitration clauses. First, the matter must have arisen from an arbitration clause in a contract where the

[41] The EAC Customs Union Protocol was concluded on 2 March 2004 while the EAC Common Market Protocol was concluded on 20 November 2009. The Monetary Union Protocol was concluded on 30 November 2013.

[42] Protocol on the Establishment of the East African Monetary Union, preamble.

Community or any of its organs or institutions is a party and which confers the jurisdiction to arbitrate on the Court.[43] Secondly, the Court may arbitrate on a dispute between Partner States regarding the implementation of the Treaty if such Partner States submit the dispute to the Court under a special agreement.[44] Additionally, parties to a commercial agreement may state in their contract that the EACJ shall have the jurisdiction to hear any dispute arising from their engagement.

In light of this jurisdiction, the EACJ Rules of Arbitration were promulgated in 2012 to facilitate the arbitral jurisdiction of the EACJ.[45] Under the rules, the EACJ constitutes itself into an arbitral tribunal to exercise its jurisdiction under Article 32 of the Treaty.[46] Under Rule 3, a party intending to commence arbitration proceedings with the Court must notify the Respondent to the proceedings in writing and also notify the Registrar of the Court. The arbitral tribunal is constituted by the judges of the court.[47] Parties to the dispute choose the applicable law. However, where the parties have expressly allowed the tribunal to determine the applicable law, the tribunal does so under the dictates of justice and fairness, without being constrained by particular laws.

The tribunal also determines the dispute in terms of the contract and the laws applicable to such contracts.[48] If the parties do not state the place where the arbitration proceedings will take place, the tribunal chooses the place after consulting witnesses and parties to the dispute.[49] The tribunal shall also entertain expert opinion when it is necessary to do so.[50] The arbitral award that the tribunal delivers to the parties should be in writing and is binding on the parties. If the parties consent, the award may be made public and also reported in law reports.[51] The award shall be enforced according to the enforcement

[43] EAC Treaty, Article 32(a).

[44] EAC Treaty, Article 32(b).

[45] East African Court of Justice Rules of Arbitration, eacj.org, 8 March 2017.

[46] EACJ Rules of Arbitration, Rule 1 on citation, application, and definitions.

[47] EACJ Rules of Arbitration, Rule 8.

[48] EACJ Rules of Arbitration, Rule 11.

[49] EACJ Rules of Arbitration, Rule 21.

[50] EACJ Rules of Arbitration, Rule 26.

[51] EACJ Rules of Arbitration, Rule 30.

procedures existing in the country in which enforcement is sought.[52] Thus, the court has the jurisdiction to hear commercial disputes through arbitral proceedings whenever parties specifically provide for that avenue in their contract.

The said arbitral jurisdiction appears to be unique to regional courts in Africa. This is so because the Court of Justice of the European Union (CJEU), the Court of Justice of the Andean Community and the Caribbean Court of Justice lack arbitral jurisdiction.[53] The Common Market for Eastern and Southern Africa (COMESA) and the Economic Community for West African States (ECOWAS)[54] have conferred arbitral jurisdiction on their regional courts as has the EAC on the EACJ. Although COMESA, ECOWAS and EAC have laws governing this arbitral jurisdiction, the jurisdiction has not yet been utilised at the time of writing this paper. The COMESA Court of Justice constituted itself as an arbitral tribunal in *Building Design Enterprise v Common Market for Eastern and Southern Africa.*[55] However, before that matter could proceed, the parties wrote to the Registrar of the Court withdrawing it.[56]

6.0 Parallel dispute resolution mechanisms for trade and investment disputes within the EAC

This section will examine the jurisdiction of good offices, conciliation, mediation and the East African Committee on Trade Remedies under the Customs Union Protocol. Further, the section will examine the jurisdiction of na-

[52] EACJ Rules of Arbitration, Rule 36.

[53] Richard Frimpong Oppong, *Legal aspects of economic integration in Africa,* Cambridge University Press, 2011.

[54] Although Article 16 of the Revised Treaty of Economic Community for West African Community, 1993 requires that an arbitral tribunal be established, the ECOWAS Community Court of Justice can sit as an arbitral tribunal pending the establishment of the said tribunal. Article 28 of the Treaty Establishing the Common Market for Eastern and Southern Africa, 1993 which came into force in 1994 confers arbitral jurisdiction to the COMESA Court of Justice.

[55] *Building Design Enterprise v Common Market for Eastern and Southern Africa*, [2002] Application for arbitration No 1. Application terminated on 18 October 2001 when the parties reached a mutual agreement to settle the dispute amicably outside court.

[56] Felix Manoera, 'Dispute settlement under COMESA', *TRALAC Working Paper No 7* (2011).

tional courts to hear commercial disputes arising from the Common Market Protocol. In addition to this, the jurisdiction of the East African Community Competition Authority under the East African Community Competition Act, the jurisdiction of other regional institutions in regional communities where Partner States of the EAC are also members, and arbitral jurisdiction of other arbitral tribunals will be examined. The existence of these multiple dispute resolution mechanisms limits access to justice by natural and legal persons at the EACJ but widens the range of institutions where these persons can file their commercial claims. As a result, the jurisdiction of the EACJ over trade and investment disputes is constrained.

6.1.0 Dispute resolution mechanisms under the Customs Union Protocol

6.1.1.0 Alternative dispute resolution mechanisms

The Customs Union Protocol establishes various mechanisms for settling trade and investment disputes. Under Article 41 of the Customs Union Protocol, regulations shall be promulgated to establish dispute resolution mechanisms giving it effect.[57] For this reason, the East African Community Customs Union (Dispute Settlement Mechanism) Regulations (the Regulations), Annex IX to the Customs Union Protocol, were promulgated. First, parties can pursue amicable dispute settlement processes such as mediation, conciliation and good offices.[58] These alternative dispute resolution mechanisms are determined by the parties and do not involve litigation. Good offices, essentially, provide for a conducive environment for the parties to amicably solve disputes without having to resort to litigation in courts.[59] In conciliation, an external third party actively participates in enabling the parties to reach an understanding while, in mediation, a neutral third party usually merely facilitates the reaching of the understanding but does not actively participate in the process. A distinction is drawn between mediation and good offices in that whereas

[57] Hence the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Annex IX to the Protocol.

[58] East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (1) and 6.

[59] World Trade Organisation Dispute Settlement Understanding (DSU), Article 5.1.

in mediation the mediator may sometimes play an active role in controlling the mediation process, good offices only initiate the negotiations and then the parties moderate the process by themselves.[60]

Thus, both the Customs Union Protocol and the Regulations recognise the need for ADR mechanisms to enable parties to resolve any disputes amicably without involving litigation. In *East African Law Society v Secretary General of the East African Community,*[61] the EACJ held that it is in the best interests of the parties to the dispute to choose a mechanism that enables them to solve their disputes promptly and amicably. Thus, the establishment of such offices is a pragmatic way of solving disputes arising from the Customs Union Protocol.

6.1.2 East African Committee on Trade Remedies

The Customs Union Protocol establishes an East African Committee on Trade Remedies (the Committee) with specific functions that are distinct from those of the EACJ.[62] According to the Customs Union Protocol, 'the Committee shall handle matters pertaining to EAC Rules of Origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement, and any other matter that the Council of Ministers refers to it for resolution'.[63] The use of the word 'shall' means that the Committee has exclusive jurisdiction over these disputes. It is, however, not clear how the Committee shall be convened. This may explain why at the time of writing this paper, the Committee had neither convened nor determined any dispute falling under its jurisdiction.

Nine members, who are qualified in matters of trade, customs and law, shall compose the members of the Committee with each Partner State appointing three members.[64] While the Committee does not have investigative machin-

[60] Chief Justice Marshall in *Schooner Exchange v M'Faddon* [1812] 7 Cranch, 136-137. See also Sompong Sucharitkul 'Good offices as a peaceful means of settling regional differences', Faculty Scholarship at GGU Law Digital Commons (1967).

[61] EACJ Reference No 1 of 2011.

[62] Customs Union Protocol, Article 24(1).

[63] Customs Union Protocol, Article 24(1).

[64] Customs Union Protocol, Article 24(2).

ery, the investigative authorities of Partner States carry out their investigative functions. However, the Committee is to initiate such investigations.[65] The Committee works hand-in-hand with Partner States and also submits a report of its investigations, findings, provisional measures to prevent injury, advisory opinions and affirmative or negative determinations about the investigations.[66] The Committee determines its own procedure with regard to convening members, hearing disputes and making its decisions.[67] Except as provided for by other regulations promulgated under the Customs Union Protocol, the decisions of the Committee shall be final with regard to the settlement of disputes arising from the implementation of the Customs Union Protocol.[68]

The decisions of the Committee cannot be appealed to the EACJ except when a party seeks to challenge the illegality of the decision, lack of jurisdiction of the Committee with regard to the particular matter and fraud.[69] When this happens, an aggrieved party may approach the EACJ and seek an interpretation of the Committee's decision in line with Article 28(2) of the Treaty, which states that Partner States can refer matters to the court for determination. Regulation 6(7) restricts these appeals to the EACJ to Partner States as aggrieved parties. It does not anticipate a scenario whereby a natural or legal person aggrieved by the decision of the Committee could file an appeal with the Court. It appears that the Customs Union Protocol and the Regulations made thereunder governing the operations of the Committee do not provide for an avenue for natural and legal persons to refer matters to the Committee and the Court for determination. This in itself is a violation of the principle of a 'people-centred Community'.[70] By 'people-centredness', the people of East Africa should be given a chance to participate in the integration process which includes an opportunity to challenge injustices before the dispute resolution institutions created by the Treaty and the Protocols.

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[65] Customs Union Protocol, Article 24(4)(a).

[66] Customs Union Protocol, Article 24(4)(a).

[67] Customs Union Protocol, Article 24(5); See also, Dispute Settlement Mechanism Regulations, Regulation 6(7).

[68] EAC Treaty, Article 24(6).

[69] East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 6(7).

[70] EAC Treaty, Article 5(3)(d).

In *East African Law Society v Secretary General of the East African Community,*[71] the Applicant sought a declaration by the Court that Article 24(1)(e) of the Customs Union Protocol was inconsistent with Articles 27(1) and 38(1) of the Treaty insofar as it purported to oust the jurisdiction of the EACJ over the interpretation and application of the Treaty. The Applicant also sought a declaration that the said Article 24 in the Customs Union Protocol contravened Articles 33(2) and 8(1)(a) and (c) of the Treaty as it gave the Committee precedence over the Court yet the Court has original jurisdiction over the interpretation and application of the Treaty. Article 75 of the Treaty empowers the Council to establish administrative institutions and authorise them to carry out functions of administering the Customs Union as the Council may deem necessary. It appears that the Committee is such an institution.

The EACJ has recognised the fact that whenever parties to a dispute submit their dispute to a resolution mechanism, they expect that the decision of the institution shall be final. Further, there is nothing in the Customs Union Protocol and the regulations to show that the jurisdiction of the Court with regard to trade and investment matters is fully ousted by the Committee. In the opinion of the Court, parties to a dispute can still apply to the Court for an interpretation of the provisions of the Customs Union Protocol and any other relevant law. Although the Court declined to rule that the establishment of the Committee ousts the jurisdiction of the EACJ in hearing disputes arising from the interpretation of the Customs Union Protocol, Article 24 of the Customs Union Protocol and the Regulations reveal the opposite. It would appear that the jurisdiction of the Court in matters appurtenant to the Customs Union Protocol is limited to the interpretation of the provisions because there is no room for an appeal of issues of law arising from the decision of the Committee. There is nothing in the Customs Union Protocol that shows that the Court can hear and determine disputes and award damages to parties to a dispute.[72]

[71] *East African Law Society v Secretary General of the East African Community.*

[72] *East Africa Law Society v Secretary General of the East African Community.*

6.2 Trade remedies available to Partner States

The Customs Union Protocol provides for three trade remedies for Partner States, namely: safeguards, anti-dumping measures and countervailing measures.[73]

6.2.1 Subsidies and countervailing measures

The Customs Union Protocol permits a Partner State to take countervailing measures where the subsidies used by another Partner State are harming its domestic industries.[74] The details of these countervailing measures are provided in Annex V of the Customs Union Protocol.[75] A subsidy occurs where a government or a public body makes a contribution towards the production of goods and services, the result of which affects the market of such a product.[76] Such a subsidy may take the form of direct funding by the government or public body, or grants and loans. Article 17 of the Customs Union Protocol provides that where a Partner State favours some undertakings by subsidising their production activities, it must notify the other Partner States about the details of the subsidy. Since one of the aims of economic integration is for the Partner States to harmonise their trade regimes by abolishing any barriers to trade, notifying the other Partner States ensures that this aim is promoted.

A Partner State is permitted to take a countervailing measure in the form of a countervailing duty to offset any injury that subsidised goods may cause to like goods in its domestic market.[77] A Partner State having reason to believe that another Partner State is maintaining subsidies is required to request that Partner State for consultations.[78] The Partner State should then inform the Committee on Trade Remedies about the subsidies being maintained and the

[73] James T Gathii, 'African regional trade agreements as flexible legal regimes', 35 *North Carolina Journal of International Law* (2009) 571.

[74] Customs Union Protocol, Article 17 and 18.

[75] East African Customs Union (Subsidies and Countervailing Measures) Regulations.

[76] Subsidies and Countervailing Measures Regulations, Regulation 7.

[77] Customs Union Protocol, Article 18.

[78] Subsidies and Countervailing Measures Regulations, Regulation 10.

consultations that have been made by the Partner States.[79] The two Partner States are required by the regulations to enter a mutual agreement within 30 days after the consultations, failure to which the Committee will take up the matter and submit a report within 90 days.[80] The report may recommend that a subsidy be withdrawn where it is a prohibited one under Regulation 9.

Discontented parties are required to object to the contents of the report within 30 days. In default, the Council of Ministers is required to adopt the report. Where a Partner State appeals to the Council of Ministers and the appeal is accepted, it will issue a directive on the suitable course of action. If the Council of Ministers does not accept the appeal by consensus, the aggrieved Partner State is permitted to refer the matter to the EACJ.[81] However, where the parties do not refer the matter to the EACJ within 20 days or where the parties do not implement the Council of Ministers directive within the specified period, the Council of Ministers shall be at liberty to authorise the complaining Partner State to impose the countervailing duties on the subsidised goods entering its local market.[82]

The EACJ has an opportunity in this remedy to determine a dispute arising from the maintenance of subsidies by a Partner State and the imposition of countervailing measures by an aggrieved Partner State. This provision is commendable, because the EACJ, as the apex neutral arbiter of disputes arising within the Community, should always have the ultimate opportunity to determine trade and investment disputes arising between the members of the Community.

6.2.2 Safeguards

Partner States are permitted by the Customs Union Protocol to use protective measures in the form of safeguards to prevent their economies from suffering injury. Such safeguards can, for example, be applied when a sudden surge occurs in the imports of a Partner State in a manner that is likely to harm

[79] Subsidies and Countervailing Measures Regulations, Regulation 10.
[80] Subsidies and Countervailing Measures Regulations, Regulation 10.
[81] Subsidies and Countervailing Measures Regulations, Regulation 10.
[82] Subsidies and Countervailing Measures Regulations, Regulation 10.

directly-competing or domestic products in the local market.[83] Two conditions must, however, be fulfilled before a Partner State applies these safeguard measures. The first condition is that the measures must be applied indiscriminately and irrespective of the product source.[84] The second condition is that the Partner State must satisfy itself that the particular product is increasing in quantity in the country and that such an increase is threatening the existence of similar products in the country. An investigation by the state's Investigating Authority shall be carried out to confirm that the two conditions have been met.[85] After carrying out investigations, the Authority must establish a causal link between the increasing amounts of the import in the country and the serious injury that is alleged to have been caused by the product.[86]

The Partner State is required to consult and notify the EAC Committee on Trade Remedies on the investigations that it has carried out with regard to the threatening imports and the reasons for carrying out the investigations.[87] The Partner State must then provide all the relevant information that it has established after carrying out the investigations to the Committee. Although the Partner State is required by the regulations to notify the Committee about the investigations and to also provide evidence of a 'serious injury or threat of serious injury,' safeguard measures are a local mechanism for the Partner State to take to protect its domestic products. At no point is the Partner State required to file a reference to the EACJ for a determination as to the imports and their alleged injury or threat of injury to the country's products.[88] Since the EACJ is not given an opportunity to determine whether an injury to the country's domestic products exists as a result of the imports, this is evidence of diminished jurisdiction of the Court.

[83] Customs Union Protocol, Article 19; East African Community Customs Union (Safeguard Measures) Regulations.

[84] Subsidies and Countervailing Measures Regulations, Regulation 4.

[85] Subsidies and Countervailing Measures Regulations, Regulation 5.

[86] Subsidies and Countervailing Measures Regulations, Regulation 6.

[87] Subsidies and Countervailing Measures Regulations, Regulation 10.

[88] Subsidies and Countervailing Measures Regulations, Regulation 10.

6.2.3 Anti-dumping measures

A Partner State is permitted by the Customs Union Protocol to take action when goods whose export price is less than the normal price of similar goods in the country exporting the goods to the Partner State enter its territory.[89] However, the Partner State that takes any anti-dumping measure must also notify the WTO of the action.[90] Article 16 of the Customs Union Protocol lists the instances when a Partner State may undertake anti-dumping measures when dumping of goods occurs. These are: when such dumping occasions material injury to the country's established industries; when it frustrates the benefits that accrue when barriers to trade are removed between Partner States; and when it retards the country's domestic industry.[91]

Like in safeguard measures, the Investigating Authority of the Partner State must first carry out investigations to establish that dumping has in fact taken place and then recommend the anti-dumping measures that should be undertaken. The determination of dumping may take the form of mathematical approaches. Such approaches will determine the 'normal value' of the product, its export price, and the price of like products in the domestic market of the affected Partner State, among other concepts.[92] It is only then that the Investigating Authority can make a finding whether dumping of goods in the country has taken place or not and also whether or not such dumping has materially affected the domestic industries of the Partner State as per the Regulations.[93]

The Investigating Authority may recommend provisional measures to be taken to remedy the situation. The measures may take the form of duties, cash deposits or bonds. If the exporter revises the prices of the products or ceases to export the products into the country, these measures do not have to be taken.[94] It is, however, the EAC Trade Remedies Committee that will make

[89] Customs Union Protocol, Article 16; EAC Customs Union Protocol (Anti-Dumping Measures).

[90] Customs Union Protocol, Article 16; Anti-Dumping Measures Protocol.

[91] Customs Union Protocol, Article 16; Anti-Dumping Measures Protocol.

[92] Anti-Dumping Regulations, Regulation 7.

[93] Anti-Dumping Regulations, Regulation 8.

[94] Anti-Dumping Regulations, Regulation 13 (1). This act by the exporter is also called 'voluntary price undertaking'.

the ultimate decision to impose these anti-dumping measures after receiving recommendations from the Partner State's Investigating Authority.[95] Thus, as in the case with safeguard measures, the Investigating Authority of the Partner State must work in hand-in-hand with the Committee to effect the remedies.

Any disputes arising between Partner States with regard to the implementation of the Regulations shall be resolved by the Committee.[96] This trade remedy provides a dispute resolution mechanism that completely avoids the EACJ as the apex arbiter of disputes in the Community. This remedy is an administrative undertaking by the Partner State and the Committee and makes dispute resolution convenient for the Partner State. However, it takes away the adjudicative functions of the Court.

It is not uncommon for regional courts to determine disputes regarding subsidies and countervailing measures, anti-dumping measures, and safeguards. The Court of Justice of the European Union (CJEU) has consistently determined such disputes both at first instance and appellate level. For example, in *Council v Gull Ahmed Textile Mills,*[97] the Council of the European Union filed an appeal at the CJEU against the decision of the General Court[98] that had been delivered on 27 September 2011. In the 2011 decision, the General Court had annulled the decision of the Council regarding a definitive anti-dumping duty on imports of cotton-type bed linen that originated from Pakistan. The CJEU agreed with the Appellant by noting that since the regulation in question annulled all products of that type originating from Pakistan, all products of that nature constituted dumped products. The CJEU also affirmed that dumped imports cause economic injury to similar products produced in the domestic market.

[95] Anti-Dumping Regulations, Regulation 14.

[96] Anti-Dumping Regulations, Regulation 19.

[97] Case 638/11, *Council v Gull Ahmed Textile Mills* [2013] ECJ.

[98] The General Court is established by Title IV of the Statute of the Court of Justice of the European Union as a court of first instance comprising 47 judges as from 1 September 2016. The court determines disputes at first instance. Such disputes can then be appealed at the Court of Justice which functions as an appellate court.

6.3 Dispute resolution mechanisms under the Common Market Protocol

There exists a contradiction under the Common Market Protocol. Whereas Article 54(1) of the Common Market Protocol states that any dispute arising from the implementation of the Common Market Protocol shall be resolved in accordance with the provisions of the Treaty, Article 54(2) goes on to confer jurisdiction to solve such disputes on national courts of Partner States. Partner States guarantee under the Common Market Protocol that parties whose rights and liberties have been infringed upon shall have recourse to their national courts based on their constitutions, national laws and administrative procedures.[99] Thus, national courts and tribunals of Partner States shall have jurisdiction to hear disputes arising from the implementation of the Common Market Protocol, unless an issue arises with the interpretation of the provisions of the Common Market Protocol, in which case, the national court or tribunal of the Partner State shall refer the matter to the EACJ.[100]

The EACJ is not an appellate court like the defunct Court of Appeal of East Africa. The Court of Appeal of East Africa was established under Article 80 of the Treaty Establishing the East African Community, 1967. When the first EAC collapsed in 1977, this court also collapsed as it was an organ of the EAC of 1967-1977. This court, unlike the one established under the 1999 Treaty, could hear appeals from national courts of Partner States. This being the case, disputing parties that exhaust local remedies have no provisions in the Treaty or the protocols that allow them to appeal to the EACJ on matters of law. The situation is aggravated by the fact that a natural or legal person cannot institute legal proceedings against another natural person or legal person at the EACJ.[101]

The relationship between regional courts in an economic integration setting and national courts of Partner States is not unique to the EAC. The CJEU held in *Van Genden Loos v Nederlandse Administratie der Belastingen*[102] that, although Articles 169 and 170 of the European Economic Treaty empowered

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[99] Common Market Protocol, Article 54 (2)(a).

[100] EAC Treaty, Article 34.

[101] EAC Treaty, Article 30.

[102] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

Partner States of the European Union (EU) and the European Commission to refer matters to the court regarding the failure of Partner States to fulfil their obligations under the Treaty, the provisions did not stop aggrieved individuals from pleading the same obligations before national courts, whenever the occasion demanded that they plead such obligations. The CJEU was also fortified in the interpretation of Article 12 of the Treaty that national courts of Partner States had an obligation to protect individual rights under the Treaty. The contentious issue that arises from this ruling is whether only the jurisprudence of the regional court has a direct effect on national courts of Partner States or aggrieved parties can appeal the decisions of such national courts at the regional court, so that the relationship between the regional court and the national courts is complementary.

In the previous section, this paper argued that the EACJ does not have an appellate jurisdiction over decisions of national courts of Partner States. In *Honourable Sitenda Sebalu v Secretary General of the East African Community and 3 Others,*[103] the EACJ held that Article 27 of the Treaty did not confer appellate jurisdiction over the Supreme Court of Uganda and that the only appellate jurisdiction that the EACJ possessed regarded appeals from the First Instance Division of the Court to its Appellate Division on points of law, procedural irregularity and grounds of lack of jurisdiction.[104] It appears, therefore, that the EACJ and national courts of Partner States regarding the adjudication of trade and investment disputes arising from the Common Market Protocol are loosely held together by Article 34 of the Treaty pertaining to preliminary rulings. Requests for preliminary rulings are discretionary on the part of the national court seeking interpretation by the EACJ.

Preliminary rulings ensure that national courts of Partner States facilitate Partner States' respect for Community law. Rule 76 of the EACJ Rules of Procedure[105] sets the procedure that preliminary rulings should follow. A request by a national court pertaining to Article 34 of the Treaty must be lodged in

[103] *Honourable Sitenda Sebalu v Secretary General of the East African Community and 3 others* [2010] EACJ Reference No 1 of 2010.

[104] EAC Treaty, Article 35A(1).

[105] East African Community Legal Notices Supplement No 1 to the East African Community Gazette No 7 (11 April 2013).

the Appellate Division of the Court in accordance with the procedure that the rules set out in the Sixth Schedule.[106] The request must specify the question raised and the issues that need to be determined by the court.[107] The EACJ shall then determine the issues and communicate its determination to the national court or tribunal as soon as it has reached the decision.[108]

The Sixth Schedule further clarifies the procedure to be followed when referring a matter to the EACJ for a preliminary ruling. It is the national court or tribunal that is supposed to notify the EACJ about the issues requiring a preliminary ruling.[109] The Registrar of the EACJ shall then notify the parties, the Secretary General of the Community and the organ or institution of the Community whose act precipitated the request for a preliminary ruling.[110] These parties, including the organ or institution of the Community where applicable and the Secretary General, shall file statements to the EACJ within two months of being notified.[111] The Court may also request clarification from the national court or tribunal that requested the preliminary ruling.[112] The Registrar shall notify all parties to the reference and also the national court or tribunal after the Court has issued its reasoned ruling on the question.[113]

Referring a matter for preliminary ruling to the EACJ enhances the cooperation of the EACJ with national courts and also ensures a uniform interpretation of Community law by all Partner States. Proceedings in the national court or tribunal must, then, be stayed, pending the determination of the regional court on the preliminary question raised. When this happens, the national court or tribunal may rule on protective measures to preserve the status quo of the case pending before it.[114]

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[106] EACJ Rules of Procedure, Rule 76(1).

[107] EACJ Rules of Procedure, Rule 76(2).

[108] EACJ Rules of Procedure, Rule 76(3).

[109] EACJ Rules of Procedure, Schedule 6, para 1.

[110] EACJ Rules of Procedure, Schedule 6, para 2.

[111] EACJ Rules of Procedure, Schedule 6, para 3.

[112] EACJ Rules of Procedure, Schedule 6, para 10.

[113] EACJ Rules of Procedure, Schedule 6, para 9.

[114] East African Court of Justice, Guidelines on a reference from national courts for a preliminary ruling, eacj.org, accessed 6 March 2017.

In *Attorney General of the Republic of Uganda v Tom Kyahurwenda,*[115] the High Court of Uganda referred two questions for a preliminary ruling by the EACJ. In the High Court case between Tom Kyahurwenda and the Attorney General of the Republic of Uganda, Tom Kyahurwenda, a former Member of Parliament in Buhanguzi County in the Republic of Uganda sued the government for malicious prosecution.[116] He sought compensation from the government on the basis that the prosecution had cost him his parliamentary seat in the elections. As a result, he asked the High Court to rule that the government of Uganda had violated Articles 6, 7, 8, and 123 of the EAC Treaty.[117] Thus, he sought reparation in form of damages for the loss and injury that he suffered in the hands of government operatives during the malicious arrest and prosecution.

The first question that the High Court of Uganda referred to the EACJ was whether or not Articles 6, 7, 8, and 123 as read together with Articles 27 and 33 of the Treaty could be determined by national courts.[118] The second question was whether or not Articles 6, 7, 8, and 123 as read together with Articles 27 and 33 of the Treaty were self-executing and conferred jurisdiction to national courts to determine matters of Treaty violations and also award damages to the applicants. The Court reformulated the questions as 'by what court(s) should the Treaty be interpreted?"[119] The EACJ held that national courts have the jurisdiction to apply the provisions of the Treaty as provided for under Articles 33 and 34 of the Treaty and that the preliminary ruling procedure in Article 34 should be based on the interpretation of the provisions of the Treaty and not their application. The regional court further held that the discretion conferred on national courts by Article 34 is narrow because it is restricted to deciding whether it is necessary to refer the question before the

[115] *Attorney General of the Republic of Uganda v Tom Kyahurwenda*, No 1 of 2014, referred by the High Court of the Republic of Uganda, arising from miscellaneous application No 558 of 2012 in civil suit No 298 of 2012 in the High Court of the Republic of Uganda at Kampala.

[116] *Tom Kyahurwenda v Attorney General of Uganda,* 298.

[117] Article 6 of the EAC treaty is about the fundamental principles of the community while Article 7 is about the operational principles of the community. Article 8 pertains to the general undertaking of partner states as to the implementation of the treaty, while Article 123 relates to cooperation of partner states of the EAC in political matters.

[118] *Attorney General of Uganda v Tom Kyahurwenda*, para 5.

[119] *Attorney General of Uganda v Tom Kyahurwenda*, para 34.

High Court for interpretation by the EACJ.[120] Once it determines that it is necessary, the national court or tribunal has no option but to refer the question to the EACJ for interpretation of the relevant Treaty provisions.

The EACJ in this case also determined that a preliminary ruling on a particular question of the Treaty is binding to the national court or tribunal that requested the ruling and also *erga omnes,* that is, to all national courts and tribunals of Partner States.[121] Further, the Court held that whereas national courts and tribunals of Partner States have jurisdiction to apply the Treaty and to award relevant damages, it is only the EACJ that has the exclusive jurisdiction to interpret the Treaty and invalidate Community acts.[122]

In *East African Law Society v Secretary General of the East African Community*,[123] the EACJ was asked to declare that Article 54(2) of the Common Market Protocol which conferred jurisdiction relating to disputes arising from the Common Market Protocol to national courts of Partner States ousted the jurisdiction of the EACJ in such matters and that even if it did not completely oust such jurisdiction from the Court, whether it created a parallel dispute resolution mechanism. The EACJ held that, although the article empowers national courts to deliver justice in terms of redress to individuals whose rights under the Common Market Protocol have been infringed upon, it does not oust the jurisdiction of the Court over the interpretation of the Common Market Protocol.[124]

Taken in its plain meaning, this ruling limits the jurisdiction of the EACJ to interpret the provisions of the Treaty and the Common Market Protocol when individuals seek such interpretation. Such a jurisdiction does not include awarding damages to the parties whose rights have been violated. In concluding this part, Article 54(2) of the Common Market Protocol confers jurisdiction to substantively determine disputes arising from the Common Market

[120] *Attorney General of Uganda v Tom Kyahurwenda*, para 56.

[121] *Attorney General of Uganda v Tom Kyahurwenda*, para 58.

[122] *Attorney General of Uganda v Tom Kyahurwenda*, para 77.

[123] *East African Law Society v Secretary General of the East African Community* [2011] EACJ Reference No 1 of 2011.

[124] *East African Law Society v Secretary General of the East African Community,* above, at paragraph 30 of concluding issue No 2.

Protocol to national courts of Partner States. It is only when parties to the dispute have differed on the interpretation of the provisions of the Common Market Protocol that they can seek an interpretation from the EACJ. Further, the national court hearing the matter has the discretion under Article 34 of the Treaty to seek the interpretation of such provisions from the EACJ. In a nutshell, the EACJ has only 'partial jurisdiction' to hear trade and investment disputes arising from the Common Market Protocol.

In the defunct East African Community, the relationship between national courts and the regional court was not any smoother. For instance, in *Republic v Okunda,*[125] the Respondents had been prosecuted under the East African Community's Official Secrets Act of 1968. Section 8(1) of the Act provided that the Secretary General of the Community had to be consulted before anyone was prosecuted under the Act. The Attorney General of the Republic of Kenya did not make such consultations because Section 26(8) of the repealed Kenyan Constitution stated that the Attorney General was not subject to any directions in the exercise of his duties. The Kenyan court held that the Attorney General did not break any law because the Community law was part of Kenyan laws and that the Constitution prevailed over any other law. An appeal at the Court of Appeal for East Africa was not successful. It was held that the Kenyan Constitution prevailed over any other law.[126] This case signifies the conflicts that are evident between Community law and national law.

The current treaty has remedied this conflict under Article 16 which states that the regulations, directives and decisions of the Council of Ministers taken or given in pursuance of the provisions of the Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the East African Legislative Assembly (EALA) within their jurisdictions. Decisions, directives and regulations of the Council, therefore, do not bind the Summit, the EACJ and the EALA. Article 8(4) of the Treaty also cures these discrepancies by providing that the laws, institutions and organs of the Treaty shall take precedence over similar ones in the Partner States regarding the implementation of the Treaty. Article 2(6) of the Constitution of Kenya provides that any treaty or convention ratified

[125] *Republic v Okunda* [1969] 91 ILM 556.

[126] *East African Community v Republic of Kenya* [1970] 9 ILM 561.

by Kenya shall form part of the laws of Kenya under the Constitution. If such provisions had existed in the former treaty, maybe, such conflicts would not have occurred in the judiciaries of the Partner States and the Community at that time regarding the implementation of the treaty.

6.4 Parallel dispute resolution mechanisms between the EAC and COMESA

Some Partner States of the EAC are also members of other regional economic communities such as COMESA, IGAD, Economic Community of Central African States (ECCAS) and Southern African Development Community (SADC). Tanzania, for example, is a member of SADC, Kenya and Uganda are members of IGAD, while Burundi is a member of ECCAS. Kenya, Burundi, Uganda, and Rwanda are members of COMESA. These other RECs have dispute resolution mechanisms that their members subscribe to.

The COMESA Court of Justice has jurisdiction over interpretation and application of the COMESA Treaty.[127] However, matters that are referred to the Court can be submitted to any other dispute resolution mechanism other than the ones listed in the Treaty.[128] The similarity of the activities that members of COMESA and the EAC engage in and the overlapping membership that exists between the two RECs make it possible for members of the EAC who are also members of COMESA to seek justice in a more convenient forum within COMESA if the forum provided by the EAC is less favourable. When this happens, the EACJ is denied an opportunity to adjudicate upon trade and investment disputes arising from the relationships of such members. The COMESA Court of Justice even appeared to recognise the importance of seeking justice in other courts and dispute resolution institutions in *Eastern and Southern African Trade and Development Bank (PTA Bank) v Yvonne Nyagamukenga.*[129] It stated that the parties did not subvert the Treaty by submitting their dispute to an arbitral tribunal constituted by the Kenyan High

[127] Treaty Establishing the Common Market for Eastern and Southern Africa (30 September 1982); COMESA Treaty, Article 7(1)(c).

[128] COMESA Treaty, Article 34(1).

[129] *Eastern and Southern African Trade and Development Bank (PTA Bank) v Yvonne Nyagamukenga* [2006] COMESA Court of Justice, Reference No 3 of 2006.

Court and that the parties were within their rights to seek the most convenient forum for their dispute to be determined.

Although there are currently no known cases that are being heard concurrently at the EACJ and the COMESA Court of Justice, there have been instances where parties from the EAC region sought justice in the COMESA region. Recent practice at the COMESA Court of Justice has shown that parties are attracted by certain factors when deciding to file their disputes in courts that are located away from their regions. In *Intesolmac (Uganda) Limited v Rwanda Civil Aviation Authority,*[130] for example, the parties filed the case at the registry of the COMESA Court of Justice, which is located in Lusaka, Zambia, yet there was no party to the case who was domiciled near Zambia. The nearest court that was available to the parties was the EACJ and the parties could have filed their case there. However, since the countries from which the parties are citizens are also members of COMESA, they decided that the COMESA Court of Justice was a more convenient forum for them to find justice. This phenomenon denies the EACJ an opportunity to hear and determine such integration questions.

6.5 Parallel arbitral jurisdiction between the EACJ and other tribunals

The EACJ can constitute itself into an arbitral tribunal in which it can carry out arbitration.[131] Considering that the Partner States have their arbitration laws that provide for arbitral procedures, there may be conflict between the arbitration rules of the Court and the arbitration laws of the Partner States. Further conflict may arise between the arbitral jurisdiction of the court and that of other arbitral tribunals existing within the region. It follows that parties to arbitration are supposed to have control of the arbitral process by choosing the arbitral panel and also choosing the place of arbitration, among other things.[132] The arbitral jurisdiction of the Court has yet to be invoked. However, there are apparent conflicts that are expected to occur when the jurisdiction is finally invoked.

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[130] *Intesolmac (Uganda) Limited v Rwanda Civil Aviation Authority* [2009] COMESA Court of Justice Reference No 1 of 2009.

[131] EAC Treaty, Article 32; EACJ Arbitration Rules.

[132] Jacob Gakeri 'Placing Kenya on the global platform: An evaluation of the legal framework on arbitration and ADR', 1(6) *International Journal of Humanities and Social Science* (2011) 1.

Most countries that are members of the United Nations submit to the arbitral procedures prepared by the United Nations Commission on International Trade Law (UNCITRAL), which proposed the UNCITRAL Model Law on International Commercial Arbitration.[133] This Model Law guides Member States in carrying out arbitral proceedings. The Arbitration Acts of Member States may be prepared in line with the UNICTRAL Model Law as a way of domesticating the law. Article 5 of this Law, for example, limits the intervention of courts by stating that no court shall intervene in matters of the law except as provided for under the said law. Thus, courts are limited in engaging in arbitration except as provided for under the law. One of the interventions that a court can make is to grant interim protection to parties to arbitral proceedings when the parties ask the court to do so under Article 9 of the Law.[134] The other instance when a court can intervene is when a party who is not satisfied with the award applies to the court for setting aside as an exclusive recourse against the award.[135] Moreover, parties to arbitration can apply to courts for recognition and enforcement of arbitral awards.[136] The Arbitration Acts of Partner States of EAC have similar provisions regarding limitations on courts' intervention in arbitration proceedings.[137]

Under Article 10, parties to arbitral proceedings are free to determine the number of arbitrators, failing which the number of arbitrators shall be three. The Arbitral Rules of the EACJ are at variance with this provision because they provide that the appointing authority of the Court shall determine the composition of the Arbitral Tribunal of the Court.[138] Thus, it appears that the EACJ could impose arbitrators on parties as it is the judges of the court that make up the arbitral tribunal. The Arbitration Acts of Partner States of EAC also provide for parties to determine the composition of the arbitration tribunal.[139]

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[133] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration [1985], with amendments in 2006.

[134] Arbitration and Conciliation Act [Uganda], Section 34; Arbitration Act [Kenya], Section 35.

[135] UNCITRAL Model Law, Article 34.

[136] UNCITRAL Model Law, Article 34.

[137] Arbitration and Conciliation Act [Uganda], Section 9; Arbitration Act [Kenya], Section 10.

[138] EACJ Rules of Arbitration, Rule 8.

[139] Arbitration Act [Kenya], Section 11 and 12; Arbitration Act [Tanzania], Section 10.

Under Article 22 of the law, parties are at liberty to agree on the language to be used during the proceedings, failure to which the tribunal shall decide the language. However, the EACJ Arbitration Rules provide that the language of the proceedings shall be English,[140] and that any document that is drawn in any other language shall be accompanied by a certified copy of translation into the English language. The question that remains is whether parties who submit to the arbitral jurisdiction of the court shall agree to be bound by this provision, especially when they are not comfortable with the language. The Kenyan Act, for example, provides that parties to arbitration shall be free to choose the language to be used in the conduct of the proceedings, failing which the tribunal shall determine the most applicable language.[141]

One of the contentious issues expected to arise during the exercise of the court's arbitral jurisdiction relates to the recognition and enforcement of the arbitral award. The Treaty provides that the execution of judgments of the court shall follow the civil procedure rules of the Partner State in which the execution of the judgement is to take place. However, this provision only relates to judgments involving a pecuniary interest.[142] The Arbitral Rules of the Court, similarly, provide that the enforcement of an arbitral award of the Court shall be in accordance with the enforcement rules existing in the Partner State where the enforcement is to take place.[143]

In essence, this arrangement on execution seems to subject the court to the jurisdiction of national courts and tribunals of Partner States. Section 35 (2) of the Kenyan Arbitration Act provides for instances where an arbitral award may be set aside by the High Court. Under paragraph (ii), an arbitration award may be set aside where the arbitration agreement was not made in accordance with the laws of Kenya or those of the country to which the parties subjected the agreement. Further, the Kenyan High Court may set aside an award where it establishes that the subject-matter of the dispute is not capable of settlement under the laws of Kenya or the award is in conflict with public

[140] EACJ Arbitration Rules, Rule 22.

[141] Arbitration Act [Kenya], Section 23. The Arbitration Act [Uganda] provides under Section 23 that the language shall be English.

[142] EAC Treaty, Article 44.

[143] EACJ Arbitration Rules, Rule 36.

policy. There is currently no law in Kenya that allows arbitral awards made by the EACJ to be recognised by Kenyan courts.

Article 3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which EAC Partner States are party to, states that States Parties shall recognise and enforce arbitral awards in accordance with the rules of the territory where the award is relied upon and also in accordance with the conditions set out in the convention. This option may be taken if the parties to the arbitration proceedings take the EACJ Arbitral Tribunal, as a tribunal like any other, whose proceedings can be subject to the New York Convention. It is a reliable option because it enhances uniformity and consistency of arbitral proceedings with those of other arbitral tribunals all over the world.

The other option open for parties to arbitration under the EACJ Tribunal and the national courts of Partner States to take is to subject the recognition and enforcement proceedings to the provisions of the International Centre for Settlement of Investment Disputes (ICSID) Convention.[144] Article 53 (1) of the ICSID Convention provides that the arbitral award arising from the arbitral proceedings carried out in accordance with the provisions of the Convention shall be binding on the parties and shall not be subjected to any other appeal or remedy except as provided under the Convention. Article 54 on the other hand, requires Partner States to recognise an award rendered pursuant to the Convention as binding and also to enforce the pecuniary obligations that the award provides as if the national courts or tribunals of that Partner State had issued such an award.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides another option. The ICSID Convention may be the only way to save the legacy and identity of the EACJ as a transnational court. For the arbitral proceedings of the court to be subjected to the procedures stated in the Convention, the Arbitral Rules of the EACJ need to state explicitly that the EACJ Tribunal would follow the ICSID Convention when exercising its arbitral jurisdiction.[145]

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[144] Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS, Washington DC (18 March 1965) 159.

[145] Convention on the Settlement of Investment Disputes between States and Nationals of

7. Conclusion

The existence of several dispute resolution mechanisms within the EAC, multiple membership of EAC Partner States in other regional economic communities, and the failure of the EAC Treaty to clearly state the EACJ's jurisdiction in commercial matters has not just fundamentally constrained the Court's jurisdiction in these matters but has also denied the region an opportunity to develop its jurisprudence in matters of relevance to trade and investment. The Treaty promises the Court this jurisdiction through future treaty enactments, rendering it redundant in commercial matters. Further, the Treaty denies the Court a clear appellate jurisdiction to determine commercial matters from national courts of Partner States and also from dispute resolution institutions existing within the Community. When other instruments confer such appellate jurisdiction on the Court, as it is with the Customs Union Protocol, the jurisdiction is limited to only a few points of law.

In addition to this, the Court's arbitral jurisdiction is questionable as it is not clear which law guides its Arbitral Tribunal. Whereas the court's Arbitral Tribunal affords natural and legal persons an opportunity to arbitrate their commercial disputes without having to incur additional costs in paying commercial arbitrators, there are clear conflicts with global arbitral model law and also with Arbitration legislations of Partner States.

As the final word, this paper recommends that the EACJ should be granted original and exclusive jurisdiction to hear and determine matters of relevance to trade and investment affecting Partner States, Community organs, natural and legal persons in the Community. This can only be done through an amendment to the EAC Treaty or by way of an additional protocol.

Other States (International Centre for Settlement of Investment Disputes, ICSID]), Article 8(4).

THE ENFORCEMENT OF THE RIGHT OF ESTABLISHMENT BEFORE THE ECOWAS COURT: JURISDICTIONAL HURDLES FOR INDIVIDUALS

Julius Edobor *

Abstract

The Economic Community of West African States Court of Justice (ECCJ) was established in 1991 by the Protocol on the ECCJ. This article examines the jurisdictional challenges faced by individuals in approaching the ECCJ with regard to the violation of the right of establishment within the sub-region. Fundamentally, the inability of the ECOWAS citizens to access the ECCJ to litigate ECOWAS Protocols is given prominent emphasis with reference to the case of *Pinheiro v. Republic of Ghana*. Although, the ECCJ can now assume jurisdiction over cases of human rights violations through its expanded mandate, its jurisdiction is still very limited, given the inability of individuals to use the jurisdiction of the Court for the interpretation and application of ECOWAS Protocols. The study, therefore, argues for an amendment to the ECOWAS instruments to accommodate the protection of individual rights. It also argues for the Court's courageous approach in interpreting ECOWAS Protocols in line with the object of ECOWAS, to accommodate suits by individuals seeking to enforce their Community rights.

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1.0 Introduction

Integration efforts in the West African sub-region is date back to the 19th Century when the idea of West African nationalism was prevalent and it was believed that the creation of a United West African States was important for the emancipation of the African Continent.[1] However, when concrete attempts at integration began to have effect, they were on the basis of economic objectives rather than political unification.

Thus, in 1975, when the original Treaty founding the Economic Community of West African States (ECOWAS), 1975 ECOWAS Treaty was signed, the reasons for coming together were essentially economic.[2] Meeting in Lagos, Nigeria in May 1975, 15 West African Heads of States and Governments adopted the 1975 ECOWAS Treaty with the aim of promoting cooperation and development in all fields of economic activities for the purpose of raising the standard living of West African peoples; fostering closer relations among Member States and contributing to the progress and development of the African Continent.[3] Decades after the adoption of the 1975 ECOWAS Treaty and after the conclusion of several protocols which were aimed at actualising the goals of integration, it seems that, the realisation of the said objectives envisaged by the Community is still far-fetched. Apparently, it can be stated that the 1993 Treaty revision opened space for ECOWAS to pay greater attention to the rights of Community citizens. Accordingly, the most elaborate provisions relating to individuals' rights within the ECOWAS legal framework are contained in the Protocols and Supplementary Protocols adopted for the purpose of extending the scope of the Community.

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[1] Foremost political actors like JA Beale Horton, Edward Blyden and Casey Hayford were identified as prime movers of the project of West African unification. See EM Edi, *Globalisation and politics in the Economic Community of West African States*, Carolina Academic Press, 2007, 27.

[2] The Economic Community of West African States (ECOWAS) Treaty is a multilateral agreement signed by the then 16 member States: Benin, Cape Verde, Ghana, Italy Coast, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta (now Burkina Faso). In the year 2000, Mauritania denounces the ECOWAS Treaty in favour of full membership in the Maghreb Union, bringing membership of ECOWAS to 15.

[3] Treaty Establishing the Economic Community of West African States [28 May 1975], Article 2(1).

Notwithstanding the above intendments, regional integration efforts in ECOWAS have faced serious challenges in the last decades of its existence. The most obvious of such challenges is that, the existing provisions in the ECOWAS Treaty did not provide the ECOWAS Community Court of Justice (ECCJ) with adequate jurisdiction to enable it handle disputes affecting the individuals that may arise within the sub-region. Worse still, though the ECOWAS instruments envisaged a Free Trade Area (FTA), as well as free movement of persons, right of residence and establishment as major steps towards economic integration, but however, many of such provisions are observed more in breach and this has either stagnated or truncated the economic development of the West African sub-region, and essentially, impeded the progress of the individuals who are supposed to be the drivers of integration activities in the Community. In addition, when the provisions of the ECOWAS instruments are contravened, most times by a Member state or its officials, there is no actionable process available to the individuals for seeking redress or remedying the breach, especially, when it affects their right of establishments. Essentially, there is doubt as to whether the individuals have any opportunity for the settlement of economic disputes arising from violations of their right of establishments through the ECCJ. This has contributed in no small measure to placing the ECOWAS intra-trade activities at low ebb.

The foregoing is against the backdrop that, since disputes are inevitable especially within the context of regional integration between the various actors, such as Community citizens, Community institutions and/or Member Sates operators manning the borders, the thorny question is: where can these private actors seek redress in the event of any violation against their rights of establishments? Can these actors approach their national courts when it borders on the violations of Community citizens' right of establishments within the sub-region? In answering the above questions, the essence of this article will be; to identify the legitimate approaches available to Community citizens, as well as business operators in holding ECOWAS Member States accountable to their integration promises, particularly, through the instrumentality of the ECCJ in terms of adjudication of inevitable economic disputes within the sub-region. This study is therefore on the premise that ECCJ should replicate the vast and courageous approaches of the the East African Court of Justice (EACJ) and the Southern African Development Community Tribunal (SADC

Tribunal), in interpreting the provisions of the ECOWAS Treaty in a clear approach that does not diminish the promotion and protection of the rights of individuals within the Community.

1.1 Concept of integration

The term 'integration' is a modern process of bringing together two or more sovereign entities within a given global geo-political zone into one unit for enhanced promotion of their economic, political, social, cultural or legal priorities or interests.[4] Integration cannot be achieved without some measure of supranationality. Thus, although the ECOWAS experience might not be perfect, it confirms that, unless Member States wilfully give up some extent of their national sovereignty and empowers sub-regional integration institutions to make binding decisions, and to implement them, little progress can be made.[5]

People come together to form communities on the basis of parameters such as common language and culture due to the need for security and self-preservation.[6] This need for security and self-preservation leads communities to integrate and nations to emerge.[7] The current global trend is for groups of neighbouring nations to pool their resources together to form a regional cooperation for the well-being of their citizens. It is argued that integration relates to any process leading to the formation of a political and economic whole or organised unit.[8] In such a process States agree to forgo the ability to formulate policies independently on matters concerning trade, custom tariffs

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[4] Muhammed Tawfiq Ladan, *Introduction to ECOWAS Community law and practice: Integration, migration, human rights, access to justice, peace and security,* Ahmadu Bello University Press, 2009, 10-11.

[5] *Ladan, Introduction to ECOWAS Community law and practice*, 11.

[6] Ali W Butu, 'Impact of ECOWAS Protocols on political and economic integration of the West African sub-region,' 1(2) *International Journal of Physical and Human Geography* (2013), 47.

[7] Butu, 'Impact of ECOWAS Protocols on political and economic integration of the West African Sub-region', 47.

[8] P Charmely, 'A note on the concept of integration on paths and on the advantages of integration,' in M Samai and K Garam (eds), *Economic integration, concept, theories and problems*, Academai Kiado, 1977.

and immigration, seeking instead to delegate the decision-making process to a new central organ.

In legal integration, for instance, the unification of national (or municipal) legal systems on the basis of common legal principles and standards, that is, inter-state legal integration, is regarded as a synonym for the concept of integration of national legal systems.[9] Undoubtedly, the effectiveness of political, economic and other inter-state integration in the modern civilised world is impossible without the respective legal formalisation and the creation of a unified legal foundation. Thus, without the integration of law, effective co-operation of States in other spheres of social life is impossible due to the fact that, the means and forms of the realisation of national interests, as well as the basic values and priorities exclude the possibility of the normal interaction of States in the political, economic, and other spheres.[10] Accordingly, EG Potapenko posits that 'law is an effective mechanism for the realisation and regulation of integration processes, within the framework of which the protection and defence of the interests of participants of integration interaction is ensured.[11] Law formalised the results of integration, enabling the degree of such integration to be determined.[12] More so, law creates a platform for elaborating a strategy of development of integration and imparts stability and transparency to them.[13] In essence, legal integration denotes the bringing together of parts of whole.[14]

Economic integration as an ambit of this discussion, involves aspects of international economic and trade laws, as well as human rights, institutional law and, most especially, peace and security law. Thus, economic integration is probably the most widely studied form of regionalism.[15] Economic integration encompasses measures designed to abolish discrimination between economic units belonging to different national States, viewed as a state of

[9] EG Potapenko, 'Methods and means of inter-state legal integration,' (2015) 10 *Journal of Comparative Law.*

[10] Potapenko, 'Methods and means of inter-state legal integration'.

[11] Potapenko, 'Methods and means of inter-state legal integration,' 144.

[12] Potapenko, 'Methods and means of inter-state legal integration'.

[13] Potapenko, 'Methods and means of inter-state legal integration'.

[14] B Balassa, *The theory of economic integration*, Richard D. Irwin Incorporation, 1961, 1.

[15] Balassa, *The theory of economic integration*.

affairs. It can be represented by the absence of various forms of discrimination between national economies.[16] It also denotes a state of affairs or a process which involves the amalgamation of separate economies into larger free trading regions.[17] However, the said amalgamation has consequences for the scope and traditional prerogatives of statehood. It produces institutions, constrains sovereignty and creates new obligations. Regional economic integration also helps in the construction of communities and identities.[18]

On the political factor of regional integration, it is apposite to state that the relationship between human rights and regional integration is both intrinsic and instrumental. Intrinsically, both integration and the regional protection of human rights involve varying degrees of diminution of sovereignty. States in regional integration arrangements agree to pool sovereignty. Thus, in political integration, the pooling evolves into a fusion of sovereignty across independent territories.[19] In a similar vein, a regional human rights regime institutes supranational values as limits on State conduct and establishes mechanisms for monitoring compliance within these limits.[20] Although economic integration of States is a regional setting which may result in the organisation of inter-State economic relationships, regionalism becomes ultimately, a political issue. It is rare for States to accidentally fall into an economic integration. They usually engage in long, sustained and highly technical discussions over time, to delimit the policies and geographical boundaries of the region.[21]

Accordingly, the pursuit of economic integration can also present novel international challenges for participating States. For instance, developing States or less developed States may engage in defensive regionalism in order to improve their collective bargaining powers against dominant States in the

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[16] Balassa, *The theory of economic integration*.

[17] A El-Agraa, *Regional integration: Experience, theory and measures*, Palgrave Macmillan, 1999, 1.

[18] El-Agraa, *Regional integration: Experience, theory and measures*.

[19] CA Odinkalu, 'Economic integration of West Africa: Challenges and prospects,' The International Conference, Accra, 21-24 October, 2019, 8.

[20] Odinkalu, 'Economic integration of West Africa: Challenges and prospects,' 8.

[21] CC Ohuruogu, 'Economic integration of the West African States within the ECOWAS framework: Vision, prospects and illusion,' The International Conference, Accra, 21-24 October 2019, 4.

global economy. It may also result into a divide and conquer strategy in inter-regional and multinational negotiations which then, places additional burdens on State-actors to maintain solidarity of the region. It has also been argued that the advantages of economic integration fall into three categories, trade benefits, employment, and political cooperation.[22] Arguably, the tenet of the above assertion is that, the founding Member States of ECOWAS envisaged the idea of economic integration that would also lead to the protection of individual rights and improve availability of a wider efficiency gains within the sub-region.[23] It suffices to state that, individual rights of establishment constitute fundamental factors for sub-regional integration.

Having established that the protection of individual rights of establishment is germane in any integration policies (be it legal, political or economic integration), the next ambit of this article interrogates the inability of ECOWAS citizens to litigate before the ECCJ for the violation of their rights of establishment.

2.0 Protection of individuals rights of establishment

Although the 1975 ECOWAS Treaty did not create a Community Court, it envisaged a Tribunal which would ensure the observance of law and justice in the interpretation of the Treaty.[24] The ECCJ was officially established by the 1991 Protocol as the principal legal organ of the ECOWAS with the responsibility to interpret and apply the treaties, conventions, protocols and decisions of the Community. Consequently, the principal function of the Court as expressed by the legal instruments of the Community includes settlement of disputes among or between Member States, institutions and officials of the

[22] B Abbot and W Kenton, 'Economic integration' <https://ww.investopedia.com/termss/e/economic-integration.asp> accessed 4 November 2019.

[23] Abbot and Kenton, 'Economic integration'.

[24] ECOWAS Treaty, Article 11. It was originally conceived as the 'Tribunal of the Community' in the 1975 ECOWAS Treaty, the ECOWAS Community Court of Justice (ECCJ) came into existence through a 1991 Protocol adopted by the ECOWAS Heads of State and Government. The ECCJ is currently established by Articles 6 and 15 of the 1993 Revised ECOWAS Treaty.

Community. The ECCJ also enforces Community laws, protects and enforces human rights of citizens of Member States.[25]

The ECCJ is equally empowered to hear and determine contentious disputes within its jurisdiction, render advisory opinions brought before it by appropriate institutions or Member State(s) of the Community, as the case may be.[26] It has the power to act as an arbitrator pending the establishment of an Arbitration Tribunal.[27]

However, the ECCJ is restrictive in nature as direct claims by individuals and non-governmental organisations (NGOs). This remains a major inadequacy of the 1991 Protocol. Interestingly, this defect was not rectified in the comprehensive review of the 1975 Treaty of ECOWAS which resulted in the ECOWAS Revised Treaty of 1993. However, the 1993 Treaty created personal rights for individuals.[28] It is baffling that the 1991 Protocol, in restricting the jurisdiction of the Court to State Parties alone, did not take cognisance of the incursion made into the rights of individuals by Protocols postdating the 1975

[25] The human rights mandate of the Court was introduced by the Supplementary Protocol A/SP.1/05.

[26] The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty. See Article 10 of Protocol A/P.1/7/91.

[27] Supplementary Protocol A/S.P.1/01/05 Amending the Protocol A/P.1/7/9 relating to the Community Court of Justice, art. 9(5).

[28] For instance, Article 3 of the ECOWAS Revised Treaty provides for; the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments; the adoption of measures for the integration of the private sector, particularly the creation of an enabling environment to promote small and medium scale enterprises; the establishment of an enabling legal environment; the harmonisation of national investment codes leading to the adoption of a single Community investment code; the harmonisation of standards and measures; the promotion of balanced development of the region, the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions; the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socio-economic development; the establishment of a fund for co-operation, compensation and development; and any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives. See also, Article 10(d) of the ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice. Also see the 1993 Revised ECOWAS Treaty which also refers to specific rights and obligations of Member States as in Articles 56(2), 59 and 66(2) (C).

Treaty,[29] which rights could not be complete without a complementary right to judicial redress. In view of the above assertion, there were global and internal pressures from NGOs[30] and probably the Court itself[31] that compelled the amendment of the 1991 Court Protocol in 2005. Although, the Court was still in its rudimentary stage as at the time the initial Protocol was drafted.

Having recognised the limited nature of its jurisdiction as a major obstacle at inception,[32] the Court embarked on sensitisation missions to draw attention to its existence and enlighten prospective litigants about its jurisdiction and competence.[33] The efforts did not yield the expected results because of the inherent defects in the 1991 Protocol,[34] which restricted individuals' access to the Court.

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[29] Such as the rights of residence, movement and establishment of citizens.

[30] In 2001, NGOs formed the West African Human Rights Forum, an umbrella organisation that gained accreditation from ECOWAS and attempted to influence Community policymaking. These opportunities for regional mobilisation provided an avenue in 2004 for human rights groups to contribute to proposals to expand the Court's jurisdiction. See Karen Alter, Laurence Helfer, and Jacqueline McAllister, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' <http://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/AfricaCourts_files/AlterHelferMcAllisterECOWASAJIL.107.4.737.Helfer.pdf> accessed 20 January 2020.

[31] The Court gained 'jurisdiction to determine case(s) of violations of human rights that occur in any Member State' in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance, requiring that the Court be given 'the power to hear, inter-alia, cases relating to violations of human rights…'. The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights**,** considered by Article 1(h) of Protocol A/SP1/12/01.

[32] Franca Ofor, 'Limits of persona jurisdiction: Perspective of ECOWAS Court of Justice' < https://www.google.com/search?q=Franca+Ofor+%E2%80%98Limits+of+Personal+Jurisdiction> accessed 10th February, 2022. See *Jerry Ugokwe v Federal Republic of Nigeria* [2005] ECCJ Suit No ECW/CCJ/APP/02/05; *Jerry Ugokwe v Nigeria* [2005] ECCJ Judgment No ECW/CCJ/JUD/03/05; *Kéiita and Another v Mali* [2005] ECCJ Suit No ECW/CCJ/APP/05/06; *Moussa Léo Kéita v Mali* [2007] ECCJ ECW/CCJ/JUD/03/07; *Essein v Republic of the Gambia* [2005] ECCJ Judgment No ECW/CCJ/APP/05/05; *Manneh v The Gambia* [2007] ECCJ Suit No ECW/CCJ/APP/04/07; *Mani Karou v Republic of Niger* [2008] ECCJ Judgment No ECW/CCJ/JUD/06/08; *The Registered Trustees of the Social Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2009] ECCJ Suit No ECW/CCJ/APP/08/09; *The Registered Trustees of the Social Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2010] ECCJ Ruling No ECW/CCJ/APP/07/10.

[33] The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011, Herlem Publishers, 2011, 04-05.

[34] Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice.

Access to the Court was widened in 2005 to allow individuals and corporate bodies within the sub-region to institute cases before it. The 2005 Supplementary Protocol also included in Court's mandate the interpretation of the legal texts of the Community, dispute settlement, enforcement of Community obligations and human rights violations.[35] However, the changes were not so far-reaching as to allow individuals to play significant roles in using the judicial process to shape Community laws. Article 9(3) of the 1991 Protocol grants the rights to litigate before the Court only to Member States. Despite the above treaty provision, it became obvious as no Member State instituted any action against another State party to enforce ECOWAS laws or seek to protect any of its nationals against any other Member State or institution of the Community in the fourteen-year period of the existence of the Court before the Protocol was amended to expand the Court's jurisdiction.

The fate of individuals who were daring enough to test the jurisdiction at that time is exemplified by *Afolabi v Federal Republic of Nigeria,*[36] where a Community citizen of Nigerian nationality claimed that the unilateral closure of the Nigeria/Benin border sometime in 2003 was unlawful and a breach of the provisions of the ECOWAS laws. Mr Afolabi cited the provisions of the ECOWAS Treaty, the Protocol on Free Movement of Persons and Goods, and the provisions of Article 12[37] of the African Charter on Human and Peoples' Rights to back his claim. He claimed compensatory reliefs and mandatory order of injunction to restrain the government of Nigeria from further closing the borders. The Court construed the Protocol literally and upheld the preliminary objection, stating that Article 9(3) of the Protocol A/P.1/7/91 under which the plaintiff instituted his action did not grant direct access to individuals for breach of their fundamental human rights.

The Court maintained this approach even after the enactment of the 2005 Supplementary Protocol[38] and was unprepared to give effect to the new provisions on its expanded jurisdiction. Individual lack of access before the ECCJ

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[35] Supplementary Protocol A/SP.1/01/05, Article 9.

[36] *Afolabi v Federal Republic of Nigeria,* [2004] ECCJ 2004/ECW/CCJ/04.

[37] Every individual shall have the right to freedom of movement and residence within the borders of a State, provided he abides by the law.

[38] Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice.

became obvious in the subsequent case of *Ukor v Laleye.*[39] It is important to note that both Protocols entered into force provisionally as soon as the Authority of Heads of State and Government of member states signed them. As the 1991 Protocol did not endow the ECCJ with human rights jurisdiction, the relevant provision from a human rights perspective is Article 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January, 2005. In the absence of anything to the contrary, the ECCJ can only entertain cases of violations that occur after that date. The ECCJ has lent judicial backing to this position as it declined jurisdiction on this ground in the above case.[40]

This inability of the ECCJ to grant access to the individuals to enforce their rights of establishment was demonstrated in *Pinheiro v Republic of Ghana*[41] where the ECCJ held that the Protocol on the Court does not grant individuals with the *locus standi* to sue a Member State for violation of its obligations enshrined in Community texts. Accordingly, only a Member State or the ECOWAS Commission has access to the Court to compel a Member State to fulfil an obligation. The ECCJ took a similar view in *Chude Mba v Republic of Ghana,*[42] where it held that the Applicant was not competent to litigate the provisions of the Protocol on the Community Court of Justice as an individual. In *Karim Meissa Wade v Republic of Senegal*,[43] though upholding *its jurisdiction to examine actions brought for failure by an ECOWAS Member State to honour its obligation, the Court reaffirmed its strict view that the application brought by Mr Wade, in the aspects relating to requests before the ECCJ to examine failure by the Republic of Senegal to fulfil its Community obligations, were inadmissible for lack of competence.*

[39] *Ukor v Laleye* [2005] ECCJ, Judgment No ECW/CCJ/APP/01/05, 19.

[40] Solomon Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2009) 7(2), *African Human Rights Law Journal*, 307-329.

[41] *Pinheiro v Republic of Ghana* [2010] ECCJ, Suit No ECW/CCJ/APP/07/10; *Pinheiro v Ghana* [2010] ECCJ, Judgment No ECW/CCJ/JUD/11/12.

[42] *Chude Mba v Republic of Ghana* [2018] ECCJ, Judgment No ECW/CCJ/JUD/30/18.

[43] *Karim Meissa Wade v Republic of Senegal* [2019] ECCJ, Judgment No ECW/CCJ/JUD/13/19.

The Court restated this position in Gnassingbe Kpatcha v Republic of Togo.[44] In its reasoning, the ECCJ held that 'a mere interest in a problem, no matter how qualified an individual or group is in the evaluation of the problem is not of itself sufficient for the Community Court of Justice to render such an individual or group adversely affected or aggrieved for the purpose of giving it standing to obtain judicial decision.' Article 7(3) (g) of the Revised ECOWAS Treaty expressly vests in the Authority of Heads of State and Government the powers to refer where it deems necessary any matter to the ECCJ when it confirms that a Member State or Institution of the Community has failed to honour any of its obligations.[45]

Thus, Article 3(1) of the Supplementary Act on Sanctions provides for judicial and political sanctions against Member States or their leaders that fail to honour their obligations to the Community.[46] In the same vein, Article 77 (1) of the Revised Treaty sets out a sanctions regime for States that fail to undertake their obligations under the Treaty. These may include: suspension of new Community loans or assistance; suspension of disbursement on-going Community projects or assistance programmes; exclusion from presenting candidates for statutory and professional posts; suspension of voting rights and suspension from participating in the activities of the Community. In spite of these sanctions mentioned, it is trite to state that the provision only enjoins the Authority of Heads of State and Government to take action to enforce that obligation. The article gives no right or cause of action to individuals to do so. Accordingly, the ECCJ held that the Plaintiff (Pinheiro) lacks the *locus standi* to prosecute the case against the Defendants (Republic of Ghana) having not violated any human rights that would warrant an action.

On this note, having established that the individuals still do not have access to litigate the violations of their rights of establishments before the ECCJ, it is therefore our argument that, the ECCJ can adopt a purposive interpretation of its jurisdiction *vis-a-vis* the Revised Treaty and other Community

[44] *Gnassingbe Kpatcha v Republic of Togo* [2015] ECCJ, Judgment No ECW/CCJ/JUD/08/15.

[45] Supplementary Act A/SP.13/02/12, Article 3(1); Supplementary Protocol (A/P.1/01/05), Article 9(1) (a), (d), (e) and (f).

[46] Supplementary Act A/SP.13/02/12.

Protocols[47] that gives rights to individuals in a manner that allows them to question Community acts.

With regards to the restricted nature of its jurisdiction as a major obstacle at beginning,[48] when access to the Court was limited to State parties and its institutions, the Court embarked on sensitisation missions (as early as it was inaugurated in year 2001) to draw attention to its existence and enlighten prospective litigants about its jurisdiction and competence.[49]'The efforts did not yield enough results because of the inherent defects in the Protocol,[50] which restricted individuals' access to the Court. However, it was the global developments and internal pressures from NGOs[51] and probably the Court itself[52]

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[47] Such as the Protocol Relating to Free Movement, Residence and Establishment; Supplementary Protocol A/SP.2/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; Decision A/DEC.2/7/85 of the Authority of Heads of State and Government of the ECOWAS Relating to the Establishment of ECOWAS Travel Certificate for Member States; Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment; Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment; Decision A/DEC.2/5/90 Establishing a Residence Card in ECOWAS Member States.

[48] (2004-2009) CCJELR VII. These include: *Ugokwe v Federal Republic of Nigeria and Others*; *Kéiita and Another v Mali*; *Essein v Republic of the Gambia*; *Manneh v Gambia*, *Karou v Niger*; *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Another.*

[49] *The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011,* Herlem Publishers, Abuja, 2011, 4-5.

[50] Protocol A/P.1/7/91 on the Community Court of Justice.

[51] In 2001, "NGOs formed the West African Human Rights Forum, an umbrella organisation that gained accreditation from ECOWAS and attempted to influence Community policymaking. These opportunities for regional mobilisation provided an avenue in 2004 for human rights groups to contribute to proposals to expand the Court's jurisdiction." See KJ Alter, LR Helfer and JR McAllister, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice', available at http://faculty.wcas.northwestern.edu/~kal438/KarenJAl ter2/AfricaCourts_files/AlterHelferMcAllisterECOWASAJIL.107.4.737.Helfer.pdf. accessed 20 January 2020.

[52] The Court gained 'jurisdiction to determine case(s) of violation[s] of human rights that occur in any Member State' in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance, requiring that the Court be given 'the power to hear, inter-alia, cases relating to violations of human rights…' The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights, considered by Article 1(h) of Protocol A/SP1/12/01.

that compelled the amendment of the 1991 protocol of the ECCJ in 2005 to accommodate individual litigants. Although individuals now have access to the Court, the limited manner in which the access has been granted remains a hindrance to the full actualisation of the roles they can play through litigation. The limitation is in the restriction of the jurisdiction only to human rights matters, without a right to litigate the protocols dealing with economic rights of Community citizens.

3.0 Protection of individuals rights of establishment in selected jurisdictions

Enforcement of disputes arising from the violations of individuals' rights of establishment in sub-regional courts, particularly, in Africa has faced a lot of challenges during their stages of operations. However, a few regional courts in Africa have also applied the doctrine of implied powers as developed by the International Court of Justice (ICJ) and as well as the Court of Justice of the European Union (CJEU). For instance, although the EACJ and the SADC Tribunal have also been impaired with jurisdictional challenges regarding their competence to adjudicate issues involving violation of individuals' rights, they have courageously progressed in the transformation towards the rationalisation of the individuals' rights of establishment within the EAC and the SADC.

3.1 The EACJ

In 1999, the Treaty of the East African Community (EAC) established the EACJ. Article 27 of the Treaty provides for the Court's jurisdiction over the interpretation and application of the Treaty and may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realise such extended jurisdiction. The Treaty has also expressed that the EAC is a people centred, as well as market-driven cooperation.[53] Fundamentally, the Community enjoins private sector and civil society participation in the

[53] EAC Treaty, Article 7(1).

negotiations that led to the conclusion of the Treaty, apart from the Summit and other organs of the Community.[54]

Although, the EACJ does not have an express mandate over issues relating to the violation of human rights that may occur within the sub-region, the established view of the Court is that there exists an implied mandate in the EAC Treaty which gives it competence to entertain and adjudicate over such cases. This position was tested in *Katabazi v Secretary General of the East African Community*,[55] where the Applicants were, *inter alia,* charged with treason and remanded in prison custody in Uganda. Subsequently, the Ugandan High Court granted bail to some of the Applicants but immediately after they were released on bail, the court was surrounded by security personnel who re-arrested them within the court premises. Thereafter, the Applicants were prosecuted before a General Court Martial and charged with similar offences and remanded in prison custody. Consequently, the matter was brought before the EACJ. The EACJ in its ruling, assumed jurisdiction and concluded that the intervention by the armed security agents of Uganda in preventing the execution of a court order violated the principles of rule of law, as well as the EAC Treaty.

Similarly, in the case of *Mohochi v Attorney General of Uganda,*[56] the EACJ supported the said view where it held that, once there is an allegation of infringement of the provision of the EAC Treaty, the EACJ has jurisdiction to interpret and apply the provisions alleged to be infringed under the powers conferred on it by virtue of Articles 23(1) and 27(1) of the EAC Treaty. By implication, an individual, who is a Community citizen and having an establishment in any Partner State of the Community and whose rights of establishment has been infringed upon, can seek redress before the EACJ for a remedy.

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[54] *East African Law Society and Others v Attorney General of Kenya and Others* [2007] EACJ, Reference No 3 of 2007.

[55] *Katabazi v Secretary General of the East African Community* [2007] EACJ, Reference No 1 of 2007, 3; *Democratic Party v Secretary-General of the EAC & 4 Others* [2013] EACJ Reference No 2 of 2012; *Venant Masenge v Attorney-General of the Republic of Burundi* [2014] EACJ, Reference No 9 of 2012; *African Network for Animal Welfare v Attorney General of the United Republic of Tanzania*, Judgment of 20 June 2014.

[56] *Mohochi v Attorney General of Uganda* [2011] EACJ Reference No 5 of 2011.

It is apt to commend the EACJ's interpretation on this legal question, as it shows a courageous approach of the Court in interpreting the provisions of the EAC Treaty in a clear approach that does not diminish the promotion and protection of the rights of individuals within the EAC.

3.2 The SADC Tribunal

The SADC Tribunal covers the interpretation and application of the SADC Treaty, its protocols and other legal instruments within the SADC.[57] The SADC Treaty and its Protocol on the SADC Tribunal are both silent on the adjudication of violation of human rights within the sub-region. However, the SADC Treaty does make reference to human rights, democracy and the rule of law.[58] In *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe,*[59] the SADC Tribunal made practical and effective use of the principles contained in the SADC Treaty and judiciously asserted that it had the power and competence to adjudicate over human rights cases.

4.0 Concluding remarks and recommendations

The inability of individuals to use Community legal instruments for the protection of their rights remains a key factor in impeding integration in the ECOWAS sub-region. Although individuals now have access to the ECCJ, the

[57] Treaty of the Southern African Development Community, Article 16 (1); the Protocol on the Tribunal in the Southern African Development Community, Article 14.

[58] Preamble to the SADC Treaty which provides for the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law; and Article 4(c) of the Treaty which requires Member States to act in accordance with the principles of human rights, democracy and the rule of law.

[59] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* [2008] SADC Tribunal, (2/2007) [2008] SADCT 2. As a direct result of the Zimbabwean opposition to the Campbell decision, the Heads of State and Government of SADC decided to suspend the Tribunal in August 2012. In the same meeting, SADC countries also declared that a successor court, if ever constituted, would have no jurisdiction over cases brought by individuals and civil society against states. Rather, only States would have access to the Court, to solve inter-State disputes. See also *Louis Karel Fick v Republic of Zimbabwe* 2010 SADC 8 (16 July 2010).

limited manner in which the access was granted remains a hindrance to the full actualisation of their role in integration through litigation. The limitation is in the restriction of the jurisdiction only to human rights matters, without a right to litigate other legal instruments like the Protocols. If the Court's jurisdiction as it presently stands is not expanded to accommodate individuals who are supposed to be the prime movers of businesses in the sub-region, to litigate, as well to protect their businesses, then the realisation of integration objectives envisaged by ECOWAS would remain a hope in transit. This is because the ECOWAS Court is supposed to be a court of justice that should accommodate issues effecting not just Member States, its institutions and/or individuals' human rights violations, but also, Community citizens' rights of establishment. The EACJ and the SADC provide ready lessons for the ECCJ to adopt a courageous approach in protecting the rights of individuals under the ECOWAS legal framework.

EFFECT OF COVID-19 CONTAINMENT MEASURES ON THE RIGHT TO FREE MOVEMENT UNDER EAST AFRICAN COMMUNITY COMMON MARKET LAW

Priscah Wamucii Nyotah*

Abstract

The right of establishment is provided for under the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol). It entitles nationals of an East African Community (EAC) Partner State to move into another Partner State, establish themselves and carry out economic activities. The attainment of the right of establishment is one of the key drivers towards the achievement of the accelerated economic growth and development of the Partner States. Due to the Covid-19 pandemic, the EAC Partner States have invoked protection of public health as a ground to restrict the movement of citizens of other Partner States into their territories. Through content analysis method, this paper analyses the provisions of the Common Market Protocol in facilitating the realisation of the right of establishment in the wake of pandemics such as Covid-19, with a focus on free movement of persons. It finds that there are no parameters on the invocation of threat to public health as a ground for limiting free movement under the Common Market Protocol. It concludes that this lack of guiding provisions contributes to the violation of the right of establishment.

Keywords: right of establishment, Covid-19 pandemic, EAC, public health restrictions

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1.0 Introduction

The Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) provides for a number of rights, including the right of establishment. This right entitles nationals of Partner States to move into another Partner State, establish themselves and carry out economic activities,[1] as a self-employed person, or to set up and manage economic undertakings on a stable, continuous, and long-term basis. Attaining the right of establishment is one of the key drivers towards Partner States achieving accelerated economic growth and development,[2] and must therefore, be realised if the accelerated economic growth and development of the Partner States is to be fully attained.

Taking cue from the Economic Community of West African States (ECOWAS), its states recognised that economic development can be achieved by opening up their borders to international specialisation, and that to achieve this, focus must shift to citizens of the other Partner States and their role in assisting the Member States to achieve their desired economic development.[3]In the EAC, juridical persons are placed in the same footing with natural persons to enable them move freely and do business in the Partner States. The beneficiaries of the right of establishment are business people and organisations, who are motivated to contribute to the economy of the Partner State, and by extension, the region's economic development. This right aims to create for them a conducive and expanded business environment within which to thrive.[4]

The right of establishment involves complete integration into the economy of the host Partner State by being able to join social security schemes, and to move with their spouses, children or dependants who are entitled to be employed or to engage in economic activities as self-employed persons provided that the child meets the age limits under the national law of the host Partner

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[1] Protocol on the Establishment of the East African Community Common Market, Article 13.

[2] Common Market Protocol, Article 4(2)(a).

[3] Michael P Okom and Rose Ohiama Ugbe, 'The right of establishment under the ECOWAS common market protocol', 2(5) *International Journal of Law* (2016) 42.

[4] Okom and Ugbe, 'The right of establishment under the ECOWAS Common Market Protocol', 40.

State.[5]Just like natural persons, juridical persons, that is, companies or firms, are also entitled to establish themselves in a Partner State by setting up and managing undertakings through incorporation of companies or firms in the Partner State, or through setting up of agencies, branches or subsidiaries,[6]so long as they meet the nationality criteria.[7] They must have been established according to the national laws of a Partner State, have their registered office, central administration or principal place of business and must be carrying out substantial business activities in a Partner State.[8]

For nationals of EAC Partner States to realise their right of establishment, they must be able to enter, stay and move freely within the host Partner State. Thus, the freedom of movement is a key enabler of the realisation of the right of establishment.[9] The Covid-19 pandemic has negatively affected the freedom of movement, and therefore, the right of establishment, because Partner States have invoked protection of public health as a ground to restrict the movement of citizens of other Partner States into their territories.[10]

Through the content analysis method, this paper analyses the provisions of the Common Market Protocol in facilitating the realisation of the right of establishment in the wake of pandemics such as Covid-19, with a focus on the free movement of persons. The paper concludes that lack of guiding provisions on the implementation of public health limitations contributes to the violation of the right of establishment. It proposes some interventions that can be put in place in order to assist Partner States to protect and promote the health of their own citizens while still allowing nationals of other Partner States to realise their right of establishment.

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[5] Common Market Protocol, Article 10(5), 13(3)(b) and 13(4).

[6] Common Market Protocol, Article 13(11)(b)(i).

[7] Common Market Protocol, Article 13(6).

[8] Common Market Protocol, Article 13(6).

[9] East African Community, Common Market (Right of Establishment Regulations) (Annex III), Regulation 5.

[10] Common Market Protocol, Articles 7(5) and 13(8).

2.0 Background

The Common Market Protocol was signed by EAC Heads of States and Government on 20 November 2009 and entered into force on 1 July 2010.11 One of the objectives of the Common Market Protocol is to facilitate the realisation of faster economic development through attainment of the free movement of goods, persons, labour, services and capital and the rights of establishment and residence.[12] The right of establishment is one of the two rights provided for under the Common Market Protocol.[13] As such, it deserves due attention, promotion and protection as it has a role to play in the realisation of the potential of all persons in the EAC in the pursuit of their economic progress. It is the duty of Partner States to promote and protect it. Partner States made commitments under Articles 13(1) and 54(2) of the Common Market Protocol to ensure that all these rights and freedoms are enforceable under their constitutions, national laws, or administrative structures; and that anyone who feels that their rights have been violated or there is a threat of violation has access to legal redress even when the violation or threat is by persons acting in their official capacity.[14]

Freedom of movement is one of the pre-conditions for the realisation of the right of establishment. It has also been identified as a crucial prerequisite for the development of the human person.[15] In other words, for a person to be able to achieve their economic development goals, they must be able to move from one point to another, and if countries want to achieve economic development, they must allow people to move freely across borders. However, the right of establishment is not absolute. It is subject to restrictions based on public health, public policy and public security considerations.[16] The same

[11] Common Market Protocol, 53; East African Community, history of the EAC, eac.int on 8 May 2022.

[12] Common Market Protocol, preamble para 6.

[13] Common Market Protocol, Article 2(4). The right of residence is the second right.

[14] Common market protocol, Article 54.

[15] UN Human Rights committee, CCPR General Comment No 27 Article 12 (freedom of movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 1.

[16] Common Market Protocol, Article 13(8).

restrictions are applicable to the freedom of movement of persons.[17] The decision as to whether to introduce restrictions to the right of establishment is the responsibility of the Partner States, which have to act in compliance with the Common Market Protocol.[18] A well-coordinated, predictable and transparent approach to the adoption of restrictions on freedom of movement is indispensable to prevent the spread of Covid-19, to protect and promote the health of citizens, and to maintain free movement within the Community under safe conditions. This is very important for nationals of the EAC who intend to, or are in the process of establishing themselves in other Partner States in light of the unpredictable nature of the Covid-19 pandemic.

On 11 March 2020, the World Health Organisation (WHO) declared Covid-19 a pandemic due to factors such as its alarming levels of spread, severity and major negative social and economic consequences.[19] WHO defines a pandemic as a worldwide spread of an illness which makes many people sick.[20] The designation of a new disease as a pandemic is important because it informs the possible measures that can be taken to contain the spread of the disease, including measures restricting movement of persons across national borders. As noted by the World Trade Organisation (WTO), due to Covid-19, governments around the world imposed and continue to impose travel or immigration restrictions, which have severely restricted cross-border movement of individuals and negatively affected trade and investment.[21] The EAC Secretary-General has noted that the Covid-19 pandemic has disrupted livelihoods and negatively impacted economic growth in the region.[22]

The EAC has correctly stated that free movement of persons has the effect of spreading diseases such as the Covid-19,[23] and to contain its spread,

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[17] Common Market Protocol, Article 7(5).

[18] EAC Treaty, Article 13(7).

[19] World Health Organisation, 'WHO Director General's opening remarks at the media briefing on Covid-19', 11 March 2020.

[20] World Health Organisation, *Community case management during an influenza outbreak: Trainer's guide,* World Health Organisation, 2011, 30.

[21] World Trade Organisation, 'Cross-border mobility, Covid-19 and global trade: Information note', 25 August 2020.

[22] Luke Anami, 'East Africa: Secretary-General Mathuki to rid EAC of hurdles stifling business', *The East African, 27* April 2021.

[23] East African Community Covid-19 response plan, April 2020, 3 and 8.

Partner States have adopted various measures, some of which have had an adverse impact on free movement of persons.[24] These measures include: mandatory quarantine for all travellers entering the Partner States; reporting of cases and sharing information with other Partner States; strict screening procedures at border posts; and minimised cross-border movement of people.[25] While the measures are intended to safeguard the health and wellbeing of citizens, they have had serious consequences for the freedom of movement of persons within the EAC. Restoring freedom of movement, while protecting public health, is a major concern, especially for businesspeople.

While it is known that Covid-19 is a pandemic as defined by WHO,[26] Partner States do not seem to be in agreement on the nature of the disease, the magnitude, and approaches to its containment.[27] Consequently, there is no uniformity in the introduction and application of restrictions based on public health across the EAC Partner States and the people who suffer the consequences of this confused situation are the citizens of the EAC who intend to, or are exercising their right of establishment.

For instance, Tanzania was reported as one of the countries which initially refused to report cases and publish data on Covid-19, refused to take public health measures to counter transmission of the disease, and failed to roll out vaccination.[28] The restrictions being put in place appear unilateral and have resulted in significant disruptions in the business environment. Nationals are still confronted with a wide array of diverging measures, which are often adopted on short notice, are based on very different criteria, or not sufficiently coordinated with other Partner States. This has resulted in a high level of uncertainty for both citizens and businesses.

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[24] EAC Covid-19 response plan, 6.

[25] EAC Covid-19 response plan, 6 and 7.

[26] WHO, 'WHO director general's opening remarks at the media briefing on Covid-19' also, WTO, 'Cross-border mobility, Covid-19 and global trade: Information note'.

[27] Tabitha Kiriti Nganga, Daniel Abala, Kennedy Osoro, Benedicto Ongeri, Socrates Majune Kraido, Justine Ongeri Mogendi and Gastone Otieno, 'Impact of Covid-19 on international trade and post-recovery strategies in Kenya', *WTO Chairs Programme*, 2022, 21.

[28] World Health Organisation, 'Director-General's statement on Tanzania and COVID-19', 20 February 2021.

The EAC has made some steps towards training of staff serving at border entry points on the Covid-19 Response Plan.[29] However, no efforts have been made to train public officers who make policies on the manner of imposing restrictions on the basis of public health in light of the fundamental rights under the Common Market Protocol. None of the Partner States has taken up this initiative individually. Consequently, there is no common approach on balancing public interest in curbing the spread of the virus on the one hand, and promoting and protecting the right of establishment on the other hand. Political statements have been made, for example, by President Samia Suluhu of Tanzania,[30] that there will be better cooperation in promoting cross-border investments. The nature and extent of such cooperation remains to be seen.

3.0 The right of establishment

In 1986, the United Nations General Assembly (UNGA) adopted the Declaration on the Right to Development.[31] The Declaration was adopted pursuant to the principles of the Charter of the United Nations, on international cooperation for development and promotion of higher standards of employment, living, and social and economic development and progress.[32] The UN General Assembly viewed development as a comprehensive economic, social, cultural and political process aimed at the constant improvement of the well-being of all individuals and peoples, on the basis of their participation in development and in the fair distribution of its benefits.[33] The UN General Assembly, therefore, declared the right to development a human right.[34] This means that states have the responsibility to create national and international conditions favoura-

[29] EAC Covid-19 response plan, 10; EAC, 'EAC secretariat strengthens outbreak response capacities of one stop border posts', Press release, 2 October 2020.

[30] Presidential Strategic Communications Unit, 'Kenya and Tanzania agree to eliminate barriers to trade and free movement of people', 4 May 2021.

[31] United Nations Declaration on the Right to Development, 4 December 1986, A/RES/41/128 UNTS.

[32] United Nations Declaration on the Right to Development, preamble para 1; Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 55.

[33] UN Declaration on the Right to Development, preamble paras 1 and 2.

[34] UN Declaration on the Right to Development, Article 1.

ble to the realisation of the right to development.[35] To achieve this, the General Assembly called upon states to put in place appropriate policy, legislative and institutional measures at national and international levels.[36]

The right to development is a right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic and social development.[37] It applies to all people, in all countries, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[38] The right's core elements include: people-centred development, participation, equity, non-discrimination, and self-determination.[39] States have taken up the responsibility and this is evident in the regional integration efforts where economic development is one of the main objectives, and nationals of the Partner States have been identified as key drivers of the objectives. Their participation has been recognised and protected in regional treaties, through provisions such as those allowing free movement of goods, people, services and rights of residence and establishment.

In the EAC, one of the operational principles for the practical achievement of accelerated, harmonious and balanced development and sustained expansion of economic activities is people-centred and market-driven cooperation,[40] hence the creation of the Common Market.[41] One of the specific objectives of the Common Market is to accelerate economic growth and development of the Partner States through the attainment of the right of establishment.[42] Therefore, the right of establishment is one of the ways in which EAC Partner States protect and promote the right to development as the right of establishment enables nationals to participate in, contribute to and enjoy

[35] UN Declaration on the Right to Development, Article 4.

[36] UN Declaration on the Right to Development, Article 10.

[37] United Nations, 'Frequently asked questions on the right to development', 2016, Question 1, ohchr.org on 2 August 2021.

[38] United Nations, 'Frequently asked questions on the right to development, question 1.'

[39] United Nations, 'Frequently asked questions on the right to development, question 1.'

[40] Treaty for the Establishment of the East African Community (EAC Treaty), 2144 UNTS 255, Article 7(1)(a).

[41] EAC Treaty, Articles 5 and 76; Common Market Protocol, preamble para 2 and Article 4.

[42] Common Market Protocol, Article 4(2).

economic and social development in the territories of host Partner States. They do this by moving into the territories of host Partner States and carrying on economic activities as self-employed persons or through juristic persons, such as, companies, firms and sole proprietorships.

The right of establishment is one of the key drivers in the achievement of the goal of the EAC Common Market, namely, to achieve accelerated economic development in the Partner States.[43] The other drivers are freedom of movement of persons, goods, capital, labour, and services and the right of residence.[44] Recognising this right is not sufficient in itself. There must be legal provisions to guide its realisation. Max Weber, a proponent of law and development theory of law, observes that the law provides certainty in commercial dealings and protects civil liberties for economic well-being.[45] Yong-Shik Lee states that law safeguards and maintains internal stability and guides countries' paths of development.[46] Back in the 18th Century, Adam Smith had argued that imperfect law and the unpredictability in its enforcement is a factor that retards commerce.[47] Consequently, there must be legal provisions that guide how the right of establishment is to be realised, and specifically, guide invocation of public health as a ground for restricting free movement of persons in pursuit of their right of establishment.

Neither the EAC Treaty nor the Common Market Protocol expressly define the right of establishment. ECOWAS defines it as 'the right granted to a citizen, who is a national of the Member State, to settle or establish in another Member State, other than the State of origin, and to have access to economic activities, to carry out these activities, as well as to set up and manage enterprises and, in particular, companies, under the same conditions as defined by the legislation of the host Member State for its own national'.[48] The European

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[43] Common Market Protocol, preamble, para 6.

[44] Common Market Protocol, preamble, para 6.

[45] Max Weber, *Law in economy and society*, Touchstone Publishers, 1967, 30.

[46] Yong-Shik Lee, 'General theory of law and development', 50(3) *Cornell International Law Journal* (2017) 471.

[47] Adam Smith, *Lectures on jurisprudence*, Oxford University Press, 1978, 528.

[48] ECOWAS, Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment (29 May 1990) A/SP 2/5/90), Article 1.

Union (EU) defines the right to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the country where such an establishment is sited.[49]

In the context of the right of establishment, an 'economic undertaking' means an entity that carries on economic activities.[50] This means that the income generating activities could include activities such as provision of services, where one earns remuneration or income. Non-profit making activities, such as charitable groups, religious organisations, and trusts do not qualify as economic activities and are therefore, excluded.[51] The right signifies integration in the economy of the host Partner State, excludes persons employed under any contract of employment, and involves long term stays in the territory of the host State.[52]

4.0 Scope of the right of establishment

The EAC Partner States guaranteed the right of establishment to nationals of other Partner States within their territories.[53] The Common Market Protocol defines a national of a Partner State as 'a natural or legal person who is a national in accordance with the laws of the Partner State.'[54] A national of any other country not a Partner State in the EAC cannot benefit from this right even if they legally reside in a Partner State, even on long term basis. The right of establishment enables an individual to move to another state and establish a new company or firm, or to start branches of an existing company or firm.

The requirement that juridical persons must have their registered office, central administration or principal place of business and must be carrying out

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[49] Treaty Establishing the European Economic Community – TEC, Article 43 (Article 49 of the renamed Treaty on the Functioning of the European Union - TFEU).

[50] *Klaus Höfner and Fritz Elser v Macrotron GmbH* (1991) I-01979*,* para 21.

[51] Cesare Maestripieri, 'Freedom of establishment and freedom to supply services', 10 *Common Market Law Review* (1973) 151.

[52] Maestripieri, 'Freedom of establishment and freedom to supply services', 150.

[53] Common Market Protocol, Article 13(1).

[54] Common Market Protocol, Article 1.

substantial business activities in a Partner State,[55] prevents 'briefcase companies'[56] from benefiting from this right. It also means that it is not possible to form a company in one Partner State for the sole purpose of establishing itself in another Partner State, through opening of branches. Such a company must demonstrate that it actually carries on business activities in the home Partner State.

For a person to invoke the right of establishment, there must be a cross-border element or activity,[57] which means that the right is not available to nationals of a Partner State against their own governments or fellow nationals. For a natural person to benefit under this right, they must be a national of a Partner State seeking to do business in the territory of another Partner State.[58] A person who pursues an economic activity is regarded as self-employed if they are not under any contract of employment or supervision and earn a living through this activity.[59] A dependant of a self-employed person is only entitled to admission to a host Partner State and, it is the duty of the host Partner State to facilitate their entry and ability to take up the economic activity.[60]

There are a number of obligations which Partner States must fulfil in order to facilitate the right of establishment. These include non-discrimination on the ground of nationality,[61] removal of restrictions and non-creation of new ones,[62] free movement of persons with regard to entry, stay and exit,[63] and mutual recognition and acceptance of certifications granted and requirements met in other Partner States.[64] Everyone lawfully within the territory of a State enjoys the right to move freely from one place to another within that territory and to choose their place of residence.[65]

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[55] Common Market Protocol, Article 13(6).

[56] A company that only exists on paper and does not have a known actual place of business and the nature and size of their business activities are not well known.

[57] Common Market Protocol, Article 13(3).

[58] Common Market Protocol, Article 13(1) and (3).

[59] Common Market Protocol, Article 1.

[60] Common Market Protocol, Article 10(6), 13(4), 14(2).

[61] Common Market Protocol, Articles 3(2)(a) and 13(2).

[62] Common Market Protocol, Articles 13(5) and 16(5).

[63] Right of Establishment Regulations, Regulation 5.

[64] Right of Establishment Regulations, Regulation 13.

[65] Common Market Protocol, Article 4(2)(a), 5(d) and 7(1).

According to Regulation 5 of EAC Common Market (Right of Establishment) Regulations (Annex III), an individual, their spouse and child may freely enter, stay or exit the territory of a host Partner State upon compliance with immigration procedures and laws of the host Partner State.[66] However, a host Partner State can limit free movement on the basis of public health, provided that they notify the other Partner States when they are placed.[67]

5.0 Restrictions under the Common Market Protocol

As already highlighted, Articles 7(5) and 13(8) of the Common Market Protocol, subject the right of establishment and the freedom of movement of people to restrictions on the basis of public policy, health and security.[68] However, Partner States undertake to remove all restrictions or obstacles on the right of establishment based on the nationality of companies, firms and self-employed persons of the Partner States and, not to introduce any new restrictions in their territories, save as otherwise provided in the Protocol.[69] Partner States are further required to remove administrative procedures and practices that form obstacles to the right of establishment, and those that restrict entry of personnel of the companies or firms registered in another Partner State into that Partner State.[70] This means that any restriction must be in accordance with the provisions of the Common Market Protocol.

Since the onset of the Covid-19 pandemic, EAC Partner States have been imposing measures they deem appropriate to contain the spread of the coronavirus, such as closure of borders, mandatory quarantine, mandatory testing upon entry into the country, and Covid-19 negative certificates issued within certain hours before traveling into the country. But the application of such measures has been inconsistent. For instance, in May 2020, for travellers going into Tanzania, borders were not closed and there was no mandatory

[66] Right of Establishment Regulations, Regulation 5.

[67] Common Market Protocol, Article 7(5) and (6).

[68] Common Market Protocol, Article 7(5), on freedom of movement of people; and Article 13(8) on right of establishment.

[69] Common Market Protocol, Articles 5(2)(d) and 13(5).

[70] Common Market Protocol, Article 13(11).

quarantine[71] whilst quarantine was mandatory for travellers going into Kenya, Uganda, Rwanda at the time. In March 2020, South Sudan closed all her borders.[72] The measures were not uniform across the Partner States especially with respect to movement of people exercising their right of establishment. There was an apparent lack of co-ordination and protectionist approaches seemed to be given higher priority than protection and promotion of the right of establishment. Some legal issues are emerging on how Partner States can fulfil their duty to their own nationals and also to nationals of other Partner States in light of the pandemic.

Further, information on cross-border movement restrictions is not readily available on online platforms for health ministries and ministries concerned with EAC affairs in some of the Partner States as expected.[73] The EAC Secretariat website does not have any information or a centralised database on the individual Partner States' restrictions on cross-border movements.[74] Burundi's Ministry of Public Health website and information on Covid-19 therein are in French language, which is not a common language in the EAC.[75] Some of the ministries with some information on travel restrictions do not have up to date information. For instance, as at August 2021, the latest information on travel restrictions available on the website of Tanzania's health ministry was of 18 May 2020,[76] while that of South Sudan was in its April 2020 Standard Operating Procedure for Points of Entry.[77]As of the same August 2021, Kenya's Ministry of EAC Affairs website had no information on Covid-19 and cross-border movement.[78] Failure to provide up to date information online

[71] United Republic of Tanzania, Travel Advisory No 3 of 18 May 2020, tzembassy.go.tz, on 6 August 2021.

[72] South Sudan ministry of health, Coronavirus Disease (COVID 19) outbreak: standard operating procedure for points of entry (POE) April 2020, 8.

[73] See Uganda Health Ministry website, health.go.ug on 6 August 2021; Rwanda Ministry of Health website, moh.gov.rw on 6 August 2021.

[74] EAC secretariat website, eac.intl on 6 August 2021.

[75] Republic of Burundi Ministry of Public Health and the fight against AIDS website, minisante.bi on 6 August 2021.

[76] Tanzania Ministry of Health website, moh.go.tz on 6 August 2021.

[77] South Sudan Ministry of Health, Coronavirus disease (COVID 19) outbreak: Standard Operating Procedure for points of entry (POE).

[78] Kenya Ministry of East African Community and Regional Development website, meac.go.ke on 6 August 2021.

means someone who wishes to travel will have to find their way to a border entry point or contact civil aviation authorities to find out with certainty what travel restrictions are in place. In such circumstances, decision making for purposes of travel is made difficult and one may end up not moving into the territory of a Partner State at the time they need to. Furthermore, the restrictions keep changing from time to time depending on a specific country's situation. Lack of timely, accurate and readily available information negatively affects the freedom of movement. This kind of scenario may lead to loss of investment or business opportunities or increased costs.

In determining whether a restriction violates the provisions of Common Market Protocol, the test is whether the objective or effect of the restriction is to impair the realisation of the rights and freedoms, whether it is proportionate to the interest protected, whether it is discriminatory on the basis of nationality, and whether it is justifiable and necessary in a democratic society in view of public policy, health and security.[79] While restrictions on the grounds of public health are aimed at preventing threats to the health of the population, they must be specifically aimed at preventing diseases or injury or providing care for the sick or injured.[80]

The Common Market Protocol does not define what public health means or what it entails. The meaning of pandemic or epidemic have also not been provided. Lack of definitions has a potential effect of hindering the realisation of rights under the Common Market Protocol because decision making is not based on clearly defined parameters, as noted by the EAC in its Covid-19 Response Plan.[81] Lack of definition may make it easy for public officials charged with the responsibility of facilitating free movement to exercise their discretion/powers in a manner that does not promote free movement and therefore, it makes it harder for nationals of other Partner States to exercise their right of establishment.

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[79] Ilke Gocman, 'The freedom of establishment and to provide services: A comparison of the freedoms in European Union law and Turkey–EU association law', 8(1) *Ankara Law Review* (2011) 101; Common Market Protocol, Article 13(10).

[80] United Nations Commission on Human Rights, *The Siracusa principles on the limitation and derogation provisions in the international covenant on civil and political rights*, 28 September 1984, E/CN.4/1985/4, para 25.

[81] EAC Covid-19 Response Plan, 3.

In Tanzania, a disease becomes an epidemic, endemic or pandemic once it is so declared by notice in the Gazette by the Minister in charge of health in accordance with Section 25 of the Public Health Act. In Kenya, a declaration of a disease as a pandemic, epidemic or endemic is by order of the Minster of Health as per Section 35 of the Public Health Act. Uganda has a provision similar to Kenya's under Section 35 of Public Health Act. Rwanda, Burundi and South Sudan do not have any legal provisions to this effect. None of these countries attempt to define these terms in their laws. The measures that can be taken to contain the spread of the disease also differ immensely. In Uganda and Kenya, the measures are specified in their public health laws with discretion given to the Ministers for Health to take any measures they consider fit to achieve the intended goal.[82] In Tanzania, the measures are not specified. This facilitates the lack of uniformity in the mode of approach taken by the Partner States in dealing with the Covid-19 pandemic. For instance, if one Partner State does not declare the disease a pandemic, the rest of the Partner States will have difficulties dealing with the nationals of that Partner States. The Common Market Protocol and national laws of Partner States fail the transparency and accountability test.

In the EU, restrictions based on public health are in respect of diseases with epidemic potential, communicable ailments or transmittable parasitic diseases as defined by the WHO, provided that the diseases are the focus of protective rules and regulations applicable to citizens of the host state.[83] EU's definition of what a restriction on the basis of public health means is a useful guide to EU Member States in the wake of pandemics, such as the Covid-19 pandemic, since there is certainty in the application of the law. However, neither the EAC Treaty nor the Common Market Protocol houses such provisions.

Measures such as those requiring persons to go on quarantine upon entry or to carry out medical tests are reasonable restrictions. However, they must

[82] Public Health Act (Uganda), Section 36; and Public Health Act (Kenya), Section 71.

[83] European Union directive 2004/38/EC of the European parliament and the council [29 April 2004], Article 29, on the right of citizens of the union and their family members to move and reside freely within the territory of the member states amending regulation (EEC) No 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC (EU free movement and residence directive).

meet the criteria of ensuring that the effect of the restriction is not to impair the realisation of the right of establishment, be proportionate to the interest protected, not discriminatory on the basis of nationality, and must be justifiable within the imperatives of the common good or general interest, must be suited to achieving their intended goal and must not go beyond what is necessary to attain such legitimate objectives.[84] In addition, the requirement must be grounded in law.

Comparatively, in the EU, quarantines and taking of tests are acceptable restrictions and must be provided free of charge, as part of the medical examination required for persons entitled to the right of residence, so as not to impose a further burden on the citizens of the other Member States.[85] The Common Market Protocol does not provide any guidance to this effect. The measures being taken by the EAC Partner States do not seem to have any legal basis at the Community level.

5.1.0 Non discrimination

Discrimination of nationals of other Partner States on the basis of nationality would definitely constitute a barrier to the realisation of the right of establishment and freedom of movement. A discriminatory measure is one that prohibits or otherwise impedes economic activities,[86] or renders less attractive the exercise of a right or freedom.[87] As a matter of principle, and for efficient implementation of the Common Market, discrimination of nationals of other Partner States, whether direct or indirect, on the ground of nationality is prohibited.[88] Respecting and promoting this principle of non-discrimination is the starting point towards ensuring that any restriction imposed on the basis of public health does not impede the freedom of movement. The treatment

[84] *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, judgment of 30 November 1995 — case C-55/94, para. 37.

[85] Article 29, EU directive 2004/38/EC.

[86] Sjoerd Douma, 'Non-discriminatory tax obstacles', 21 *European Community Tax Review* (2012) 67.

[87] *Columbus Container Services BVBA & co. v Finanzamt Bielefeld-Innenstadt* (judgment on merits) EU-ECJ C-298/05(2007), para 34.

[88] Common Market Protocol, Articles 3(2) and 29(2)(b).

they get should be the same as that given to nationals of the host Partner State.[89] This means that where taking up of a certain activity requires fulfilment of certain conditions that also apply to nationals of the Partner State, then a national of another Partner State must comply with these conditions, and if there are no conditions, then they are free to establish themselves.[90]

It is discriminatory for a host Partner State to close its borders for nationals of other Partner States seeking to exercise their right of establishment whereas it has not locked down movement of its own citizens within the territory or in some parts of the territory as that would amount to according nationals of other Partner States treatment that is less favourable to that given to own nationals, and therefore discriminatory. This is because, in principle, established nationals of other Partner States attain the status of legal residents upon issuance with work and residence permits as per Regulation 6(2) of the EAC Common Market (Right of Residence) Regulations,[91] and should not be treated as visitors or tourists. Their stay is on long term basis as opposed to short term.

5.2.0 Proportionality

The measures taken in response to public health emergencies must be proportionate to the interest protected. In applying public health restrictions, the interest is to prevent the spread of diseases, and not any other interest. For instance, in the EU, invoking public health restrictions in order to serve economic ends is expressly prohibited under the law.[92] The Common Market Protocol does not contain any provision guiding the implementation of the principle of proportionality. Without guiding provisions, the restriction based on public health is likely to be abused to achieve goals other than safeguarding public health. For instance, in August 2020, Kenya excluded Tanzania from the list of countries whose citizens would be allowed entry under the revised

[89] Common Market Protocol, Article 3(2)(b).

[90] *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (1995) I-04165, 23 and 33.

[91] Right of Residence Regulations, Regulations 6.

[92] EU Directive 2004/38/EC, Article 27(1).

restrictions.[93] Kenya unilaterally considered Tanzania as an unsafe area after what Kenya considered as an unreasonably relaxed approach to the pandemic by Tanzania, and excluded it from the list of countries exempt from mandatory quarantine after entering Kenya.[94] In a move that was seen as retaliatory, Tanzania banned flights from Kenya and this move was seen as not being about public health considerations.[95] Tanzania's action against Kenya does not seem proportionate to the public health interest being protected by limiting movement of people to reduce spread of Covid-19, considering that her former Head of State, John Magufuli, had reportedly, declared Tanzania to be 'Covid-free', open for business, and called upon her citizens to go about their business as usual.[96] If there were rules under the Common Market Protocol governing imposition of restrictions based on public health, such rules would have offered clearer remedies for this kind of scenario.

5.3.0 Mutual recognition of health travel certificates

Article 13(7) of the Common Market Protocol requires Partner States to mutually recognise certificates granted to a self-employed person, a company or firm in the other Partner States. Such certificates may be construed to include health travel certificates such as yellow fever vaccination certificate and Covid-19 Polymerase Chain Reaction (PCR) test certificates, which are required by countries for purposes of allowing entry to or departure from their territories. These certificates have an impact on the freedom of movement, and consequently, the right of establishment.

The objective of Article 13(7) of the Common Market Protocol's mutual recognition is to prevent a host Partner State from applying its rules to granting of certifications, or meeting certain requirements that have already

[93] Gerald Adae, 'Why Tanzania banned three Kenyan airlines', *Business daily*, 26 August 2020.

[94] Ministry of transport, infrastructure, housing, urban development and public works, 'Communique on the resumption of international air travel on 1 August 2020', transport.go.ke on 2 November 2020.

[95] Gerald Adae, 'Why Tanzania banned three Kenyan airlines.'

[96] BBC, 'Coronavirus: John Magufuli declares Tanzania free of Covid-19', 8 June 2020.

been granted or met under the laws of another Partner State.[97] It is aimed at removing the relevant barriers to establishment. It creates an obligation on the part of a Partner State to be open and receptive to laws and rules of another Partner State, and to refrain from imposing rules, procedures, and administrative controls whose effect is to restrict the activities of a national of another Partner State.[98] It means a national of a Partner State can carry with them advantageous standards of their home Partner State into the host Partner State.[99] This helps in ensuring that another layer of rules is not added to the home Partner State's rules by the host Partner State. If such a second layer (or double burden) is added, then it may be difficult for someone to realise the right of establishment. In any case, such a measure would violate this rule and amounts to a restriction, which is prohibited unless it is justifiable.

The nature of such obligations means that Partner States must be prepared to lose some regulatory autonomy.[100] However, the Partner States may refuse mutual recognition on the permissible grounds of public health, because states still retain their power and obligation to regulate internal matters.[101] No provision prohibits recognition of certificates regarding public health. In fact, yellow fever certificates are acceptable across the Partner States. Further, Regulation 13 (1) of Annex III provides that:

> where a Partner State requires the nationals of that Partner State who intend to take up economic activities to fulfil certain requirements as to good repute and proof that the requirements are satisfied, the competent authority of the Partner State shall accept a certificate issued by a competent authority of another Partner State as sufficient evidence in respect of nationals of another Partner State indicating that the requirements have been met.

Although there is no express provision under the Common Market Protocol or Annex III requiring Partner States to accept health certificates issued by

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[97] Matteo Ortino, 'The role and functioning of mutual recognition in the European market of financial services', 56(5) *International and Comparative Law Quarterly* (2007) 312.

[98] Ortino, 'The role and functioning of mutual recognition in the European market of financial services', 312.

[99] Markus Mostl, 'Preconditions and limits of mutual recognition', 47 *Common Market Law Review* (2010) 409.

[100] Mostl, 'Preconditions and limits of mutual recognition', 411.

[101] Mostl, 'Preconditions and limits of mutual recognition', 411.

another Partner State, Regulation 13(1) of Annex III can be applied. Regulation 13(1) recognises the principle of mutual recognition of certificates where a Partner State requires the national of the Partner State who intends to undertake economic activities to fulfil certain requirements as to good repute and proof that the requirements are satisfied. In this case the competent authority of the Partner State shall accept a certificate issued by a competent authority of that other Partner State as sufficient evidence proving this.[102]

It is not clear why some Partner States do not recognise Covid-19 negative certificates issued in another Partner State by requiring the holders to undergo another test at an extra cost and in some cases like South Sudan, self-isolation at own cost, before being allowed to enter and stay in their territory.[103] It signifies lack of commitment, co-ordination, good faith and good will on the part of Partner States to facilitate realisation of the right of establishment.

Furthermore, EAC does not have standardised rules/requirements for use of Covid-19 PCR certificates, thereby leaving it to individual Partner States to decide whether to accept certificates issued by other Partner States and under what conditions. This has created a situation which has led to Partner States providing their own standards which are different, and which keep changing from time to time. For instance, in Kenya, the Ministry of Health issued travel requirements which took effect from 11 June 2021, providing that travellers wishing to enter the country, except children aged five years and below, must possess a Covid-19 negative PCR test certificate conducted within 96 hours before travel.[104] The travel requirements also provide conditions for entry of persons from various countries. As per these requirements, persons from certain countries, including EAC Partner States are exempt from mandatory quarantine upon entry into Kenya.[105]

In Uganda, with effect from 6 July 2021, and except for children aged below three years, all travellers had to possess a Covid-19 negative certificate

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[102] Annex III, Regulation 13(1).

[103] United Kingdom, 'Foreign travel advice- South Sudan', gov.uk , on 11 August 2021.

[104] Ministry of Health, 'Travel requirements with effect from 11 June 2021', kcaa.or.ke ,on 10 August 2021.

[105] Ministry of Health, 'Travel requirements with effect from 11 June 2021.'

issued within 72 hours from the time of sample collection to boarding the plane departing their country of origin, whether one is vaccinated and holds a vaccination certificate or not.[106] Further, travellers from Kenya, Tanzania, and South Sudan must undergo a PCR test upon arrival at a cost of USD (United States Dollars) 65, whether or not they have a certificate issued in their home country, while travellers from Burundi and Rwanda were not subject to this requirement.[107] In Rwanda, all persons entering the country must have a Covid-19 negative PCR test conducted 72 hours before departure, and are required to take a second test upon entry at a cost of USD 60, except for accompanied children below five years.[108] In South Sudan, with effect from June 2021, there is a requirement for travellers to possess a Covid-19 negative certificate issued not more than 72 hours before departure and self-isolation for 10 days without a test or 7 days with a test and release.[109]

These country-specific requirements are not published in a central source, such as the EAC website, for ease of access to information by nationals of Partner States.

5.4.0 Clear and timely information

Transparency and sharing of information are some of the principles of the Common Market,[110] and mandatory when it comes to restrictions on the right of establishment.[111] However, timelines and the nature of the information to be shared are not provided for. The result is that a Partner State may decide not to give information in good time. It may also fail to provide comprehensive information to assist travellers make a decision. This creates uncertainty and unpredictability for the nationals of the EAC because it is not possible to

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[106] Uganda Civil Aviation Authority, 'Frequently asked questions in relation to Covid-19 standard operating procedures at Entebbe international airport', (6 July 2021) caa.go.ug ,on 11 August 2021.

[107] Uganda Civil Aviation Authority, 'Frequently asked questions in relation to Covid-19 standard operating procedures at Entebbe international airport.'

[108] Ministry of Health, 'Info note for passengers arriving or departing from Rwanda' (15 June 2021) rbc.gov.rw ,on 11 August 2021.

[109] United Kingdom, 'Foreign travel advice- South Sudan'.

[110] Common Market Protocol, Article 3(2)(c).

[111] Common Market Protocol, Article 13(9).

know what restrictions are in place in good time and the information may be so inadequate as to hinder the exercise of the right to free movement. This is the case where the information does not outline the documents one needs to provide before being allowed to enter the territory of another Partner State.

Recent interventions by the EAC fall short of meeting this requirement. For instance, the EAC Covid-19 Response Plan does not address freedom of movement of people or the right of establishment. It only mentions free movement of goods and services. The only guidelines developed by the EAC concerning free movement of goods and services are contained in the EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services during the Covid-19 Pandemic.[112] Whereas there is information on the restrictions imposed by EAC Partner States annexed to the Guidelines, these are restrictions, as of April 2020, containing measures such as cessations of movement from Nairobi metropolis in Kenya.[113] While this restriction has since been lifted, the information available to EAC citizens had not been updated as at November 2021. The information available to them is inaccurate. At the time of writing, the Covid-19 portal in the EAC official website contained information only updated until April 2020.[114] None of the Departments/ Ministries responsible for EAC affairs and immigration in any of the Partner States had provided information on restrictions based on public health in their official websites. Lack of information is an impediment to the exercise of the right of establishment that fails the test and makes the exercise of the right of establishment unattractive.

The EU Council, for example, has made it clear that EU Member States should provide relevant stakeholders and the general public with clear, comprehensive and timely information about any restrictions to free movement, any accompanying requirements (for example negative tests for Covid-19 infection or passenger locator forms), as well as the measures applied to travellers travelling from higher-risk areas. In particular, Member States should, as quickly as possible, inform the public of any newly introduced or lifted re-

[112] EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services during the Covid-19 pandemic (April 2020) eac.int, on 28 March 2022.

[113] EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services, 11.

[114] EAC official website, eac.int, on 27 October 2020.

strictions, communicated to other Member States and the European Commission.[115] This information should also be made available on the 'Re-open EU' web platform, which should contain a cross-reference to the map published regularly by the European Centre for Disease Prevention and Control, and the substance of the measures, their geographical scope and the categories of persons to whom they apply should be clearly described.[116]

6.0 Conclusion

The Common Market Protocol does not provide adequate mechanisms to guide the question of restrictions based on public health in light of pandemics such as Covid-19. It does not define what public health and pandemics are and what they entail. There are no provisions guiding the exercise of discretion and powers by Partner States to impose restrictions based on public health considerations. There are no criteria set to assist in ensuring that a restriction strikes a balance between promoting public health by stopping the spread of Covid-19 and ensuring freedom of movement of persons for purposes of establishment, and does not discriminate on the basis of nationality. Lack of guiding provisions has, and will lead to violation of the right of establishment by the Partner States. However, it is possible for Partner States to recognise Covid-19 certificates issued by a competent authority of a Partner State without further conditions for purposes of facilitating movement of persons.

The EU has made progress in providing the much-needed guidance to its Member States. As early as 2004, the EU had recognised and appreciated that restrictions based on public health can inhibit the realisation of the freedom of movement of persons and of establishment and came up with Directive 2004/38/EC[117] whose Article 29 provides guidance on how to apply restrictions on public health basis. This is a practice worth adopting to the unique circumstances of the EAC.

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[115] EU Council Recommendation 2020/ 1475, 13th October 2020, *Official Journal of European Law,* Recommendation 25.

[116] EU Council Recommendation 2020/ 1475*,* Recommendation 25.

[117] EU Directive 2004/38/EC, Article 29.

To better fulfil its mandate, the EAC ought to consider the following recommendations to facilitate the realisation of the aims of the Common Market Protocol.

i. Appropriate amendments be made to the Common Market Protocol to define what restrictions on public health entail.

ii. The EAC Summit and the East African Legislative Assembly to issue appropriate directives and expressly legislate to expressly provide for the criteria for imposition and application of restrictions based on public health, especially with regard to the right of establishment.

iii. Provisions to guide availability and dissemination of information on public health restrictions be made in the Common Market Protocol or directives issued under it.

iv. Partner States be encouraged to apply Regulation 13 (1) of Annex III on mutual recognition of certificates so that they can accept Covid-19 health certificates provided they are issued by competent authorities of other Partner States, without subjecting the holders to additional conditions and costs, in order to promote free movement.

v. The EU experience has useful lessons that can be borrowed and applied in the EAC with appropriate modifications. The lessons include the test for applying public health restrictions, and availing timely, comprehensive, and accurate information on the restrictions,

vi. Intensive and extensive training should be conducted targeting public officers who formulate and enforce policies to increase their capacity in the protection and promotion of the rights and fundamental freedoms under the Common Market Protocol even as they seek to protect their own states from threats to national security and public health.

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

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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]

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[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-

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[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.

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[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]

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[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]

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[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.

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[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

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[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]

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[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-

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[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.

A CRITIQUE OF THE EAST AFRICAN COMMUNITY'S NON-TARIFF BARRIERS REGIME

Hanningtone Amol*

Abstract

The role of tariffs as instruments of control of international trade has gradually waned, with uniform tariffs applying in major regional economic communities (RECs). States desire, as is expected, to retain control over inflow and outflow of trade in their territories. Non-tariff measures (NTMs) have emerged as effective tools in the hands of states to maintain control over trade, where tariffs are no longer considered effective controls. Over time, discriminatory and unjustified uses of NTMs have resulted in unhealthy trade barriers commonly known as non-tariff barriers (NTBs). In the East African Community (EAC), inter-state trade has been adversely affected by NTBs. The outbreak of the Covid-19 pandemic in EAC in 2020, for example, highlighted the significance of rising NTBs in intra-EAC trade, with each Partner State adopting measures targeting flow of trade across borders. This paper is a critique of the EAC's legal regime on elimination of NTBs.

Keywords: EAC, non-tariff barriers, non-tariff measures, dispute settlement, National Monitoring Committee, National Focal Point, countervailing measures

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1. Introduction

Despite international trade growing in importance in the last century, new restrictions that seek to make inter-state trade difficult continue to emerge.[1] The irony of states erecting barriers to what is perceived as an important aspect of inter-state relations and economic health points to the complexity of geopolitics. These restrictions, normally termed non-tariff barriers (NTBs), deserve an in-depth study focusing on decisive ways to eliminate and prevent them from mushrooming. The importance of international trade today must be seen in the context of several states retaining open trading agreements between and amongst themselves, despite rising tension in complex geopolitical setups.[2] A good example is the recent flare of tension between the United States of America (USA) and the People's Republic of China over activities in the South China Sea and Pacific Islands, yet, the USA and China remain strong trading partners.[3] The importance of retaining trading relations despite rising geopolitical tensions reflects the complex interdependence of nations on world trade and an increasingly interconnected global economy whose building blocks are the contributions of each nation, ranging from those providing raw materials to those specialised in manufacturing.[4]

Global trade carries a huge influence on geopolitical developments. Global trade negotiations following major world conflicts, especially the Second World War, reified global superpower relationships and the appreciation of international trade as an influence on power relations.[5] With the reality of the need for international cooperation for development in mind, harnessing regional integration more effectively, for both goods and services, would help all countries lower their cost base, thereby enhancing global competitiveness.

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[1] Luisa Kinzius, Alexander Sandkamp and Erdal Yalcin, *Global trade protection and the role of nontariff barriers*, CEPR, 16 September 2019.

[2] Ivo H Daalder and James M Lindsay, *The globalization of politics: American foreign policy for a new century*, Brookings, 1 January 2003.

[3] Office of the United States (USTR), 'The People's Republic of China'<https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> on 17 November 2019.

[4] Tanious Mina E, 'The impact of economic interdependence on the probability of conflict between states: The case of "American-Chinese relationship on Taiwan since 1995', 4(1) *Review of Economics and Political Science* (2019) 38-53.

[5] Greg Buckman, *Global trade: Past mistakes, future choices*, Fernwood Publishing, 2005, 27.

For smaller nations, regional integration offers the prospect of improved access to neighbouring markets as well as the potential to attract greater foreign direct investment (FDI).[6]

In areas where trading partners seek to control the flow and balance of trade, they have employed tariffs, anti-dumping and countervailing measures[7] to exert leverage. In other cases, however, free trade areas (FTAs) and customs unions (CUs) may eliminate the use of tariff measures through introduction of uniform tariffs.[8] In CUs and FTAs, states retain enormous powers to surreptitiously employ measures other than tariffs to retain control of trade and slow inflow of trade from other countries into their territories. These measures include sanitary and phytosanitary standards, packaging and weight requirements, and other domestic regulations that are required of exporters or importers. Otherwise termed as non-tariff measures (NTMs), such measures are considered as NTBs when they are not justified in the context of the subject trade agreement, and are aimed at unfairly restricting flow of goods or services from another country.[9]

The EAC is a customs union re-established by Kenya, Uganda and Tanzania in 1999, with the aim of having uniform customs practices in respect to imports and exports in the region. The EAC has since grown to include, by end May 2022, an additional four states: Rwanda, Burundi, South Sudan and the Democratic Republic of Congo, listed by order of admission.[10] Prior to its re-establishment, the EAC existed as a union of the three original members until it collapsed in 1977 due to geopolitical tensions and mutual suspicions.[11] The EAC is governed by the Treaty for the Establishment of the East African

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[6] Ian Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa', *World Bank Africa Trade Policy Notes*, note 9, November 2010.

[7] According to World Trade Organisation, countervailing measures, also known as anti-subsidy duties, are trade import duties imposed to neutralise the negative effects of subsidies in distorting trade between states. They are imposed after an investigation finds that a foreign country subsidises its exports, injuring domestic producers in the importing country.

[8] See Corporate finance institute, 'Free trade area', 29 April 2022.

[9] See Institute for Government, 'Non-tariff barriers', 2022.

[10] East African Community, 'Overview of EAC' EAC.int on 6 May 2022.

[11] Bheki Mngomezulu, 'Why did regional integration fail in East Africa in the 1970s? A historical explanation', *History and African Studies Seminar*, University of KwaZulu-Natal, 14 August 2013.

Community, 1999 (the EAC Treaty). The EAC Treaty establishes structures of the EAC. It also sets the foundation for the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol), the Protocol for the Establishment of the East African Community Customs Union (Customs Union Protocol) and the Protocol of the Establishment of the East African Community Monetary Union (Monetary Union Protocol). It is these Protocols that define areas of cooperation and the terms of trade among the EAC Partner States.[12]

The EAC's launch of a regional common market in July 2010 was followed back-to-back by the full realisation of the customs union, which was established in 2004.[13] While all the EAC Partner States performed well in eradicating tariff barriers through compliance with the Customs Union Protocol, NTBs have remained a thorn in cross-border trade. Both the EAC Treaty and the EAC Customs Union Protocol pay specific attention to NTBs and call for their elimination.[14] This reality has seen EAC Partner States dedicate attention to identification and classification of NTBs, and the establishment of the EAC Time-bound Program for Eliminating NTBs. Moving from identification of NTBs to actually eliminating them has, however, been a challenge. The intra-EAC trade continues to face hurdles related to NTBs.[15]

In 2017, the East African Legislative Assembly (EALA) passed the EAC Elimination of Non-Tariff Barriers Act (the EAC NTBs Act) with the view to decisively eliminate these chronic barriers to trade among Partner States. Despite the elaborate EAC legal regime on elimination of NTBs, numerous studies and documented incidents show that there has been a significant increase in NTBs in intra-EAC trade.[16] The non-reduction of NTBs in the face of elaborate legal mechanisms raise concern over the efficacy of the legal regime or its implementation.

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[12] See African Union, 'East African Community', au.int.

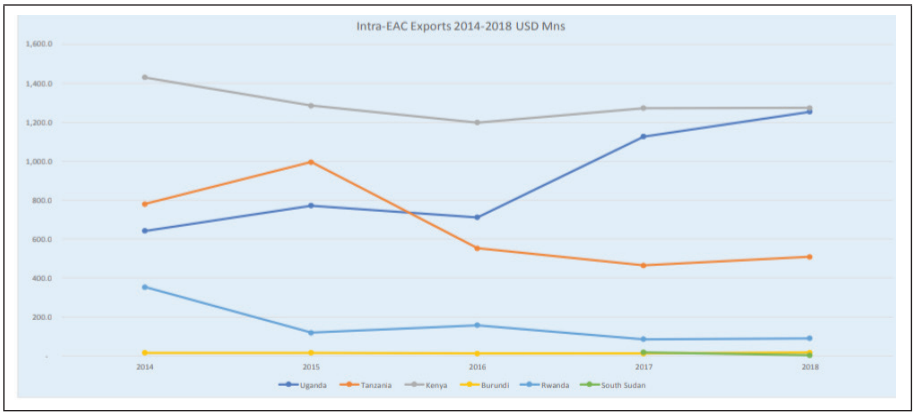
[13] See East African Community, 'Customs Union', eac.int.

[14] Treaty for the Establishment of the East African Community, Article 75(1).

[15] Robert Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community', *World Bank Africa trade policy notes*, #note 7, August 2010.

[16] Rosabela Oiro, Boniface Owino and Max Mendez-Parra, 'Non-tariff barriers and 'complaints' in the East African Community's reporting process', *CUTS International Policy Briefing*, March 2017.

Figure 1: Intra-EAC Exports 2014-2018



Source: EAC (2018 Trade Report)

Whereas integration within the EAC seems to be deepening, inter-state trade is reporting a significant decline. In its recent report, the United Nations Economic Commission for Africa (UNECA) has noted that the intra-EAC trade fell from United States Dollars (USD) 3.5 billion in 2013 to USD 2.4 billion in 2017. This decline was majorly attributable to NTBs that continue to mushroom as political tension between EAC Partner States rise.[17] The long running geopolitical tension between Rwanda and Burundi, for instance, has led to near collapse of commercial or trade activities between the two countries.[18] In another bizarre and unfortunate incident in early 2019, the two major crossing points between Rwanda and Uganda were completely shut to all motoring or human movement, following a drastic collapse of diplomatic relations between the two EAC Partner States.[19] More recently, the diplomatic tiff between Kenya and Tanzania in the wake of immigration restriction measures adopted to manage the Covid-19 pandemic, constrained cross-border trade between the two Partner States, with momentary halt on passenger air transport between the two neighbours.[20]

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[17] *The East African*, 'Why intra-EAC trade is dwindling', 23 March 2019.

[18] See Trade Mark East Africa, 'Burundi, Rwanda ties deteriorate', 15 August 2016.

[19] Alice McCool, 'Thwarted by Rwanda-Uganda border closures, women await resolution', *Al Jazeera*, 4 October 2019.

[20] Agence France-Presse, 'Tanzania bans Kenya Airways as coronavirus spat escalates', *VOA*, 1 August 2020.

2. Understanding non-tariff barriers

Global efforts to reduce tariffs have been immensely successful, as evidenced by the rise in global trade through multilateral cooperation and research-based policy considerations.[21] Despite this success, other forms of trade restrictions remain widespread. These trade barriers, though not related to tariffs, affect more than twenty percent[22] of global trade with the catastrophic effect of inhibiting competitiveness of products from affected regions, and constraining ability of domestic firms to export regionally and globally.[23]

The question of what constitutes NTBs is a problematic one, especially, in the context of state sovereignty where states retain powers to institute measures required to protect their own economies and population, often in the form of weights and standards, sanitary and phytosanitary standards, among other measures. While classification of NTBs has been provided under the World Trade Organisation (WTO) and the General Agreement on Tariffs and Trade (GATT) framework, and under the EAC NTBs Act, each element must be examined under its unique circumstances to determine whether it does constitute an NTB or is a justified act of public policy. Indeed, the problem of defining NTBs was witnessed through various rounds of the United Nations Conference on Trade and Development (UNCTAD) negotiations, with a loose definition only agreed on after numerous rounds of negotiations.[24] The UNCTAD multi-agency sectoral team set up to classify NTBs recognised this difficulty, thus concluding that precise and balanced definition of NTBs posed substantial challenge, and that a distinction between NTBs and NTMs should not be attempted.[25]

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[21] See International Monetary Fund, 'Global trade liberalization and the developing countries', November 2001.

[22] See United Nations Press Release TAD/2030, 6 September 2005.

[23] Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

[24] See United Nations Conference on Trade and Development, 'Report of the expert meeting on methodologies, classification, quantification and development impacts of non-tariff barriers,' D/B/COM.1/EM.27/3, 8 November 2005.

[25] Hiroaki Kuwahara, 'Multi-agency effort to define and classify NTMs: Definition, classification (and collection) of NTMs, presentation to the UNESCAP/UNCTAD/WTO-OMC research workshop on rising non-tariff protectionism and crisis recovery', Macau, 14 December 2009.

NTMs refer to any measure other than a tariff that causes a trade distortion.[26] A trade distortion occurs where the price at the border differs significantly from the price in the domestic market of origin.[27] This distortion is usually attributable to skewed regulations or administrative procedures imposed to serve a specific objective such as ensuring consumer protection, public health or environmental safety. Even though the pursuit of such domestic policies is often legitimate, the mode of implementation could achieve the direct opposite of the policy's aim leading to unintended discrimination against imports. Effectively, an NTM could potentially transform into an NTB if its effect is to constrain trade. Similarly, an NTM that is not implemented in a least trade-restrictive manner could become an NTB.[28]

Generally, NTBs have protectionist and discriminatory intent.[29] This is discernible where the measures are excessive, unequal, and unrelated to comparable measures elsewhere, and when they are, they are still poorly implemented. Hitherto, *bona fide* NTMs created for purposes of consumer or environmental protection or in the interest of the public could end up being trade barriers and burdensome to traders. This is especially if the cost of compliance is punitive, compliance procedures are lacking or unnecessarily cumbersome, or there is notable bad faith in implementing them, thus, constraining traders.[30]

In the contemporary world, multilateral agreements on trade have opened wide cross-border market access based on uniform tariff rates. These can be seen in the European Union (EU), the EAC, the erstwhile Northern American Free Trade Agreement (NAFTA) and the Common Market for Eastern and Southern Africa (COMESA). The application of uniform tariff measures constricts the ability of states to employ tariffs as a trade regulation instrument. The steady decline of tariff barriers resulting from the successes of GATT

[26] See United Nations Conference on Trade and Development, *'*Trade analysis: Non-tariff measures*'*.

[27] Bernard Hoekman and Will Martin, 'Reducing distortions in international commodity markets', Economic Premise no 82, *World Bank*, Washington DC, (2012).

[28] Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

[29] See Trade Barriers Africa, 'Non-tariff barriers'.

[30] United Nations Conference on Trade and Development, 'Non-tariff measures: Evidence from selected developing countries and future research agenda', *Developing Countries in International Trade Studies,* 2010.

negotiations and the aforementioned regional economic communities (RECs) has raised a premium on NTBs as states seek to retain control of trade into and out of their territories. NTBs are therefore employed by states as protection measures as well as regulatory instruments.[31]

2.1 Classification of NTBs

According to UNCTAD, NTMs are policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both.[32] The WTO sets international trade regulations through, among other instruments, its predecessor framework under the GATT. WTO recognises NTBs as falling under various categories, namely:[33] government participation in trade and restrictive practices tolerated by government, like preference to domestic bidders or suppliers; customs and administrative entry procedures, like misinterpretation of rules of origin, import licensing and arbitrary customs classifications; technical barriers to trade including restrictive technical regulations and standards not based on international standards; and sanitary and phytosanitary measures including measures aimed at addressing plant, animal and human health.

2.2 NTBs in the context of the EAC

NTBs are a thorny issue in EAC integration, and have been recognised as such throughout the negotiations of the EAC Treaty and the protocols under it. The EAC Partner States came up with the Time-bound Program for the Elimination of Identified Non-Tariff Barriers (the Time-bound Program) in 2009 with the aim of simplifying and accelerating the process of eliminating NTBs.[34] Under the Time-bound Program, NTBs are classified under one of four categories, each category being premised on the level of political and

[31] UNCTAD, 'Non-tariff measures: Evidence from selected developing countries and future research agenda'.

[32] UNCTAD, 'Non-tariff measures: Evidence from selected developing countries and future research agenda'.

[33] General Agreement on Tariffs and Trade, 15 April 1994, LT/UR/A-1A/GATT/2, annex A.

[34] Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

economic complexity and the degree of impact on intra-EAC commerce. Similarly, the response mechanisms to elimination of NTBs are ranked based on the level of effort required to achieve consensus by the Partner States, and, simultaneously, on the overall impact on regional trade.[35]

A strategy towards achieving some of the objectives of the Time-bound Program led to the EALA enacting the EAC NTBs Act in 2017. The law was designed to be a panacea to chronic NTBs and obstinate barriers to intra-EAC trade. Section 3 of the Act sets out its objective, with three broad focus areas: providing a legal framework for the removal of NTBs in the Community, providing a mechanism for identifying and monitoring the removal of NTBs within the Community, and removing restrictions that make importation or exportation within and outside EAC difficult or costly.

The EAC NTBs Act defines NTBs as laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State, whose effect is to impede trade.[36] It relies heavily on WTO's classification of NTBs.[37]

The Act prohibits Partner States from engaging in activities that could constitute NTBs. These are activities that:[38]

a. Cause additional cost to the business of an affected party including surcharges and customs bonds;
b. Result in wastage of time or loss of business or market, including delays in clearing imports and lengthy testing and certification procedures;
c. Lead to ban on market entry and loss of potential markets;
d. Amount to a corrupt practice;
e. Restrict business transactions in the Partner State;

[35] The time-bound program for the elimination of identified non-tariff barriers in EAC (2009).

[36] EAC Elimination of Non-Tariff Barriers Act, Section 2.

[37] See Monica A Hangi, 'The non-tariff barriers in trading within the East African Community', *Research Paper CUTS Geneva Resource Centre*, Geneva, 2010.

[38] EAC NTBs Act, Section 3.

f. Do not recognise the East African Rules of Origin and which lead to additional cost for verification of the goods and loss of business; and

g. Cause any other impediment to trade within the EAC.

The definition of NTBs under the EAC NTBs Act is focused on positive actions or requirements, but is silent on non-action, passive or negative requirements. A comparison with the definition in the Protocol on Trade in the Southern African Development Community (SADC) region which defines NTBs as 'any barrier to trade other than import and export duties'[39] highlights the inadequacy of the EAC's definition. Compared to the definition under the EAC NTBs Act, the SADC definition is broader and more inclusive as it not only provides for requirements that may impede trade but also recognises as NTBs non-compliance or inaction by states that could as well have negative effects on trade.

2.3 Effects of NTBs on international trade

Integration of sovereign communities, mainly, through cross-border trade in RECs is a growing phenomenon. Regional integration as a political means of bringing countries together is premised on the appreciation that it promotes economic growth, reduces border conflicts and dissipates unhealthy competition among countries. From that position, regional integration is an important instrument towards establishing sustainable global peace.[40] Unfortunately, NTBs are cancerous to international trade because they gradually reduce trade volumes and negatively influence overall economic growth, as already seen in the case of the declining intra-EAC trade.

Greater exploitation of regional communities is critical to reducing the reliance of a country on exports of a single product to a single market. The risks associated with reliance on single products and single markets cannot be overemphasised, especially with geopolitical realities and the potential for

[39] Protocol on Trade in the Southern African Development Community (SADC), Article 1.

[40] Mngomezulu, 'Why did regional integration fail in East Africa in the 1970s? A historical explanation.'

new competition emerging. For countries with robust and diverse exporting portfolio, expansion and free-flow of regional trade provide room to enhance sustainability of existing exports by lowering costs. This cost reduction is achieved through specialisation within the context of integrated regional value chains.[41]

NTBs affect trade in two distinct, yet, interrelated ways: by increasing the cost of doing business, and by restricting full access to the market. The NTBs that increase cost of doing business range from those relating to standards to cumbersome customs clearance procedures. Those that relate to restricting market access include Rules of Origin and countervailing measures like quotas.[42] NTBs are often, by their design, aimed at addressing safety and environmental issues. It is notable, however, that many important players in international trade, small and medium scale enterprises do not have adequate knowledge of NTBs. This is something that could be addressed through transparency in administration of NTBs regime.[43]

In 2017, the total EAC intra-Partner States' trade grew by 19.2%. In 2018, the volume declined to 13.9%, signalling some undercurrent activities.[44] The main culprits in the decline were trade barriers. Indeed, in an opinion-editorial in *The EastAfrican*, a weekly newspaper published in Kenya, it was noted that NTBs have caused frustrations to some Partner States, thus, compelling them to seek alliances outside the region.[45]

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[41] Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

[42] Stephen Byrne and Jonathan Rice, 'The impact of non-tariff barriers on EU goods trade after Brexit', *VOXEU,* 19 June 2018.

[43] International Trade Centre, 'Navigating non-tariff measures: Insights from a business survey in the European Union', 2016.

[44] EAC, 'Trade and investment report 2018: Maximising the benefits of regional integration', 2018.

[45] James Anyanzwa, 'NTBs and disputes blamed for the slowdown in trade among East African states', *The East African*, 27 February 2019.

Figure 2: Intra-EAC trade volumes (2014-2018)

		2014	2015	2016	2017	2018	Percentage Change			
							2015	2016	2017	2018
Imports	Uganda	684.6	630.2	530.0	565.5	796.3	-8.0	-15.9	6.7	40.8
	Tanzania	709.8	278.6	298.8	243.2	302.7	-60.7	7.2	-18.6	24.5
	Kenya	416.9	407.8	324.4	589.8	676.5	-2.2	-20.5	81.8	14.7
	Burundi	169.1	151.1	157.2	151.0	134.3	-10.7	4.0	-3.9	-11.1
	Rwanda	511.0	474.1	439.8	478.6	549.1	-7.2	-7.2	8.8	14.7
	South Sudan				462.5	377.0				-18.5
	Total	**2,491.4**	**1,941.8**	**1,750.2**	**2,490.6**	**2,835.9**	**-22.1**	**-9.9**	**42.3**	**13.9**
Exports	Uganda	642.2	771.6	711.0	1,126.3	1254.5	20.1	-7.9	58.4	11.4
	Tanzania	779.5	995.2	552.5	464.5	508.6	27.7	-44.5	-15.9	9.5
	Kenya	1,430.8	1,285.9	1,199.0	1,272.5	1273.8	-10.1	-6.8	6.1	0.1
	Burundi	15.7	14.8	12.3	11.5	16.6	-5.7	-16.9	-6.5	44.3
	Rwanda	352.4	118.8	156.6	84.6	89.7	-66.3	31.8	-46.0	6.0
	South Sudan				17.9	2.0				-88.8
	Total	**3,220.7**	**3,186.3**	**2,631.4**	**2,977.4**	**3,145.2**	**-1.1**	**-17.4**	**13.1**	**5.6**
Total EAC Trade value	Uganda	1,326.9	1,401.8	1,241.4	1,691.8	2,050.7	5.6	-11.4	36.3	21.2
	Tanzania	1,489.3	1,273.8	851.3	707.7	811.3	-14.5	-33.2	-16.9	14.6
	Kenya	1,847.7	1,693.7	1,523.4	1,862.3	1,950.3	-8.3	-10.1	22.3	4.7
	Burundi	184.8	165.9	169.5	162.5	150.9	-10.2	2.2	-4.1	-7.1
	Rwanda	863.4	593.0	596.4	563.2	638.8	-31.3	0.6	-5.6	13.4
	South Sudan				480.4	379.0				
	Total	**5,712.1**	**5,128.1**	**4,382.0**	**5,467.9**	**5,981.1**	**-10.2**	**-14.6**	**24.8**	**9.4**

Source: EAC (Trade Report 2018)

In the European Union (EU), lowering trade barriers has been recognised as a core ingredient of realising Sustainable Development Goals (SDGs). This enables more trading corporations to integrate within regional and global value chains, with a resulting spiral effect of encouraging and spreading growth beyond EU even to developing countries.[46] This is also true for the EAC where growth of cross-border trading corporations is being witnessed. Enhanced market access, facilitated by increased ease of doing business in the EAC, has already seen banking corporations like the KCB Bank Group and Equity Bank, both originally Kenyan banks, set up operations in almost all EAC countries. Insurance firms like the UAP Group and AAR, also originally Kenyan, have also spread their operations across EAC Partner States.

[46] International Trade Centre, 'Navigating non-tariff measures: Insights from a business survey in the European Union.'

Whereas more successful businesses are needed for growth, the African continent faces difficulty in recording success in business due to bad roads, unjustified road blocks and unofficial toll collection points, corrupt police officers and road officials, all contributing to a bizarre evil scheme to slow movement of goods across various regions in the continent.[47] Under the official classification of NTBs in the EAC, road tolls through weighbridges and bribery demands by traffic police officers are identified as major NTBs to movement of vehicles and goods across borders.[48] According to the WTO, intra-EAC trade is significantly low compared to trade in other RECs. This low ratio is mainly due to trade barriers such as poor infrastructure and cumbersome administrative procedures. Quite dishearteningly, about 87% of trade by EAC Partner States is with countries outside the EAC, including China, India and the EU.[49]

When the NTBs are isolated and matched with their effects on international trade, an interesting pattern develops showing that small daily hurdles can build up to catastrophic hindrances of cross-border trade. A study on NTBs in SADC has identified some of these as: inefficiencies in transport, customs, and logistics leading to inordinate delays and high logistics costs; restrictive rules of origin limiting preferential trade and increasing cost of compliance, thus, denying traders the benefits of a united regional market; and poorly designed technical regulations and standards placing emphasis on mandatory item-by-item inspections and certifications; specific national (as opposed to universal) standards and testing procedures, saddled with overlapping regulatory mandates.[50] An example of the effects of costly Rules of Origin requirements is discernible in a comparison of commercial operations of leading retailers Shoprite and Woolworths in SADC. In order for Shoprite to enjoy USD 13.6 million in customs waivers in the SADC market, for instance, it has to spend USD 5.8 million per year to obtain exemption certificates. Its

[47] Robert Guest, *The shackled continent: Africa's past, present and future*, Macmillan, 2004, 172-183.

[48] The time-bound programme for the elimination of identified non-tariff barriers in EAC 2009.

[49] World Trade Organisation, 'Trade policy review' www.wto.org on 14 September 2021.

[50] Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa.'

competitor Woolworths, on the other hand, does not use SADC preferences at all. Instead, it pays full tariffs because it considers the process of administering Rules of Origin documentation to be too costly and cumbersome.

2.4 Trends within the EAC

Consistent with the foregoing, a study by the East Africa Law Society (EALS), through a project on supporting access to trade by small-scale cross-border traders in the EAC (2019) identified the following barriers as persistent in the intra-EAC trade:[51]

a. Administrative burdens relating to regulatory compliance, including cumbersome administrative processes and multiple regulatory bodies involved in cross-border trade;

b. Information barriers caused by Partner States effecting changes to their laws without cross-border consultations and without adequate notification to traders; and lack of centralised repository of the cross-border trade regulations, rules and forms;

c. Duplication of standards and tests leading to high costs of compliance, with test centres located away from the borders;

d. Lack of conducive facilities and infrastructure at the borders, inaccessibility of cold storage facilities and poorly maintained transport infrastructure;

e. Nationalistic tendencies and discriminatory behaviour by officials, often unauthorised but prevalent, lead to capricious interpretation of customs classification and assessment of taxes, among other things; and

f. Inordinately high payments of unofficial fees in bribes and facilitations, usually resulting from the bottlenecks erected by administrative requirements.

[51] East Africa Law Society, *Supporting integration of small-scale traders in EAC,* 2019.

2.5 Quantifiable economic effects of NTBs in the EAC

On average, the tariff equivalent of NTBs is 40%. This is much higher for most traded commodities than the Most Favoured Nation (MFN) tariff applied by most countries. This alone is evidence that NTBs significantly increase costs both for firms that source intermediate inputs from the affected region as well as for consumers within the regional market.[52] A study by the World Bank on the EAC Common Market makes interesting revelations on the economic impact of NTBs on domestic and regional economy. Listing chronic NTBs as identified in the EAC Time-bound Program, the report discloses the following:[53]

- Weighbridges – calculation of *ad valorem* equivalents (AVEs), weighbridges increase cost of cross-border trade by an average resting between 0.16% and 0.86% of the price of the product.
- Border delays – delays associated with cumbersome inspection, clearance and customs procedures add about 20 hours to movement of goods across the borders, equivalent to a cost increase in regional trade ranging between 0.49% and 2.51% in transport.
- Other delays (e.g., traffic, roadblocks) – these delays mainly affect transport of goods, and may increase cost of transport and trade by a range of 1.17% to 6.05%.
- Bribes – bribery is rampant in the trade routes in the EAC, ranging from unofficial traffic fines to border facilitations. On average, each truck spares USD 35 on bribes per trip, translating to increase in costs of cross-border trade by a range of between 0.16% and 0.81%.

Based on Trade Policy Constraint Index (TPCI), if the NTBs are dealt with indiscriminately by the EAC Partner States, the net gain to the citizen and on the economic well-being of the region would be significant. Cumulatively, considerable efforts aimed at removing NTBs in the EAC could lead to the following positive impacts:

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[52] Celine Carrere and Jaime de Melo, 'Notes on detecting the effects of non-tariff measures', *CERDI working papers, 2009/32* (2009).

[53] ODI, 'Resolving the unresolved non-tariff barriers in the East African community', 1 January 2016.

a. The total intra-EAC trade volume rises by up to 13% where there are no discriminatory trade barriers;

b. The real Gross Domestic Product (GDP) of the EAC Partner States rises by around 0.5%, and consumer welfare by 0.3-0.4%;

c. Where the targeted NTBs are those affecting transportation of goods, the net effect is even greater with potential GDP impact of +2.8% to +1.7%;

d. Consumer welfare gains are registered, ranging between +2.2% to 1.5%;

e. The skills premium as measured by the relative wage of skilled to unskilled labour rises by 0.6% to 0.2% across the EAC Partner States;

f. Average prices for consumer goods and traded commodities climb down significantly based on reduced cost of cross-border trade, with an average price fall of 2.8%;

g. Looked at through the prisms of SDGs and the African Union's Agenda 2063, elimination of all NTBs may have a maximum combined poverty reduction of between 5.3% to 3.7% for the EAC Partner States; and

h. Even more interesting is the distributive benefits of indiscriminate elimination of NTBs. Even though employment effects may be small, a significant reduction in the transport and logistics NTBs may reduce the prices paid by the poorest economies in the EAC. By way of example, elimination of barriers may reduce the purchase price for unskilled workers in Tanzania by almost 2% in sensitive products such as textiles.

3. Administrative mechanisms in handling NTBs

The EAC NTBs Act recognises that Partner States play a crucial role in facilitating trade. Correctly, the Act places the burden of eliminating trade

barriers on trade policy makers – government leaders. 'The identified NTB shall, at the very first instance, be subjected to bilateral discussion between the affected Partner States.'[54] To enable bilateral negotiations, the Act creates the National Monitoring Committees (NMCs) for each Partner State, composed of trade officials and the private sector, with the following duties:[55]

a. Developing processes for elimination of NTBs in their respective Partner State;

b. Monitoring the process of elimination of the NTBs in their respective Partner State;

c. Receiving reports and complaints from affected parties on the existence of NTBs in their respective Partner State;

d. Identifying NTBs that exist in their respective Partner State and notifying the concerned organ, institution or public authority for elimination action;

e. Referring report or complaint of an affected party to the NMC of another Partner State, where the report or complaint is with regard to an NTB that exists in that other Partner State;

f. Advising their respective Partner State on the policies and laws that are NTBs in nature.

The NMCs work is supported by the National Focal Point (NFP), composed of trade policy makers and whose main activities are:[56]

a. Initiating policies and strategies on the elimination of NTBs in their respective Partner States, and submitting to NMC for approval;

b. Coordinating the activities of the NMC;

c. Facilitating the implementation of the EAC Time-bound Program and monitoring its implementation;

[54] EAC NTBs Act, Section10.

[55] EAC NTBs Act, Section 7.

[56] EAC NTBs Act, Section 8.

d. Disseminating information to the business community within the EAC on NTBs identified within their respective Partner State and the steps being taken to eliminate them;

e. Collaborating with NFPs and NMCs of other Partner States to facilitate the implementation of the EAC Time-bound Program;

f. Referring the report or complaint of an affected party to the NFP of another Partner State, where the report or complaint is with regard to an NTB that exists in that other Partner State;

g. Tracking and monitoring any new NTBs in the Community and notifying the NMC of the NTBs; and

h. Submitting periodic reports of the NMC to the EAC Council of Ministers.

The NMCs have wider representation including government officials, trade agency officials and private sector representatives. The NFP, on the other hand, is a bureaucratic agency residing within the ministry responsible for the EAC affairs in each Partner State. It is considered the secretariat of the NMC. In setting up the NMC, the Partner States have wide discretion in determining who becomes a member of the Committee. In reality, the Committees are flooded with bureaucrats and thin representation of the private sector. In terms of duties, there is notable overlap of duties between the two bodies, and this could present a challenge when executing their respective mandates.

The Act provides that where an NTB is reported or has been identified, the NMCs of the concerned Partner States should organise a discussion on how to resolve it.[57] This is the foundation for bilateral negotiations. In reality, these discussions drag for months or even years, and are not considered expedient means of resolution. On the positive side, products of such negotiations usually lead to stability in handling identified NTBs.

It is envisaged that not all NTBs submitted for bilateral negotiations will be resolved. The Act provides that where no resolution is achieved through bilateral discussions, the complaining Partner State shall refer the matter to

[57] EAC NTBs Act, Section 10(1).

the Secretary General of EAC for onward reporting to the EAC Council of Ministers. There is no clear indication of how this notification process should be carried out, and whether the trader who reported the NTB is entitled to communication between their NFP and the Secretary General.

The law does provide, however, that the complainant (trader) may refer the matter on their own to the Secretary General if his Partner State does not do so within thirty days.[58] On its face, this seems like a good path for an affected trader to get involved in the NTB resolution process. The law does not, however, specify the timelines within which the bilateral negotiations should be concluded. In theory, the negotiations could go on for years without resolution. All this time, the affected trader will not have recourse until the Partner States declare that negotiations have failed.

Generally, states prefer mutual agreements when dealing with NTBs. The main concern around mutual agreements has to do with the fact that often, states do not get to conclude their agreements, thus leaving non-tariff barriers to persist. A problem that can arise with this mechanism is that Partner States do not always agree on the best strategy for the elimination of NTBs. Although mutual agreement is the fastest way to resolve NTBs, discussions may sometimes take a long time to be concluded, thereby allowing NTBs to persist, negatively impacting intra-EAC trade.

In the early establishment of GATT, for example, trade disputes were settled diplomatically. This not only allowed a resolution that produced clear winners and losers but also meant that more neutral outcomes were explored first before sanction-backed solutions were considered.[59] This is also true in the case of EAC where Partner States prefer to handle trade conflicts through bilateral discussions. Upon the Secretary General receiving a notification of an unresolved NTB, they are required to notify the Council of Ministers for further action.[60] It is worth noting that the Council of Ministers is a body of officials representing the respective Partner States. Its decisions are primarily reached by consensus.[61] The Council of Ministers may itself take steps to re-

[58] EAC NTBs Act, Section 10(3).

[59] Buckman, *Global trade: Past mistakes, future choices*, 70.

[60] EAC NTBs Act, Section 12(1).

[61] EAC Treaty, Article 15(4).

solve the NTB or, where it considers expedient, refer the matter to the EAC Committee on Trade Remedies.[62]

Section 6 of the EAC NTBs Act introduces a compensation scheme for traders aggrieved by NTBs. It places the obligation to determine the dispute and to set compensation on the EAC Committee on Trade Remedies. While this is a noble feature of the law, the said Committee has not been set up leaving traders with no defined path to access remedy. A trader affected by NTBs only has recourse to judicial mechanisms through the East African Court of Justice (EACJ) after the full cycle has been exhausted, including the stage of the Committee on Trade Remedies.[63]

In the absence of judicial remedies, traders have to make use of available administrative mechanisms. A major challenge with administrative processes is that directives, such as a recommendation to impose a sanction on non-complying parties, can be ignored as a result of political goodwill between Partner States.[64] A legally binding mechanism that provides for sanctions that can be imposed by the Council should be adopted to ensure compliance.

The EAC approach focuses on promoting national-level focal points and monitoring mechanisms. While this is an important step towards a formal notification procedure, it is not sufficient to inform elimination of NTBs. This remains one of the weakest links in the EAC policy on NTBs elimination.[65]

4. The place of judicial mechanisms in eliminating NTBs

The EAC established a regional judicial mechanism in the form of the EACJ. The mandate of EACJ is to interpret and apply the EAC Treaty, interpret Community laws and resolve disputes related to the Treaty and the

[62] EAC NTBs Act, Section 12(2).

[63] EAC NTBs Act, Section 12(4).

[64] Craig Mathieson, 'The political economy of regional integration in Africa: The East African Community report', *European Centre for Development Policy Management,* 2016.

[65] Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

Community.[66] The EACJ is set up under Article 9 of the EAC Treaty.[67] It is divided into two divisions – the First Instance and the Appellate Division. The First Instance determines matters brought to the attention of the Court for the first time, while the Appellate Division determines appeals from decisions of the First Instance.[68] The Court currently sits on *ad hoc* basis, four times a year. This is already a challenge to the dispensation of justice, with matters taking long to be resolved.[69]

The EAC is established as a people-centred Community.[70] The Treaty emphasises good governance and participatory processes that include granting voices to the private sector and civil society.[71] This participatory approach must be considered also in the context of elimination of NTBs. As already highlighted, the administrative processes set out to deal with NTBs are not participatory and are largely bureaucratic. The role of the private sector, the civil society and the people generally is blurred with government officials getting prominence in the process. In *East Africa Law Society and 4 Others v Attorney General of Kenya and 3 Others*,[72] the Court authoritatively interpreted the Treaty and gave life to the meaning of a people-centred approach to integration by finding that the process of amending the Treaty without involving non-state actors was not consistent with the people-driven values of the Treaty.

The EACJ's mandate puts it at the zenith of resolving disputes in the EAC, especially those relating to integration. As already observed, the main driver of integration is trade, hence, the EACJ is important in resolving trade disputes. As the judicial organ of the Community, the EACJ has a cardinal responsibility in interpreting and ensuring adherence to operational principles

[66] EAC Treaty, Article 27.

[67] Article 9 sets up the court as a judicial organ of the Community.

[68] EAC Treaty, Article 23.

[69] Gerald Andae, 'EACJ registrar calls for expanded court sittings as region's cases soar' *The East African*, 14 April 2021.

[70] EAC Treaty, Article 7(1).

[71] Article 6(d) of the Treaty provides as principles of the Community good governance, equity, social justice, and respect for human rights.

[72] *East Africa Law Society and 4 others v Attorney General of Kenya and 3 others* (Ruling on Jurisdiction), 3, EACJ (2007).

and objectives laid down in the Treaty. Without a doubt, the EACJ is an important and indispensable institution in ensuring predictable and harmonious resolution of disputes in the EAC, including trade disputes.[73]

So far, the EACJ has not received significant trade dispute matters over the EAC trade regime. This could be attributed to the infiltration of provisions that establish administrative committees that chip parts of the jurisdiction of court.[74] This position is given credence by Ruhangisa who notes that:

> much as the EACJ is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty and other Community laws, the EAC continues to establish other quasi-judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and Common Market Protocols are an example where such parallel mechanisms have been established with potentialities of making [the] EACJ redundant or be a cause for conflicting and confusing decisions in the region.[75]

The EAC could learn from the WTO system. The binding dispute settlement process under WTO's Dispute Settlement Understanding (DSU) has considerably addressed international trade disputes.[76] The reality that NTBs will be subjected to enforceable legal or judicial processes is an incentive for member states to work towards eliminating them. The EAC has placed much reliance on goodwill of Partner States acting collectively as the Council of Ministers to enforce the decisions of EACJ as well as laws enacted by EALA. Even Section 17 of the EAC NTBs Act that grants the Council of Ministers some powers to eliminate NTBs only serves as a suggestion to the Council to consider sanctions against violations. There is no compelling incentive through tangible threats of sanctions for a Partner State to consider eliminating identified NTBs or take steps to ensure that new ones do not emerge.

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[73] Philomena Apiko, 'Understanding the East African Court of Justice - the hard road to independent institutions and human rights jurisdiction', Policy brief *ECDPM*, 2017.

[74] James Otieno-Odek, 'Judicial enforcement and implementation of EAC law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community Law*, Brill, 2017.

[75] John Eudes Ruhangisa, 'East African Court of Justice: Ten years of operation (achievements and challenges)' 2011.

[76] Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African community'.

While the administrative processes set out under the EAC Treaty and the EAC NTB law provide flexibility for bilateral discussions, there is need for predictability of trade dispute resolution.[77] Individual traders and businessmen should have certainty as to what they should expect when they submit a complaint or dispute, and be assured of reasonable timelines within which a decision is expected. This is largely absent in the quasi-diplomatic administrative processes highlighted above, yet, capable of being introduced in judicial processes.

EAC could adopt a hybrid system, with administrative processes being backed by judicial mechanisms, and with the option for individual traders to pursue judicial remedies directly without being coerced into waiting for uncertain administrative processes. EAC could learn from the WTO's Dispute Settlement Understanding system on resolution of trade disputes, combining judicial and administrative mechanisms. While the DSU system is not fool proof, EAC could adopt a modified system that donates the powers to determine trade disputes and prescribe remedies to a specialised division of EACJ. This, unlike the WTO system that relies on *ad hoc* panel of experts to support the Dispute Settlement Body (DSB), will have consistent patronage of qualified judges selected based on skills and experience. They will be manning the Court on regular basis and get accustomed to handling simple and complex trade disputes.

A trade dispute resolution system does not have to be perfect; it only needs to be predictable and reliable. The WTO system enshrined under the DSU, for instance, is widely popular among WTO Member States for its predictability despite its inherent weaknesses.[78] Since its inception in 1995, the system has processed over 573 disputes and issued near 400 determinations. The WTO system places emphasis on timely disposal of disputes and effective remedies. These two elements are key ingredients to the success of a trade dispute system.[79] These key ingredients can almost be guaranteed where an effec-

[77] Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African community'.

[78] Marco Bronckers and Freya Baetens, 'Reconsidering financial remedies in WTO dispute settlement', 16(2) *Journal of International Law* (2013) 281.

[79] Arie Reich, *The effectiveness of the WTO dispute settlement system: A statistical analysis*, European University Institute, 2017.

tive judicial system exists to complement the administrative structures. In the EAC, this system can be achieved through empowering the EACJ to entertain trade disputes, and by addressing structural challenges faced by the court.

Absence of a clear and compelling enforcement mechanism of decisions remains a challenge to both the EACJ and other decision-making bodies in the EAC. In the case of EACJ, the Treaty provides that decisions not relating to monetary compensation shall be submitted to the Council of Ministers for enforcement.[80] The Council of Ministers, as already observed, is a bureaucratic body which makes decisions by consensus. This enforcement procedure basically renders decisions by the EACJ not relating to monetary compensation unenforceable where there is no goodwill among the Partner States. The WTO model of negative consensus, where decisions of the DSU's Appellate Body are considered adopted by the WTO Council without need for a vote, works well and a similar system could serve EAC well too.[81]

5. Conclusion: Case for review of the EAC NTBs Law

It is not enough that the EAC has a Customs Union. The benefits of the Customs Union are lost and remain vague if other trade-restricting measures are not addressed. Indeed, effective enjoyment of negotiated tariff arrangements requires states to actively aim at facilitating cross-border trade by addressing NTBs.[82]

Access to remedies by traders is central to resolving NTBs. Remedies should give assurance and confidence to affected traders that cross-border trade works. Further, they should be effective and deterrent enough to make trade officials and governments to work towards eliminating causative acts and omissions. Lack of effective remedies in cases of NTBs is a strong incentive for offending governments not to work towards their resolution in a timely manner or at all.

[80] East African Court of Justice, 'Frequently asked questions', www.eacj.org.

[81] World Trade Organisation, 'WTO bodies involved in the dispute settlement process', www.wto.org.

[82] Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

This paper has noted the adverse effects of NTBs on intra-EAC trade, with a stunted growth of 13% while 87% of trade takes place with partners outside the EAC. This stunted growth is largely blamed on unresolved NTBs. The growth of the EAC Partner States and achievement of the SDGs will be fast-tracked if intra-EAC trade is encouraged through elimination of disruptive agents like NTBs. Free movement of goods in intra-EAC trade will not be achieved even after full realisation of the Customs Union as long as NTBs persist, and no tangible efforts are deployed to eliminate them yet.[83]

It is observable that countries that are experiencing economic successes are, generally, liberal to cross-border trade. They employ suitable measures to ensure low cost of trade; improved infrastructure to support movement of goods and services; have less regulatory requirements and in most cases these regulatory functions are collapsed into one regulatory bucket; and they enjoy good governance and low levels of corruption and bureaucratic inefficiencies.[84]

The EAC NTBs Act has inherent weaknesses that require resolution if the flow of cross-border trade is to be improved. These weaknesses include the uncertainties of the administrative process, absence of clear path to remedies and the peripheral role given to the EACJ.

5.1 Recommendations: Addressing deficiencies in the existing mechanisms

To ensure realisation of the intended aim of resolving NTBs in the intra-EAC trade, the EAC NTBs regime should be reviewed and improved with a focus on the following areas:

[83] Leonard Obura Aloo, 'Free movement of goods in EAC', in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community Law*, Brill, 2017.

[84] Mengistae Taye, 'The business environment in Southern Africa: Issues in trade and market integration', World Bank, 2010.

5.1.1 Reviewing composition of the national monitoring committees

The discretion of Partner States to determine who sits in NMCs, including from the private sector, is prone to abuse considering that open governance is at embryonic stages in many EAC Partner States. The law should clearly delineate the representation of private sector, civil society, trade policy experts and trade association officials as these are critical players in cross-border trade.

5.1.2 Harmonising mandates of the two agencies (NMCs and NFPs)

The overlapping mandate of the NMC and the NFP should be reviewed and addressed. While the NFP is a government agency, the NMC is a multi-sectoral agency comprising of government and private sector representation. To avert possible tension while executing their respective mandates, the law should provide that the NMC is responsible for identifying and initiating processes for elimination of NTBs. The NFP, on the other hand, should provide secretariat support to the NMC.

5.1.3 Granting more say to affected traders

The emphasis of bilateral negotiations in eliminating NTBs is an unsustainable one. It is also least disruptive as it involves diplomatic discussions. There are deficiencies in the processes laid out under the law. The processes largely ignore the affected traders. The law only recognises the affected traders on two instances – where a report is not made to the EAC Secretary General, and where the traders are dissatisfied with the final outcome of the NTB resolution process. The processes, as already discussed, could take years. The law has no clear demarcation of timelines, as they are often stated with overlaps.

In reviewing the law, there is need to grant more voice to traders. They should be entitled to be copied in correspondence between the Partner States during the bilateral negotiations, or at least entitled to updates on a regular basis. They should also be copied in the notification to the Secretary General where bilateral negotiations fail, or should be notified of the failure of the negotiations.

5.1.4 Enhancing access to judicial remedies

The requirement that an affected trader can only seek judicial remedies after exhaustion of the administrative process is itself draconian and spiteful on the rule of law. It is cumbersome and even punishing, to expect a private trader to exhaust remedies that are largely controlled by government bureaucrats and where the trader has no right to information or notification. In reviewing the law, affected traders should be entitled at any time to seek judicial remedies where they do not have confidence that the administrative mechanisms will bear fruit or where administrative processes do not return results within reasonable periods.

In a nutshell, the process of enhancing access to remedies by traders is essential in resolving NTBs. The access should be made available through administrative mechanisms that are easy to access and transparent, as well as through low-cost judicial processes that are easily available to every trader.

5.1.5 Adopting negative consensus

The EAC Treaty, the EAC Common Market Protocol as well as the EAC NTBs Act provide that decisions shall, generally, be made by consensus. Attaining positive consensus has been a challenge in an area with competing political and economic interests. To make decision-making flow free and easy, the law should be modified to provide for negative consensus. This means that once a committee, for instance the Trade Remedies Committee, has made a decision, the relevant administrative body like the Council of Ministers is considered to have adopted it unless by consensus they vote to reject the decision. The system is working under the WTO DSU, and the EAC Partner States already enjoy the efficiency in the system through their membership in the WTO.

5.1.6 Simplification of procedures

Procedures are essential to free flow of regional trade. They should always be simple, easy to understand and easy to comply with. While the EAC

has introduced the Simplified Trade Regime (STR)[85] to enhance understanding of regional trade policy and laws, knowledge of these regulations remain low even among custom and border officials.

The EAC Rules of Origin regulations remain one of the least understood of the facets of the Customs Union and the Common Market. For ease of compliance and to enable domestic producers in the EAC to derive true benefit of the low intra-EAC tariffs, the EAC Partner States should:

i. Provide intra-EAC exporters with options as to which rule they should apply, based on net benefit as perceived by each. This could, for instance, provide a choice between a change in tariff heading test or a reasonable value-added rule;

ii. Completely eradicate Rules of Origin requirements that are production process-specific;

iii. Eliminate Rules of Origin certificate requirements for products whose preference margins fall below a defined percentage;

iv. Apply the Rules of Origin regulations indiscriminately, fairly and consistently to avoid unhealthy competition; and

v. Invest more in trade and customs intelligence and pass the benefits to especially large-scale exporters who should not be required to produce certificates of origin for each item but simply undergo periodic assessment to ensure they are complying with Rules of Origin regulations.

5.1.7 Facilitating regulatory convergence

Duplicity of roles and multiplication of governmental authorities involved in regulating regional trade has added more confusion than aid to intra-EAC trade. Being a common market, the EAC must now consider establishing supranational authorities to regulate cross-border trade as opposed to leaving it in the hands of national regulators. Joint standards and inspection

[85] Trade Mark East Africa, 'Why informal cross border trade remains important', 29 January 2015.

authorities, for instance, will reduce instances of non-recognition of standards by one country of another's.

The introduction of One Stop Border Posts (OSBPs) across intra-EAC borders is a positive step towards regulatory convergence. The OSBPs, however, still operate as separate borders only providing the convenience of meeting officials from the two border countries under one roof. A joint-border post should in the ideal, be managed centrally and jointly by the two border states. This will reduce bureaucratic burdens, heavy documentation and other redundant trade restrictions.

5.1.8 Harmonisation of tests and standards

Cumbersome and expensive standards and testing processes have been identified as a major barrier to trade in the EAC. Each Partner State has its own national standards and expects imports from other Partner States to comply with these standards. While the Community laws provide for mutual recognition of standards and reciprocity, in reality each Partner State rigidly holds to her standards. Sadly, there are also no testing facilities at the borders and traders often incur additional costs to take products for testing at the capital cities where testing facilities are located.[86]

While standards and tests are aimed generally at protecting interests of the public, in the EAC there are no safeguards by which new or current technical regulations are assessed to ensure they are consistent with public policy objectives. In addition, new standards are formulated without a baseline survey on capacity of Partner States and the private sector to comply with them. The overall effect is that these standards undermine regional trade and product competitiveness.

To address this challenge, the EAC Partner States should work towards establishing common standards and by adopting existing universal standards, adjusted to accommodate the realities and capacities of private players and

[86] Luise Nudi Rasanga, 'Harmonization of standards in the East African Community: Challenges and opportunities (2000-2012)', Unpublished masters of arts in international studies dissertation, University of Nairobi, August 2013.

states in the region. This will make standards and testing regulations more efficient, responsive and in line with public policy objectives while facilitating regional trade.

In addition, Community laws and policies should target the current over-reliance on bureaucratic orders and commands on regional trade. High-handed traffic police officers on trade routes purporting to enforce standards, overzealous border officials and strict unbeneficial testing requirements that focus on inspection manually or through slow electronic scanning of every item passing through the border is slowing regional trade. This ends up tying up scarce regulatory and customs resources in mundane activities thus limiting capacity of these crucial facilities to carry out effective robust border management. The EAC Partner States could, for example, agree on a policy that individual testing and scrutiny at border posts shall be applied, based on trade and security intelligence, on traders or sectors for which the risks are greatest for circumventing national or regional trade policy measures.[87]

5.1.9 Transparency in regulatory information

Difficulty in accessing regulatory and cross-border trade information has been noted in the EAC. There are no centralised websites or information resource centres where one can access all information under one roof. The EAC Secretariat should prioritise setting up a centralised information resource facility that provides simplified information on all regulatory requirements to cross-border traders. The resource should be a collaborative facility where each Partner State has a room (even virtual) and provides information, regulatory forms, tariff books and fees schedules to traders. This will not only reduce incidents of non-compliance by traders based on lack of information, but also reduce the time spent at the borders seeking clarifications and exemptions. Where states seek to introduce new regulatory measures, the resource centre should have this in time to enable traders and their associations to submit comments on them. These comments could be treated as forming part of the regulatory impact assessment.

[87] Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

5.1.10 Transparent and predictable trade dispute resolution system

The EAC trade dispute system is unpredictable: it is not cast on a time-bound regulation, and it does not adequately provide for the role of judicial settlement and remedies. As opposed to the WTO's DSU system that emphasises judicial processes over administrative ones, the EAC system relies heavily on an administrative mechanism that is not backed by easily enforceable legal sanctions for violators. There is little incentive for states to comply with the dispute settlement system at the moment.

The EACJ should be empowered to determine trade disputes. Ideally, the EAC Trade Remedies Committee should be established as a division under the EACJ with specific mandate of determining trade disputes. This will create specialisation in the Court while ensuring that trade disputes receive elevated attention beyond lip service that characterises the present system. The WTO's DSU system could be adopted with specific modifications as already proposed, including setting the EAC's reasonable time-bound processes to ensure disputes are settled without unreasonable delays.

The foundation of the EAC integration is trade, and the EACJ should be sufficiently capacitated to administer trade disputes. As opposed to the current state where the Court sits on *ad hoc* basis three times a year, a division available on full time basis will ensure timely resolution of trade disputes. Having a full-time bench to hear trade disputes will require budgetary reviews of the EACJ's operations and provision of more resources.

There is further need to review the EAC Treaty to give express jurisdiction to the EACJ to administer trade disputes. Parallel mechanisms have been introduced, with mandates competing with the Court's thus clipping its jurisdiction. These should be addressed and harmonised.

In addition, the role of national courts should be highlighted and a collaboration mechanism with the EACJ be established and cast in policy. National courts will play an important role in ensuring decisions of the EACJ on trade disputes are implemented by Partner States. This will complement the role of the administrative mechanisms like the Council of Ministers and the Summit through sanctions and negotiated compliance matrices.

5.1.11 Reclassification and systemised elimination of NTBs

There is need to adopt a simple procedure for classifying NTBs and eliminating them. EAC Partner States, except South Sudan, are members of the WTO and, therefore, have access to an already simplified regime by WTO. All existing NTBs, as set out under the EAC Time-bound Program, should be microscopically examined against the WTO compliance benchmarks. This will reveal whether the NTBs are non-discriminatory, transparent and do not constitute an unnecessary restriction to cross-border trade. Once established that an NTB fails the WTO compliance test, the violating Partner State should be given a reasonable time to modify or altogether abolish the barrier. Where non-compliance is noted, the already discussed enforcement mechanism, including sanctions, should be triggered.

5.1.12 Regulatory impact assessment

The capricious manner in which new regulatory regimes are introduced by Partner States scores highly as a contributor to persistent trade barriers in the EAC. The area of standards is one of the sticky regulatory regimes most abused, with Partner States raising anything at any time as standard to block trade commodities from other Partner States.

Worth observing, imposing shifting and cumbersome regulatory requirements on especially small-scale cross-border traders is economically counterproductive and leads to corruption as these traders seek to circumvent these already difficult requirements. The EAC, for instance, has about eight standards applying to dairy produce exporters in the intra-EAC trade. Because these standards were mechanically adopted without appreciating the technological and economic constraints in the region, compliance remains at an all-time low.[88]

Compliance with regulatory requirements and standards is accompanied by financial liability to traders. Creating a new regulatory measure or standard without appreciating this reality and its impact on trade is, to say the least, injudicious.

[88] Michael F Jensen, Nicholas Strychacz, and John Keyser Michael, 'Non-tariff barriers and regional standards in the EAC dairy sector', *Africa Trade Policy Notes*, note 2, June 2010.

Holding Partner States to their Treaty commitments, the EAC should have a policy requiring all Partner States to undertake, and submit reports to the EAC Council of Ministers, in-depth regulatory impact assessment of the proposed regulatory measure that could restrict intra-EAC trade. Such assessment will inform decision-makers at regional level on suitability of the proposed measures and to consider other less restrictive, yet, effective options that could be adopted.

5.1.13 Establishing an autonomous trade monitoring mechanism

NTBs persist partly because monitoring mechanisms are weak in the EAC. The capacity of the EAC Secretariat to adequately monitor NTBs and regulatory compliance is constrained. Borrowing from the Association of Southeast Asian Nations (ASEAN) model,[89] the EAC should consider setting up a trade monitoring directorate with specific resources dedicated to monitoring regional trade, assessing impacts of NTMs and new NTBs, without necessarily relying on periodic reports by Partner States. This mechanism will not only complement the role of the national monitoring mechanisms but will also serve as a crucial think-tank for EAC policy organs. With such a directorate, the EAC will readily assess impact of NTBs and new NTMs and also easily gather crucial statistics on impact of trade policies, national regulations and Community laws on trade and economic integration in the region.

[89] Association of Southeast Asian Nations, 'Guidelines for the implementation of ASEAN commitments on non-tariff measures on goods,' 2022.

THE KENYA-USA NEGOTIATIONS FOR A FREE TRADE AREA AGREEMENT: MAKING A CASE FOR A GENDER-RESPONSIVE APPROACH

Omolo Joseph Agutu

Abstract

Through free trade agreements, participating states aim to facilitate trade among themselves by eliminating all barriers from their Free Trade Area's (FTA) internal trade. The extent to which a participating state derives and distributes benefits from an FTA agreement necessarily depends on the nature and structure of its economy. Thus, the gender dimension of an economy must be one of the factors to be considered in any discussion on a free trade agreement so as to ensure equitable and full participation of all persons who fall in a country's working age group. In doing this, some of the questions that should be considered are: what is the gender profile of the country's economy and how does it affect men and women? What factors (inhibitors and enablers) have contributed to the present gender profile of the economy? What is the desired level of gender-inclusion in the economy and how can it be achieved? And are there effective mechanisms under the free trade agreement for enforcing the gender-inclusion goals? In seeking to answer these questions, this article looks at the gender issues in the Kenya-USA FTA agreement negotiations.

Keywords: Kenya-USA FTA, Free Trade Area, Trade and Gender Equality, Gender Inclusion, Gender-Responsive Approach, Gender-Impact Assessment

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1.0 Introduction

On 8 July 2020, Kenya and the United States of America (USA) launched bilateral negotiations on a free trade area (FTA) agreement.[1] Typically, through FTAs, countries agree to eliminate trade barriers like tariffs and quotas on trade with each other while retaining autonomy on trade policy with third countries with the aim of facilitating trade between themselves. So far, Kenya and the USA have exchanged their negotiation objectives and a number of preparatory trade negotiation rounds have been carried out.[2] Remarkably, the negotiation objectives identified by Kenya and the USA have not identified gender inclusion as a major concern. In fact, there is only a single mention of promoting participation of women in government procurement in the USA's objectives.

This brief article seeks to contribute to the ongoing discourse on a possible Kenya-USA FTA Agreement, with gender lenses. The article is divided into five sections. Section one discusses general points relating to the ongoing trade negotiations and the nature of economic engagements between Kenya and the USA. Section two provides an analysis of the gender profile of Kenya's economy. Section three proposes some approaches that could be employed to make the resultant FTA agreement and its implementation gender-responsive. Section four tries to anticipate some challenges that may be experienced in the development and implementation of a gender-responsive FTA. Section 5 contains the conclusions.

Kenya is a key security and economic partner of the USA in Africa and this can be attested to by the fact that the ongoing negotiations represent the first ever attempt to create an FTA between the USA and a Sub-Saharan African country, and the second in the whole of Africa.[3] Kenya is an important

[1] Republic of Kenya, Statement by Betty C Maina, CBS, Cabinet Secretary, Ministry of Industrialisation, Trade and Enterprise Development during the Launch of the Negotiations of the Kenya-United States of America (USA) Free Trade Agreement (FTA) on 8 July 2020.

[2] Office of the United States Trade Representative, 'United States-Kenya negotiations: Summary of specific negotiating objectives,' May 2020; and Ministry of Industrialisation, Trade and Enterprise Development.

[3] The USA signed an FTA with Morocco in 2004.

player in USA's Eastern Africa anti-terrorism campaign.[4] In trade terms, however, Kenya does not constitute a significant trading partner for the USA. 2019 statistics rank Kenya as USA's the 96th largest goods trading partner (US Dollars 1.1 billion), the 109th largest goods export market (USD 401 million) and the 86th largest supplier of goods imports (USD 667 million).[5] Conversely, for Kenya, the USA is a very important trading partner. In 2019 and 2020, the USA was the 4th leading destination market for exports from Kenya valued at USD 552.3 million (8.7%) and USD 525 million (7.7%) respectively.[6] In 2020, the USA was the 7th largest import source for Kenya representing 3.44% (USD 531 million) of its total imports.[7] In character, the exports from Kenya to the USA are mainly low-value added products such as fruits, nuts, ores, slag, coffee and spices.[8] On the other hand, the major USA exports to Kenya are high value-added products like aircraft, plastics and machinery.[9] Detailed data on trade in services between the two countries is not available for analysis.

At present, trade between the USA and Kenya is conducted under the framework provided by the African Growth and Opportunity Act (AGOA) which grants duty-free market access for some products from eligible Sub-Saharan African countries.[10] AGOA was enacted in 2000 and, unless it is extended further, it shall expire in 2025.[11] Crucially, the Kenya-USA FTA once concluded, could replace AGOA in USA-Kenya trade relations and is intended to serve as a model for future negotiations between the USA and other African countries.[12]

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[4] Samuel L. Aronson, 'United States aid to Kenya: A study on regional security and counterterrorism assistance before and after 9/11' 5(1) *African Journal of Criminology and Justice Studies* (2011) 119, 125.

[5] Office of the United States Trade Representative, 'Countries and regions: Kenya' - <https://ustr.gov/countries-regions/africa/east-africa/kenya#:~:text=Kenya%20is%20currently%20our%2096th,was%20%24266%20million%20in%202019.> on 19 August 2021.

[6] Kenya Export Promotion and Branding Agency, *Kenya export performance in 2020*, March 2021.

[7] TrendEconomy, 'Annual International Trade Statistics by Country (HS02): Kenya' - <https://trendeconomy.com/data/h2/Kenya/TOTAL> on 19 August 2021.

[8] Office of the United States Trade Representative, 'Countries and regions: Kenya.'

[9] Office of the United States Trade Representative, 'Countries and regions: Kenya.'

[10] TRALAC, 'About AGOA' - <https://agoa.info/about-agoa.html> on 21 March 2022.

[11] TRALAC, 'About AGOA'.

[12] Office of the United States Trade Representative, 'United States-Kenya negotiations: Summary of specific negotiating objectives, May 2020.

2.0 The gender profile of Kenya's economy

According to the most recent census, there are 24,014,716 (50.5%) women, 23,548,056 (49.5%) men and 1,524 (0.003%) intersex people in Kenya.[13] Further, only 19,677,401 people are working as part of Kenya's labour force, 49.8% of whom are male while 50.2% are female.[14] Kenya's current gross domestic product (GDP) is approximately USD 99 billion (2020).[15] Informal employment accounts for approximately 83% of total employment in Kenya[16] and the gender pay gap stands at 32% in favour of men.[17] Table 1 and 2 below contain additional facts about the economy and its gender profile respectively.[18]

Table 1: Summary of key facts of the economy (2017)[19]

GDP composition by end use	Household consumption	77%
	Government consumption	13.7%
	Investment in fixed capital	17.1%
	Investment in inventories	-0.1%
	Exports of goods and services	13.9%
	Imports of goods and services	-21.7%
GDP composition by sector of origin	Agriculture	35%
	Industry	17.6%
	Services	47.7%
Labour force by occupation	Agriculture	61.1%
	Industry	6.7%
	Services	32.2%

[13] Kenya National Bureau of Statistics, 'Kenya Population and Housing Census: Distribution of population by age, sex and administrative units' 3, 2019, 11.

[14] KNBS, 'Kenya Population and Housing Census' 162.

[15] Heritage Foundation, '2021 Index of economic freedom' - <https://www.heritage.org/index/country/kenya> accessed 23 August 2021.

[16] KNBS, Economic Survey, 2019, 39; and KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 64.

[17] Equileap, *Gender equality in Kenya: Assessing 60 leading companies on workplace equality,* Special Report, November 2019, 11.

[18] Moody's Analytics, 'Economic indicators: Kenya' - <https://www.economy.com/kenya/indicators#ECONOMY> on 23 August 2021.

[19] Information sourced from Moody's Analytics, 'Economic indicators: Kenya' - <https://www.economy.com/kenya/indicators#ECONOMY> on 23 August 2021.

Table 2: Gendered Profile of the Economy

	Indicator	**Men**	**Women**
1	Labour force participation rate (2019)[20]	69.6%	64.1%
2	Real monthly earning index (2014)[21]	4.12	3.52
3	Unemployment rate (2019)[22]	2.43%	2.76%
4	Modern sector employment (2017)[23]	66%	34%
5	Wage employment in agricultural sector (2016)[24]	67%	33%
6	Share of agricultural sector employment over all sources of employment (2019)[25]	11.4%	11.9%
7	Wage employment in manufacturing sector (2017)[26]	84%	16%
8	Wage employment in public administration (2017)[27]	64%	36%
9	Wage employment in service activities (2017)[28]	48%	52%
10	Mean annual household real per capita expenditure based on gender of the household head (2016)[29]	Ksh 56,745	Ksh 50,800

[20] KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 104.

[21] KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 103.

[22] World Bank, 'Unemployment, total (% of total labor force) (modeled ILO estimates) - Kenya' -<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=KE> on 23 August 2021.

[23] KNBS, Women and men in Kenya: Facts and figures 2017, 46.

[24] KNBS, Women and men in Kenya, 46.

[25] Other types of employments account for employment of men and women as follows: Household chores (3.3% for men and 5.2% for women); Financial (2.2% for men and 3.5% for women); Professional (2.8% for men and 1.7% for women); Accommodation (2.8% for men and 3% for women); Health (3.8% for men and 8.3% for women); Transport (4.3% for men and 1.1% for women); ICT (4.4% for men and 4.7% for women); Construction (9.8% for men and 3.6% for women); Public Administration (8.7% for men and 13.6% for women); Trade (10.1% for men and 7.6% for women); Manufacturing (15.5% for men and 5.9% for women); Education (16.8% for men and 27% for women); Formal-wage employment (31.06% for men and 17.72% for women); and Self-Employment (41.21% for men and 54.43% for women). KNBS, Economic Survey, 2019 39; and KNBS, Inequality Trends and Diagnostics in Kenya, 2020 65; KIPPRA, Kenya Economic Report: Creating an Enabling Environment for Inclusive Growth in Kenya, 2020 10.

[26] KNBS, Women and men in Kenya, 47.

[27] KNBS, Women and men in Kenya, 48.

[28] KNBS, Women and men in Kenya, 49.

[29] KNBS, *Inequality trends and diagnostics in Kenya,* 2020, 40.

	Indicator	Men	Women
11	Average asset ownership index based on the gender of the household head (2016)[30]	5	4.2
12	Share of ownership of unlicensed establishments (2015)[31]	38.2%	61.8%
13	Primary school enrolment (2017)[32]	52%	50%
14	Secondary school enrolment (2017)[33]	52%	48%
15	Student enrolment in technical institutions (2017)[34]	62%	38%
16	Student enrolment in universities (2017)[35]	55.5%	44.5%
17	Membership of the National Assembly (2017)[36]	80%	20%
18	Membership of the Senate (2017)[37]	72%	28%
19	Governors (2017)[38]	100%	0%
20	Membership of County Assemblies (2017)[39]	68%	32%
21	Cabinet Secretaries (2017)[40]	75%	25%
22	Principal Secretaries (2017)[41]	63%	37%
23	Membership of the Supreme Court Bench (2017)[42]	72%	28%
24	Membership of the Court of Appeal Bench (2017)[43]	74%	26%

[30] KNBS, *Inequality trends and diagnostics in Kenya,* 2020, 105.

[31] KIPPRA, *Kenya economic report: Creating an enabling environment for inclusive growth in Kenya*, 2020, 83.

[32] KNBS, Women and men in Kenya, 48.

[33] KNBS, Women and men in Kenya, 39.

[34] KNBS, Women and men in Kenya, 44.

[35] KNBS, Women and men in Kenya, 41.

[36] KNBS, Women and men in Kenya, 60.

[37] KNBS, Women and men in Kenya, 60.

[38] KNBS, Women and men in Kenya, 60.

[39] KNBS, Women and men in Kenya, 60.

[40] KNBS, Women and men in Kenya, 61.

[41] KNBS, Women and men in Kenya, 61.

[42] KNBS, Women and men in Kenya, 62.

[43] KNBS, Women and men in Kenya, 62.

	Indicator	Men	Women
25	Membership of the High Court Bench (2017)[44]	62%	38%
26	Membership of the Magistracy (2017)[45]	52%	48%
27	Membership of Boards of Directors in private sector companies (2015)[46]	80%	20%
28	Chairs to Board of Directors in private sector companies (2015)[47]	90%	10%
29	Membership of Boards of Directors in Private Sector Companies listed in the Nairobi Securities Exchange (2015)[48]	79%	21%
30	Membership of the National Police Service (2016)[49]	85%	15%
31	Experience of physical violence (15-49 Age Group) (2014)[50]	8%	38%
32	Experience of physical sexual violence (15-49 Age Group) (2014)[51]	4%	13%

3.0 Suggestions for a gender-sensitive approach

As outlined above, Kenya's economy manifests gender inequality in terms of access to opportunities, access to education and skills, participation in policy and decision making, earnings and access to and control of means of production. Although enhancing trade flow between Kenya and the USA through an FTA agreement could provide an opportunity to empower women, such mere enhancement would not in itself help alleviate gender inequalities.

[44] KNBS, Women and men in Kenya, 62.
[45] KNBS, Women and men in Kenya, 62.
[46] KNBS, Women and men in Kenya, 62.
[47] KNBS, Women and men in Kenya, 62.
[48] KNBS, Women and men in Kenya, 52.
[49] KNBS, Women and men in Kenya, 67.
[50] KNBS, Women and men in Kenya, 52.
[51] KNBS, Women and men in Kenya, 52.

In fact, it may widen the disparities in favour of men by magnifying the existing fault lines. Thus, this section highlights the ways in which gender considerations can be included in the Kenya-USA FTA agreement.

3.1.0 Involvement of female trade experts

Gender equality in trade, like any other sphere of life, cannot be achieved without meaningful participation of women. Thus, there is need to involve more women and women trade experts and other resource persons with technical knowledge and practical experience on the connection between trade and gender inequality in the negotiations.

3.2.0 Ex-ante study on distributional effects

There already exists a wealth of information on the gender inequality in the structure of Kenya's economy. Using this information as a starting point, the Government of Kenya should, first, carry out a study to compile up-to-date data on the status of gender inequality in the economy. In this study, it could rely on the United Nations Minimum Set of Gender Indicators.[52] Using this updated information, the government should then carry out a further study on the possible distributional effects of the FTA along gender lines (gender-impact assessment). These two studies should provide a wholesome view of the economy, identifying the patterns and parameters of existing gender inequalities and how the FTA would impact them.

3.3.0 Setting gender-inclusivity goals

The gender-impact assessment report should form the baseline for setting the negotiations on a gender-conscious path. The 2010 Constitution provides for equality between men and women and this must be reflected in the

[52] The list is made up of 52 indicators to be used across countries and regions, for the national production and international compilation of gender statistics. The indicators are organised into five categories as follows: economic structures and access to resources; education; health and related services; public life and decision-making; and human rights of women and child.

gender-inclusivity goals.[53] The Government should use the studies proposed above to identify the sectors where women are advantaged and those in which they are disadvantaged. In the sectors where women are advantaged, subject to the constitutional dictates, the Government must design ways to safeguard this. In sectors where women are disadvantaged, the Government must outline clear and time bound goals for meeting the constitutional requirement for gender equality.

3.4.0 Textual provisions[54]

The proposed FTA agreement could ensure gender mainstreaming in the following three ways: adoption of a side note or protocol on gender concerns; a stand-alone chapter on gender concerns in the FTA agreement; or inclusion of provisions that safeguard gender equality in different topics to be covered in the FTA agreement. Whichever option the negotiating team adopts, the matters listed below should be expressly provided for:

1. A preamble and set of objectives/principles with an explicit provision on gender equality and gender inclusion goals.
2. Incorporation of legal standards in national laws on gender equality as minimum standards.
3. Gender equality exceptions or reservations along the same lines as those on protection of public morals, human health, animal life or the environment already appearing in trade agreements. Such a provision could allow a party to deviate from the commitments under the FTA agreement should its gender equality goals make it necessary.
4. More favourable treatment for women-owned trading companies.
5. Incentives like tax rebates/holidays for trading companies with policies that enhance women empowerment through flexible working hours, sexual harassment policies, skill development programmes for women and embracement of gender diversity at all levels.

[53] Article 27, Constitution of Kenya.

[54] Some proposals have been borrowed from other sources like International Trade Centre (2020). *Mainstreaming Gender in Free Trade Agreements*. ITC, Geneva.

6. Technical and financial assistance for research and capacity building initiatives on gender and trade and education and skill development for women.
7. A joint mechanism to continuously monitor the effect of the FTA agreement on gender equality.
8. Legally binding dispute settlement mechanism to cover provisions on gender equality as well. The dispute settlement mechanism could allow for initiation of enforcement proceedings by citizens of the two parties in addition to the parties.

4.0 Possible challenges to the gender mainstreaming process

This section discusses some challenges that are likely to emerge in the negotiation, adoption and implementation of a gender-responsive approach in the Kenya-USA FTA agreement.

4.1.0 Lack of political goodwill

Despite the constitutional provisions providing for gender equality in Kenya, gender equality as a concept still remains a highly contested matter. This can be witnessed in the controversy relating to failure by the Parliament of Kenya to enact a law to give effect to the two-thirds' gender principle.[55] Trade policy negotiation is a political process. Thus, the general lack of political goodwill on the implementation of the provisions of the Constitution of Kenya on gender equality is likely to also undermine adoption of a gender-sensitive approach in the Kenya-USA FTA negotiations.

4.2.0 Lack of gender-disaggregated data

As outlined in section 2 above, although some data exist on the gendered structure of Kenya's economy, a lot of useful information is still not reliably

[55] This happened despite the existence of four court orders compelling Parliament to act.

available.[56] For instance, there is no well-established, consistent and standardised protocol on collection and compilation of this kind of data.[57] Further, the available data lacks crucial information such as daily time use by men and women, gender disaggregated pay information and gender dimensions of taxation.

4.3.0 Strong socio-cultural biases

Gender is a socio-cultural construct. Most communities in Kenya have cultural or customary practices that subjugate the welfare and interests of women and girls.[58] Having been practised for long periods of time, these practices have created an impervious layer that perpetuates and justifies injustices against women as part of accepted social order. For instance, despite the existence of laws on equality in Kenya, according to anecdotal accounts, women continue to predominantly shoulder the burden of most household roles like housekeeping, food preparation and childcare. Similarly, women are still discriminated against in land ownership and choice of work.[59]

4.4.0 Absence of women in positions of power

Since women have historically been disadvantaged in terms of access to education and representation in policy/decision making positions,[60] there is a real danger that their participation in the FTA negotiations would be hampered due to a shortage of female trade experts within the Ministry of Industrialisation, Trade and Enterprise Development.

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[56] KNBS and UN Women, *Gender sector statistics plan*, 2020, 11.

[57] Some progress has been made in this regard through the adoption in 2020 of the Gender Sector Statistics Plan.

[58] Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.

[59] Borden Project, 'Exploring land rights for women in Kenya' - <https://borgenproject.org/land-rights-for-women-in-kenya/> on 21 March 2022.

[60] UN Women, Kenya national gender statistics assessment 2018, 56; KNBS, Women and men in Kenya.

5.0 Conclusion

The economy is a gendered system and its movement by way of contraction or expansion would necessarily enhance any embedded inequalities within it. Women are generally disadvantaged in Kenya's economy. They don't have access to the lucrative sectors of the economy, they have poor earnings, they do not own factors of production, they are poorly represented in decision making organs and are overburdened by reproductive roles. Consequently, whatever promise the Kenya-USA FTA may hold, its benefits may not be felt by women in Kenya without a deliberate commitment to gender inclusion.

THE LITERAL INTERPRETATION RULE IN TAX STATUTES: THE BARCLAYS AND THE COMMISSIONER OF DOMESTIC TAXES CASES

Abdullahi Ali*

Traditionally, tax statutes have been interpreted in a literal and strict manner. Proponents of the literal interpretation of tax statutes approach (also referred to as the 'traditional approach') have in principle carried sway for the basic reason that the punitive nature of a tax law demands that the taxpayer ought to know in unambiguous and clear terms whether and how exactly they are liable for tax. This issue was addressed by the High Court and the Court of Appeal in the cases between Barclays Bank of Kenya Limited and the Kenya Revenue Authority's Commissioner of Domestic Taxes. This case review assesses these cases and the impact of the resulting jurisprudence on the interpretation of tax statues in Kenya.

Key words: literal interpretation of statutes, purposive interpretation of statutes, interchange fee, royalty, withholding tax, interpretation of punitive law

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1.0 Introduction

> ...in a taxing Act, one has to look merely at what is clearly said. There is *no room for intendment* as to a tax. There is no equity about tax. There is no presumption as to a tax. *Nothing is to be read in*, *nothing is to be implied* (emphasis added). One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, *cannot bring the subject within the letter of the law*, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.[1]

The debate on the extent to which a tax statute can be interpreted in a literal manner has been a long one.[2] Proponents of the literal interpretation of tax statutes approach (also referred to as the 'traditional approach')[3] have in principle carried sway for the basic reason that the punitive nature of a tax law demands that the taxpayer ought to know in unambiguous and clear terms whether and how exactly they are liable for tax. This question was a key point of contention in the case *Tanganyika Mine Workers Union v the Registrar of Trade Unions*,[4] where the Court held that punitive laws (that is, tax statutes) must be construed strictly and in such circumstances one ought not to do violence to its language in order to bring people within it. Rather, the court ought to take care that no one is brought within the statute without express language. Additionally, it is an accepted maxim within the traditional approach in the interpretation of tax statutes that where there is an ambiguity, it ought to be construed in favour of the taxpayer.[5]

Contrastingly, Lord Russel CJ in *Attorney-General v Carlton Bank*,[6] in support of the purposive rule of interpretation described the court's duty with

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[1] Rowland J, in *Cape Brandy Syndicate v Inland Revenue Commissioners* (1920) 1 KB 64.

[2] Kerry Harnish, 'Interpreting the Income Tax Act: Purpose v plain meaning and the effect of uncertainty in the tax law' 35(3) *Alberta Law Review* (1997), 688.

[3] Stephen Bowman, 'Interpretation of tax legislation: The evolution of purposive analysis', 43(5) *Canadian Tax Journal* (1995).

[4] *Tanganyika Mine Workers Union v Registrar of Trade Unions* (1961) EA 629.

[5] Bowman, 'Interpretation of tax legislation: The evolution of purposive analysis'.

[6] *Attorney-General v Carlton Bank* (1899) 2 QB 158, para 164 (CA).

regard to any statute including a tax statute as the duty '…to give effect to the intention of the legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.' Evidently, the norm that should be followed in the interpretation of tax statutes has been contested but has traditionally fallen in favour of a literal/strict interpretation.

This case review assesses the application of the literal interpretation of tax statutes approach in the cases between Barclays Bank of Kenya Limited (Barclays) and the Kenya Revenue Authority's (KRA) Commissioner of Domestic Taxes before the High Court in *R v Commissioner of Domestic Taxes (Large Taxpayers Office) ex parte Barclays Bank of Kenya Ltd*,[7] and the Court of Appeal in the appeal by the KRA from the High Court decision in *Commissioner of Domestic Taxes (Large Taxpayers Office) v Barclays Bank of Kenya*.[8] As at June 2022, there was an appeal pending before the Supreme Court brought by ABSA Bank, (previously Barclays) challenging the decision of the Court of Appeal which reversed the decision of the High Court.[9]

The first part is the introduction above. This case review, in the second part, lays out the factual background to the dispute between Barclays and KRA highlighting in detail the contentious issues between the parties. The third part provides an analysis of the issues that were set for determination before both courts, their *ratio* and how each court's decision differed from the other. This review concludes by assessing what the Barclays cases decisions mean for the applicability of the literal approach in the interpretation of tax statutes.

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[7] *R v Commissioner of Domestic Taxes Large Taxpayers Office ex parte Barclays Bank of Kenya Ltd*, Miscellaneous Civil Application No 46 of 2013, Judgment of the High Court at Nairobi, 20 May 2015 (eKLR).

[8] *Commissioner of Domestic Taxes (Large Taxpayers Office) v Barclays Bank of Kenya,* Civil Appeal No 195 of 2017, Judgment of the Court of Appeal at Nairobi, 6 November 2020 (eKLR).

[9] Bowman, 'Interpretation of tax legislation'.

2.0 Factual background to the dispute

Barclays is a member of card payment networks – also known as card associations – which membership grants it access to a global network that enables digital payments. These card associations (hereinafter card companies) own and operate their networks (hereinafter card companies network) independently albeit in a very similar manner. The major card associations include VISA and MasterCard.

The card companies' primary purpose is to administer a worldwide consumer payment system for its members. This enables its members to provide their customers with the means of making payments for goods and services with the use of credit cards, travellers' cheques and debit cards in a convenient and secure manner. In order to provide the consumer payment system, the card companies operate networks that link all their members around the world.

The networks provide for two types of members: an issuer and an acquirer. An issuer is a financial institution that issues a credit card to its customers whereas an acquirer is a financial institution that honours payments to a merchant based on the credit transactions made by a customer. A merchant is any establishment that allows payment for goods or services with the use of a credit card. A member can be both an issuer and an acquirer with regard to any transaction. In Kenya there are three main acquirers: Barclays, Kenya Commercial Bank and Equity Bank.

The sequence of steps that are followed in a typical credit card transaction was submitted to the courts as follows:

a) A customer applies to an issuer for a credit card and the issuer issues either a VISA or MasterCard to its customer. The card holder goes to a merchant and uses the card to make a purchase. The merchant swipes the card through the Point of Sale (PoS) terminal configured to accept a VISA card or MasterCard.

b) By swiping the card, the merchant seeks authorisation through the acquirer who then seeks authorisation through the card company network (for example VISANET if the card is a VISA card or MIP if it is a MasterCard).

c) Since it is only the acquirer that has an agreement with the merchant, once the merchant seeks authorisation, the acquirer through the network sends a verification request to the issuer. The request's objective is to verify the card holder's data and credit status.

d) The issuer then receives and responds to the verification request.

e) The acquirer then receives the response of the verification request via the card company network from the issuer.

f) The acquirer sends authorisation to the merchant.

g) Once the merchant receives authorisation, a charge slip is generated in duplicate and the customer signs the slip and thereafter takes possession of the goods and leaves with a copy of the slip.

h) The merchant then initiates banking by uploading the transactions to the acquirer.

i) The acquirer then pays the merchant.

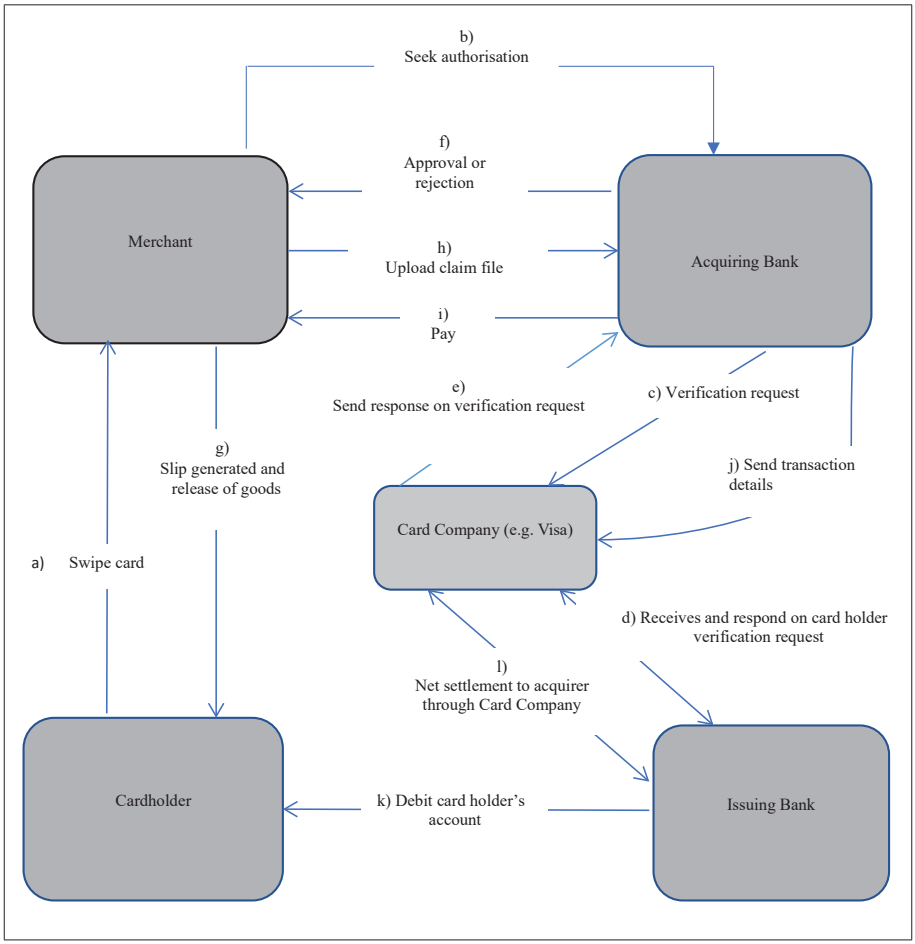
j) The acquirer then sends the transaction details to the card company network depending on which card has been utilised.

k) The information is then transmitted by the network to the issuer who debits the card holder's account.

l) The issuer then settles the net amount to the acquirer through the card company network.

The above sequence known as the four-party card payment system is illustrated in the figure below.

Figure 1: Flow of a four-party card payment transaction



Barclays submitted that the networks enable the flow of the transactions described above by enabling a settlement and clearing process such that the card companies ensure that the network is secure and reliable. This enables efficient authorisation and switching, as well as the settlement and clearing operations between its members.

2.1 Contention between the parties

There were two contentious issues between the parties. First, was whether certain payments constituted royalty as defined under Section 2 of the Income Tax Act. Secondly, was whether the payment referred to as interchange fees constituted management and professional fees as defined under the Income Tax Act.

Regarding the first issue, Barclays paid transaction fees which fell into numerous sub-categories in order to access and use the networks operated by the card companies. In the case of VISA, the sub-categories included access fees, authorisation fees, switching fees, PIN verification fees, clearing and settlement fees, amongst others. As an acquirer, Barclays submitted that it merely configures its own computers and systems to enable it to access the card company networks. It did not have control over the card company networks or systems. Further, it did not at any time have access to card company software to process the payments. It claimed that it does not buy the software of the card companies or sell it to anyone else.

Contrastingly, KRA submitted that Barclays paid for the facility to have access to the card company network through its systems. Therefore, Barclays was granted access to knowhow, formula or process by which it carries out in its own business transactions and as such the payment for the access amounted to a royalty and was thus subject to withholding tax. The term 'royalty' under the Income Tax Act is defined to encompass four distinct payments that include the following:[10]

a) the copyright of a literary, artistic or scientific work; or
b) a cinematograph film, including film or tape for radio or television broadcasting; or
c) a patent, trademark, design or model, plan, formula or process (emphasis added); or
d) any industrial, commercial or scientific equipment.

[10] Income Tax Act, (No 16 of 1973), Section 2.

Barclays maintained that the term 'royalty' is specifically defined in the Income Tax Act and KRA's contention that fees payable to the card companies to access information and facilitate communication between the various operators constituted royalty was inaccurate. Moreover, it contended that all the transaction fees paid to the card companies constituted fees for various services and not royalty. Further, Barclays submitted that the Trademark Licence Agreements did not contain any clause for payment of royalties for use of a trademark and neither did KRA exhibit any invoices from VISA or MasterCard to prove that it was paying royalties for use of a trademark.

Regarding the second issue, Barclays submitted that once a transaction is concluded and the merchant presents the bills to the acquirer, the acquirer settles the bill less the agreed commission for running the merchant's account. Subsequently, the acquirer presents the bill for settlement by the issuer and the payments are cleared and settled as follows:

a) The issuer is debited with the transaction amount and the amount is credited to the acquirer who honoured the amount to the merchant.

b) The acquirer is then debited with interchange fee that is credited to the issuer.

c) Both the acquirer and the issuer are debited with the transaction fees payable to the card company for the use of card company network.

d) Accounts are prepared, invoices are issued, and settlement effected.

Barclays submitted to the courts that a credit card system is a four-party system involving the card holder, the issuer, the acquirer and the merchant. A specific payment referred to as an interchange fee is paid by the acquirer to the issuer. The interchange fee performs a balancing act and seeks to influence acquirers' and issuers' decisions so that they contribute more than they would otherwise do to achieve the full potential of the credit card system. The collective setting of the interchange fee aims at promoting the coordination of the decisions and the activities of the issuers and acquirers in a four-party system to ensure maximum benefit for the system holistically.

Moreover, Barclays submitted to the courts that the interchange fee is not a payment in respect of any service provided by the issuers but is paid by acquirers to subsidise the cost of issuing the cards. The interchange fee is a bal-

ancing mechanism which operates to the benefit of the card system as a whole. Further, Barclays maintained that the interchange fee is based on the value of each individual transaction itself and not on the volume of transactions and is not a payment for services provided by the card companies.

In contrast, KRA submitted that the interchange fee that was paid by Barclays constituted management and professional fees as defined under the Income Tax Act. Management and professional fees are defined under the Income Tax Act as follows:[11]

> any payment made to any person, other than a payment made to an employee by his employer, as consideration for any *managerial, technical, agency, contractual, professional or consultancy services* however calculated (emphasis added).

Additionally, KRA maintained that in the clearing and settlement process, the interchange fee is earned from the acquirer and the issuer is deemed to be 'paid' according to the definition of 'paid' under Section 2 of the Income Tax Act. It submitted that 'paid' includes distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person.

Barclays did not contest that there was indeed a payment. However, it maintained that in order to impute withholding tax liability as a management or professional fees, it was incumbent upon KRA to show whether the service was either a managerial, technical, agency, contractual, professional or consultancy service. In its view, KRA failed to identify with specificity and certainty the service provided for the payment of the interchange fee.

3.0 Courts' analysis of the issues

Given the foregoing factual background to the dispute, two issues arose for determination before both the High Court and the Court of Appeal:

a) Whether the transaction fees paid to the card companies constituted royalty for the right to use the card companies' trademarks and logos; and

[11] Income Tax Act, (No 16 of 1973), Section 2.

b) Whether the interchange fees paid by Barclays to issuing banks in the payment ecosystem were management or professional fees liable to withholding tax under Sections 35 (1)(a) and 35 (3)(f) of the Income Tax Act.

3.1 Whether the transaction fees paid to the card companies constituted royalty for right to use the card companies' trademarks and logos

3.1.1. Determination of the High Court

Quite significantly, this case turned on the question of ambiguity with respect to the interpretation of tax statutory provisions. Odunga J, while relying on authority, found that taxation can only be done on clear words and cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally, even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject.[12]

On whether the payments constituted royalties, the High Court disagreed with KRA's position. It provided that instead of KRA relying on the various payments made to the card companies (of which no specific payment was categorised as royalty) as a guide to establish tax liability, it should rely on clear and unambiguous tax statutory provisions to impute that the payments were indeed royalty and thereafter charge a tax liability.

3.1.2. Determination of the Court of Appeal

The Court of Appeal reiterated the position that tax statutes must be clear in the manner in which they impose a tax liability. It however provided that the determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not

[12] Some of the cases Odunga J relied on include, *Cape Brandy Syndicate v Inland Revenue Commissioner*, (1921) 1 KB 64 and *Keroche Industries Limited v Kenya Revenue Authority & 5 Others,* Miscellaneous Civil Application 743 of 2006, Judgment of the High Court at Nairobi, 6 July 2007 (eKLR).

an abstract or pedantic exercise. It is based on the evidence and the circumstances of each case.

By taking VISA as an example, the Court of Appeal found that the two agreements between Barclays and VISA and Barclays and MasterCard are headed 'Trademark License Agreement'. Whilst the agreement with VISA was silent on payment for use of VISA's trademarks and logos, those with MasterCard expressly provided that no royalty would be payable.

In the view of the Court of Appeal, determining whether the payments made by Barclays to the card companies constituted royalty was to be done by considering the terms of the statute, the written agreements, and the totality of the relationship between Barclays and the card companies, including the actual dealings between the parties. The Court of Appeal provided that without the use of credit and debit cards bearing those specific trademarks and logos from the authorising card company, Barclays could not access or use the networks. In the Court of Appeal's view, KRA was able to identify with clarity the basis upon which it was claiming withholding tax from Barclays based on payment of royalty, however disguised. It found that the transaction fee constituted, in the circumstances, payment for the right to use the card companies' trademarks and logos. The payment, the Court of Appeal held constituted royalty for trademark under Section 2(c) of the Income Tax Act.

The Court of Appeal held that it did not perceive any ambiguity in the statute that would require legislative intervention. Additionally, it was not satisfied from the totality of the evidence on record that Barclays did not understand the basis of KRA's demand for withholding tax as royalty for its use of the credit cards' trademarks and logos.

3.2. Whether the interchange fees paid by Barclays to issuing banks in the payment ecosystem were management or professional fees liable to withholding tax

3.2.1. Determination of the High Court

The High Court reiterated the principles laid out in part 3.1.1 above. In its view, it was unacceptable for KRA to resort to 'professional or manage-

ment fee' when the said phrase encompasses a host of other services such as managerial, technical, agency, contractual, professional or consultancy services. Therefore, resorting to a term which encompasses a host of services without distinguishing which category the service falls into was, in its considered opinion, unacceptable.

The High Court held that the way KRA arrived at its decision did not meet the level of clarity required in taxation. KRA ought to have clearly identified the category in which the tax it sought fell into.

3.2.2. Determination of the Court of Appeal

The Court of Appeal, in direct contrast to the High Court held that management and professional fees did not have to fall within only one of the service categories defined as constituting management and professional fees under Section 2 of the Income Tax Act. It could cover one or more. In the Court of Appeal's view, it was critical to look at the totality of the evidence on record and determine whether there was a clear explanation of what KRA alleged to constitute management or professional fees, and whether that payment made by Barclays reasonably fell within the terms of the statute (emphasis added). The Court of Appeal held that this could not be answered by considering only how the parties had described or rationalised the payment.

In respect of the interchange fees, the Court of Appeal held that there was clear coordination, managerial, professional, and contractual services rendered by the issuer to the acquirer, for which the latter pays. Therefore, this in its view satisfied the definition of management and professional fees as required under the Income Tax Act.

4.0 Analysis and conclusion

As provided in the analysis of the issues before the courts, both the Court of Appeal and the High Court recognised the importance of the literal interpretation rule in tax statutes. However, the Court of Appeal departed from the High Court's determination by assessing the totality of the relationship between Barclays and the card companies and whether the payments made by Barclays reasonably fell within the terms of the statute.

Quite evidently, a payment of transaction fees had been made. The Income Tax Act in Section 3 anticipates that all income accrued from or derived in Kenya, whether by a resident or a non-resident person is chargeable to tax. Further, the Income Tax Act anticipates that payment of an amount to a non-resident without permanent establishment in Kenya as well as payment of an amount to a resident person with a permanent establishment along the categories specified in Section 35(1) and (3) should attract withholding tax at the prescribed rates.

The competing contentions between the taxpayer (Barclays) and the tax authority (KRA) can be succinctly stated as follows: For the taxpayer, the category of payment that constitutes interchange fees as well as whether royalties are payable under the circumstances is not clearly and unambiguously provided for under the Act and therefore should not attract tax. Consequently, the taxpayer maintains that this is a lacuna in the law that can only be remedied by way of legislation. Contrastingly, the tax authority provides that the legislation is not ambiguous and anticipates the character of payment categories made by the taxpayer.

The Court of Appeal, in essence, extended the applicability of the doctrine of 'substance over form' by taking a purposive interpretation of the relevant tax statutory provisions. In its view, the totality of evidence on record and the facts, however disguised, could be deemed to constitute royalty and interchange fees in their respective circumstances.

The jurisprudence developed as a result of this dispute has had significant consequences not only for the banking industry but for all taxpayers in Kenya. Furthermore, the determination that will be arrived by the Supreme Court in the pending appeal will no doubt have a considerable impact on the way judges ought to interpret tax statutes in Kenya. In May 2022, the Supreme Court agreed to hear and determine the appeal.

PRIVITY OF CONTRACT AND ASSIGNMENT OF ARBITRATION AGREEMENTS IN KENYA

(Kampala International University v Housing Finance Company Limited [2021] KEHC 105 (KLR))

Cedric Kadima*

Abstract

The assignability of contractual rights has more often than not been discussed in terms of the privity of contract. It is widely accepted that contractual rights can freely be assigned. However, there are exceptions to this rule, which are non-assignability clauses in the contracts and personal nature of contractual rights. Consequently, there are discussions on whether the arbitration agreement in the contract is also freely transferrable through assignment of contractual rights. In *intuitu personae* contracts (where the relationship and confidence of parties resulted in the arbitration agreement), it is argued that the arbitration agreement is not transferrable, but different jurisdictions conclude differently. This paper exposes Kenya's stand on assignability of arbitration agreements as rendered by the High Court of Kenya in *Kampala International University v Housing Finance Company Limited* (Miscellaneous Cause E564 of 2019) [2021] KEHC 105 (KLR) (Commercial and Tax) (16 September 2021) (Ruling).

Keywords: assignment, arbitration agreement, privity, *intuitu personae.*

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Introduction

In Kenya, Section 35 of the Arbitration Act gives an aggrieved party in arbitration proceedings the right to challenge the same in a court of law.[1] Such a challenge should be made before the High Court of Kenya. One of the issues susceptible to challenge is the jurisdiction of the arbitral tribunal. The challenge to jurisdiction of the arbitral tribunal can be made before constitution of the tribunal, during proceedings or after the tribunal has concluded its proceedings and has published an award.[2]

The High Court of Kenya in *Kampala International University v Housing Finance Company Limited,*[3] was called upon to determine the jurisdiction of the arbitral tribunal after the final award was made by the arbitral tribunal. One of the issues for determination was whether a third party, who one of the main parties assigned rights to, was capable of enforcing the arbitral award. The court concluded that the third party, a subsidiary of one of the respondents in the suit, was capable of enforcing the award.

Despite the decision of the court being on the right of a third party to enforcement of the award of an arbitral tribunal, the decision has a bearing on subsequent contracts that have or would be assigned to third parties, and such contracts contain arbitration agreements. This paper appreciates the decision of the court, but hypothesises that in future commercial contracts executed in Kenya, a party is likely to assign or transfer its rights to a third party, including the arbitration agreement, without the consent of the other.

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[1] Arbitration Act, Cap 49 Laws of Kenya.

[2] Arbitration Act, Section 6, 7, 14 and 35; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*, Petition No 12 of 2016, Supreme Court Judgement (2019) eKLR.

[3] *Kampala International University v Housing Finance Company Limited*, Miscellaneous Cause E564 of 2019, Ruling of the High Court at Nairobi of 16 September 2021, KLR.

Background

Facts of the case

In 2010, Kampala International University (KIU) undertook the process of construction of a university campus in Kitengela, Kajiado County and sought through Housing Finance Corporation of Kenya (HFCK) USD 15,000,000 to partly finance the construction. Due to the size of debt instrument, HFCK agreed to syndicate the facility with another financial institution that it worked with previously to fund the balance of USD 5 million. The loan facility was subject to first charge over KIU's immoveable properties, its escrow account for receipt of income from the University and various guarantees, and all agreed securities were executed in favour of HFCK.

HFCK did not syndicate the loan as agreed and did not disburse monies in a timely manner as agreed. Further, HFCK did not disburse the last tranche. On account of the failure of HFCK to disburse the monies, KIU's development came to a halt, contractors deserted the site and KIU's losses accumulated. The applicant instructed its advocates to file suit in court for damages. However, in discussions/correspondence by parties' advocates, they agreed to arbitration. The arbitration proceedings resulted to the Final Arbitral Award made and published by the arbitrator, Hon. Mr. Collins Namachanja, on 27th September 2019.

The applicant, KIU, filed an application in the High Court of Kenya, Commercial and Tax Division that sought for the Final Arbitral Award made and published by the arbitrator be set aside or stayed. The Applicant sought to convince the Court that it would suffer irreparable damage if the arbitral award was enforced as the Arbitral Tribunal lacked jurisdiction. Among the grounds the applicant relied on were:

i. That the arbitrator was partial as he had failed to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

ii. That the arbitral award deals with a dispute not contemplated by the terms of reference to the arbitrator.

iii. That the arbitral award contained decisions on matters beyond the scope of the reference of arbitration and in the premise the award was in favour of the respondent.

iv. That the respondent unlawfully passed itself off as HFCK, another company incorporated under the laws of Kenya, while it had no privity of contract between the parties.

v. That the Final Arbitral Award adversely affected independent third parties without their knowledge and consent.

However, from the above, the review's focus lies on ground (iv) and (v) above on privity and independent third parties.

Relevant facts to privity and independent third parties

The Court formulated an issue for determination on this argument; whether the dispute/claim by HFCK can legally be pursued by (Housing Finance Corporation) HFC, a new company that was not in existence at the time of signing the contract in dispute. The applicant contended that HFC had no cause of action against it as it was a stranger to the Agreement between HFCK and KIU. KIU based the argument on the fact that HFC lacked privity of contract. On the other hand, the respondent (HFCK) argued that in the contract between itself and KIU, there was a part that it described itself to "…*include successors in title and assigns in the contracts/agreement between HFCK & KIU*…" It is important to note is that HFCK had restructured itself and formulated many other subsidiary companies including HFC after it entered into the contract with the Applicant.

The Court looked into the evidence provided by both parties and pointed out to the Letter of Offer for Construction Loan Facility dated 8 January 2014 and 4 November 2014. The letters provided, under terms & conditions of offer, that:

> …Housing Finance means Housing Finance Company of Kenya Limited, a mortgage finance company incorporated in the Republic of Kenya, whose address is care of Post Office Box Number 30088 Nairobi and includes its **successors and assigns**…

The Court further relied on the precedence in Civil Appeal 206 of 2008 *City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates vs Nairobi City Water & Sewarage Co Ltd.*[4] The case involved privity of contract and contractual assignment. The appellate court observed that a contract cannot confer rights or impose obligations on strangers. That whilst it may be clear in a simple case, it may not be so obvious where there are several contracts, or several parties or both. For example, in the case of multilateral contracts, collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a company, collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.[5]

The Court then concluded that, from the above, HFCK assigned its interest in the contracts of letters of offer to HFC as contracted by parties and as spelt out in the precedence. Not to let eyes off the hook, the arbitration agreement is one of the rights and interests assigned.

Implications of the decision

In principle, the court pronounced that where there are several contracts, or several parties or both, privity of contract is inconsequential. The decision bears the following consequences:

i. A parent company can enter into a contract that binds its subsidiary, without its knowledge or consent, despite the two being completely independent persons; or

ii. A company can transfer or assign an agreement to arbitrate to a third party without consent from the other main party in a contract; or

iii. Existing parties to a contract might not need to enter into a novation agreement to substitute a party to a contract if it involves a parent and a subsidiary company.

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[4] *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another, Court of Appeal, Civil Appeal 206 of 2008,* Judgement of the Court of Appeal of 28 July 2008 eKLR.

[5] *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another,* para 34.

As a fundamental rule, companies are separate legal entities irrespective of whether they carry out their business under a group structure or not.[6] Separate legal personality implies that a contract is only binding upon the legal person, for instance, a limited liability company, which appears as a party thereto. As a consequence, an arbitration clause or an arbitral award only binds the specific company which agreed to arbitrate. The rule complements the privity of contract rule that requires that mutual rights and obligations arising under a contract shall only be binding upon the parties to it.

The decision of the court failed to take into account that there are special relationships between parties to a contract to which they gain confidence to enter an arbitration agreement. Therefore, whether in enforcement of an arbitral award or institution of arbitral proceedings, parties maintain that special relationship until they agree otherwise. This special relationship is characterised as *intuitu personae*.

Intuitu personae

An intuitu persona is considered as an implied factor that bars the assignment of a claim.[7] In the scope of assignment of claims, *intuitu personae* presents that an arbitration clause is not transferred to the assignee if the original contract was concluded with regard to the fact that the other contracting party was chosen for a specific reason.[8] Therefore, possible assignees and other entities acting on behalf of the assignor would not be able to perform as well as the original contracting partner.[9]

The ICSID tribunal in *Venessa Venture v Venezuela*,[10] while making a determination on the *intuitu personae* arguments submitted by parties, held that

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[6] William W Park, *Non-signatories and international contracts: An arbitrator's dilemma in multiple parties in arbitration,* Oxford University Press, 2009, 16.

[7] Mertcan Ipek, 'Assignment of contractual rights and its effect on arbitration' Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, C22, S1, 522-524. Available at https://dergipark.org.tr/en/download/article-file/274363 accessed on 18 October 2022

[8] Andrea Vincze, 'Arbitration clause – is it transferred to the assignee?' 1 *Nordic Journal of Commercial Law* (2003), 5-6.

[9] Vincze, 'Arbitration clause – is it transferred to the assignee?', 6.

[10] *Venesa Venture Limited v Bolivarian Republic of Venezuela,* ARB (AF) 04/6, ICSID (2013), 148-149.

there are two indicators that have to be drawn to conclude the *intuitu personae* relationship:

(i) The process through which an investor was considered among other investors;

(ii) Personal relationship with the investor. This means that there has to be a very unique characteristic of the investor that led to its consideration.

Further, there are some obligations under a contract that are so personal in nature that they can only be performed expressly by the party that has assumed the obligations under the contract.

Additionally, the Swedish Supreme Court invented a third indicator-consideration; that if the investment was concluded based on a confidential and personal relationship, an automatic transfer of an arbitration agreement to the assignee of contractual rights is precluded in such circumstance.[11]

In the preceding paragraphs, it is not enough for a contract, in the description of parties, to capture that a party '*…includes its successors and assigns…*' as sufficient consent to assign an arbitration agreement. The court ought to have looked at the relationship of the parties and why the applicant choose HFCK as the financier before declaring that HFC, that HFCK assigned its rights to, was competent to pursue its rights under the arbitration agreement. A written agreement between the main parties to the contract ought to have been made.

In *Enka Insaat Ve Sanayi AS v OOO 'Insurance Company Chubb*',[12] the Supreme Court of the United Kingdom was confronted with an almost similar circumstance. In the case, the Supreme Court agreed that since there was no signed agreement to novate, the contracts had not been novated and the parent company did not acquire the liabilities under contracts entered into by the subsidiary company. This included the arbitration agreement.[13]

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[11] *Bricklayers, Masons and Plasterers Intern. Union of America v. Boyd G. Heminger*, Supreme Court of Sweden (1997), 129-131; *MS Emja Braak Shiffarts KG v. Wärtsilä Diesel Aktiebolag,* Rev. Arb (1998), 431-433.

[12] *Enka Insaat Ve Sanayi AS v OOO "'Insurance Company Chubb*", Supreme Court of United Kingdom (2020), 38.

[13] *Enka Insaat Ve Sanayi AS v OOO 'Insurance Company Chubb'.*

Conclusion: What next for courts

A recommendation to the courts would be that when approached with a case that involves assignment of rights to a third party that was not privy to the contract, the following should be considered:

i. Whether there is an express agreement or clause in the main contract that parties agree to assign their rights and responsibilities including the arbitration agreement; or

ii. Whether there is a novation agreement between the main parties to substitute either of the parties during the performance of the contract;[14] or

iii. Whether there is a unique or special relationship between the main parties in the contract, in case there exists no agreement or clauses to assign or transfer an arbitration agreement.[15]

If courts choose to look way from the above recommendations, a party in a contract might take advantage and breach the contract, and at the same time, assign its rights and the agreement to arbitrate, without consent of the other party. It can go as far as assigning the contract to a third party that is incapable of performing the specific terms of the contract, or even a third party that is on the brink of being declared insolvent. Furthermore, the fundamentals of consent to arbitrate are usually based on confidence between the parties, if assignment of such rights is permitted without express consent, then the confidence to arbitrate is vitiated.

If the matter and specifically the issue on privity and independent third parties will not be overturned by the appellate court, it will remain the law.

[14] *Enka Insaat Ve Sanayi AS v OOO 'Insurance Company Chubb'.*

[15] *Venesa Venture Limited v Bolivarian Republic of Venezuela.*

' MATCH FIXING' IN INVESTOR STATE ARBITRATION: *PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED V FEDERAL REPUBLIC OF NIGERIA*

John S Nyanje*

1. Introduction

Match fixing has been defined in organised sports as the act of playing or officiating a match with the intention of achieving a pre-determined result, which is seen as violating the rules of the game and often the law.[1] It sometimes takes the form of a player deciding to commit certain errors during the match in order to achieve a certain result. This is mostly influenced by bribery and blackmail from bookmakers.[2] It seems that investor-state dispute settlement (ISDS) is now so lowly valued that it would be comparable to the rot of match fixing in competitive sports. *Process & Industrial Developments Limited (P&ID) v Federal Republic of Nigeria*[3] is a classic example of how the rot and corruption in ISDS is endemic especially in Global South states. It is an example of how players in an ISDS case can collude to achieve a desired outcome at the expense of truth and justice.

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[1] Gallardo Alfonso Myers, 'Corrupción en el deporte. Represión penal ¿necesaria?', in Carrillo Ana and Gallardo Alfonso Myers (eds) *Corrupción y delincuencia económica: prevención, represión y recuperación de activos*, Universidad de Salamanca, Ratio Legis, 2015, 195-216.

[2] Gallardo, 'Corrupción en el deporte. Represión penal ¿necesaria?', 195-216.

[3] See *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria*, (Part Final Award on Liability), 15 July 2015; See also *Federal Republic of Nigeria v Process & Industrial Developments Limited,* (Award on Merits), EWHC 2379 (Comm), (4 September 2020).

As I have argued elsewhere, it is not in dispute that ISDS sits at the lowest levels of confidence today than it has ever done since its inception.[4] Currently, ISDS comes under intense criticism from almost all states in the world. This criticism targets different aspects of ISDS, from the excessive powers of investors to institute claims independently, to the constitution of arbitral tribunals and the lack of consistency and predictability of decisions, as well as the huge sum of money awarded to investors as damages in these disputes.[5] This case, *P&ID v Nigeria*, certainly constitutes a classic example of these questions that reformers of the ISDS system demand.

Indicative of the gravity of the situation, corruption in ISDS has been addressed at head of state level at the United Nations (UN) Generally Assembly. During the 74th General Assembly of the UN in New York, President Muhammadu Buhari of Nigeria stated the following:

> Organised criminal networks, often acting with impunity across international borders present new challenges where only collective actions can deliver genuine results.… This is true in the battle against violent extremism, against trafficking in people and drugs and against corruption and money laundering…. The present Nigerian government is facing the challenges of corruption head-on. We are giving notice to international criminal groups by the vigorous prosecution of the P&ID scam attempting to cheat Nigeria of billions of dollars.[6]

To many in attendance at the UN General Assembly when President Buhari mentioned Process and Industrial Developments Ltd (P&ID) they may have thought that it was an organised crime group (it could as well be). But this was a multi-national company awarded one of the biggest natural gas projects in Africa that was estimated to be worth almost 7 billion dollars and which was engaged in protracted legal battle with Nigeria.

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[4] John Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms', *Afronomicslaw.org*, 7 September 2020.

[5] Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

[6] Quoted from Damilare Famutiwa, 'P&ID: President Buhari issues strong warning to international firms', *Nairametrics*, 25 September 2019.

2. Corruption in ISDS

Traditionally, corruption in ISDS has operated as a shield in the sense of how an investor makes an investment in the host country and how the host state uses corruption as a shield to defend itself from the manner in which the investments are made. Perhaps, it is instructive to consider the notorious case of *World Duty Free Co Ltd v Republic of Kenya*[7] which is the *locus classicus* on corruption cases in ISDS. The case amongst similar others,[8] has generated debate in the academy and amongst practitioners. Whilst the consequences of the same allegation for the respondent state remains shrouded in obscurity, a lot of emphasis has been placed on the allegation of corruption, the burden and standard of proof,[9] the duties of the tribunal faced with the allegations[10] and the consequential bar on the investor's claims.[11]

As has been argued by David Orta and others,[12] a survey of the last two decades of ISDS awards involving corruption issues suggests a clear roadmap for states to avoid liability. States can raise corruption allegations at virtually no risk, as even with presumptions or no direct evidence, a tribunal may find corruption to have occurred. In so doing, states can gain effective immunity from liability for acts that may constitute violations of international investment law, with no consequences for the state's own illicit acts. This landscape has raised serious concerns of fairness and has given rise to criticism of the

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[7] *World Duty Free Company v Republic of Kenya* (Award on Merits) ARB/00/7, ICSID, (4 October 2006).

[8] *Siemens AG v Argentine Republic* (Award on Merits) ARB/02/8, ICSID, (6 February 2007); *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan*, (Award on Merits), ARB/06/15, ICSID (8 September 2009); *Metal-tech Ltd v Republic of Uzbekistan*, (Award on Merits), ARB/10/3, ICSID, (4 October 2013).

[9] See Florian Haugeneder, 'Corruption in investor-state arbitration', 10(3) *Journal of World Investment and Trade* (2009) 323-339; Carolyn B Lamm, Rahim Moloo and Hansel T Pham, 'Fraud and corruption in international arbitration' in MA Fernandez-Ballesteros and David Arias (eds), *Liber amicorum Bernardo Cremades*, La Ley, Madrid, 2010, 699-731.

[10] Doug Jones, 'The remedial armoury of an arbitral tribunal: The extent to which tribunals can look beyond the parties' submissions', 78(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (2012) 102-122.

[11] Mohamed Abdel Raouf, 'How should international arbitrators tackle corruption issues?', 24(1) *ICSID Review – Foreign Investment Law Journal* (2009) 116-136.

[12] David Orta, Brian Lowe and Lucas Loviscek, 'Allegations of corruption in investment treaty arbitration: The need for reform', *Expert Guides,* 2019.

predictability and legitimacy of ISDS, making apparent the need for substantial reforms.

In the instance of *P&ID v Nigeria*, the corruption described above is coupled with allegations of lawyers being bribed by investors to not defend the case dutifully in order to have the investor easily win the case. This is what we term as 'match-fixing' in ISDS.

This case review will delve into assessing corruption in ISDS and how tribunals and courts have determined such questions. The review will look into the arbitration proceedings in *P&ID v Nigeria* as well as the proceedings in the English and US courts that have now unveiled the challenges and setting aside of the award on the basis of corrupt practices by P&ID as well as Nigerian officials and lawyers.

The first part of the case review is the introduction and overview of corruption in ISDS. The second part of the case review will look into the facts of the case, the different proceedings and the different legal issues raised at the different proceedings of the case, primarily the arbitration and the proceedings before the English courts. The brief will then conclude with what the case offers for the future of ISDS in African states.

3. The mafia-like plot

The story of P&ID is so fantastic as to sound straight from a Sicilian mafia book. In 2008 the Nigerian government invited bids for development of infrastructure to solve its decades long problems with gas flaring. However, the Nigerian government hardly found takers among international oil companies (IOCs) when it laid out its proposal despite it being one of Africa's more vibrant economies. Instead, thirteen small and virtually unknown companies were finally granted concessions for the project. One of these was P&ID. Where Nigeria's trusted international energy partners feared to tread, an obscure company boldly ventured.[13]

[13] Fikayo Akerodolu, 'Nigeria and P&ID: The story behind the $9.6 billion judgement', *Stears Business*, November 2019.

On paper, P&ID was an engineering and project management company. Its founders and principals, Michael Quinn and Brendan Cahill, both Irishmen, claimed to have over 60 years of combined experience of project management and execution in Nigeria. In reality, P&ID was nothing but a shell company registered in the British Virgin Islands with no operational history. It did not even have a website yet it was given a mandate to undertake one Africa's biggest gas projects.[14]

Michael Quinn was known to have strong ties with senior government officials and even presidents in Nigeria. P&ID was not Quinn's first government contract. In 2001, Quinn was involved in a failed contract to repair and upgrade 36 British-made scorpion tanks in Nigeria. The Irishman had charged the Nigerian army for tank parts that were never delivered, costing the government millions of dollars and earning him a considerable fortune. Quinn was eventually charged with espionage and handling secret military materials in 2006, but the case was dropped within the year amid claims from some prosecution lawyers that the government had intervened.[15]

In the period after award of the contract, P&ID's ownership was transferred to two Cayman Islands-based funds, VR Advisory Services Ltd, which has a 25% stake, and Lismore Capital which owns 75%. Lismore Capital is owned by a London based lawyer who acted for P&ID during the arbitration.[16]

3.1 Arbitration proceedings

The legal dispute between Nigeria and Process & Industrial Developments Limited (P&ID) arose over a purported repudiation by Nigeria of a gas supply and processing agreement ('GSPA') entered into on 11 January 2010 by both parties for the various obligations of production of gas in Nigeria.[17]

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[14] Akerodolu, 'Nigeria and P&ID: The story behind the $9.6 billion judgement'.

[15] Akerodolu, 'Nigeria and P&ID: The story behind the $9.6 billion judgement'.

[16] Spotlight on corruption, 'Sham litigation or legitimate investor claims? The extraordinary case of *P&ID v Nigeria*'.

[17] BBC, 'Nigerian Government ordered to pay $9bn to private gas firm,' 16 August 2019, (analysing the *Nigeria v P&ID* case, the BBC discusses the dispute and the final arbitral award issued against Nigeria).

The terms of the GSPA are such that Nigeria was to arrange for the supply of wet gas (natural gas) to P&ID's gas processing facility, which it intended to build in Nigeria. In exchange, P&ID would process the wet gas and return approximately 85% of it to the Government of Nigeria ('the Government') in the form of lean gas.[18] The GSPA arrangement was also such that it required the Government of Nigeria to construct pipelines and arrange facilities to transport the wet gas to P&ID's facilities. The Government of Nigeria, failed to construct the pipelines for the transportation of the wet gas and delayed the agreement for three years.[19]

P&ID viewed this failure as a repudiation of the contract[20] and commenced, in August 2012, an arbitration action against Nigeria before a London tribunal. In July 2015 the tribunal decided that the Government had repudiated the agreement by failing to meet its obligations.[21]

3.2 The evidence and proceedings

At the tribunal hearing, Michael Quinn explained that P&ID had already invested $40 million on preparatory engineering work to make sure they could execute the project even before the contract was awarded. Interestingly, Theophilus Danjuma, the billionaire one-time Defence Minister and a former friend of Quinn's, revealed in a Bloomberg interview that his company had spent the $40 million and Quinn was only a consultant.[22] He also claimed that Quinn applied for the gas contract without his knowledge.[23] Apart from the money invested, Quinn also claimed that the company had secured (but not

[18] *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Part Final Award on Jurisdiction), para 3 (2014), (hereinafter *P&ID v Nigeria* 2014). 'Lean gas,' also referred to as 'dry gas,' is 'natural gas that contains a few or no liquefiable liquid hydrocarbons'. What is natural gas? *NatGas.info*, 20 January 2021.

[19] *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Final Award), para 49 (2017), (hereinafter *P&ID v Nigeria* 2017).

[20] In the *P&ID v Nigeria* arbitration action, P&ID 'wrote to the ministry alleging that it had repudiated the GSPA and accepting the repudiation.' See *P&ID v Nigeria* 2014, para 6.

[21] *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Part Final Award on Liability, para 78 (2015), (hereinafter *P&ID v Nigeria* 2015).

[22] Orta and others, 'Allegations of corruption in investment treaty arbitration'.

[23] Orta and others, 'Allegations of corruption in investment treaty arbitration'.

purchased) land from the Cross River government, as specified in the agreement. In addition, P&ID had gotten confirmation from Addax Petroleum, the oil & gas upstream company that would supply some of the gas, and secured financing for the gas processing facility.[24] In short, P&ID was ready to proceed and communicated as much to the Nigerian government the same in May 2010.

Nigeria's lawyers argued otherwise, stressing that P&ID should only be awarded nominal damages (i.e., they should not be compensated for lost future earnings). The government's argument was two-fold: that P&ID had not met its obligations either and that at the onset of arbitration proceedings, it should have sought to mitigate its loss by pursuing other investment opportunities.[25]

3.3 The award

In 2017, the London tribunal awarded damages to P&ID in the sum of $6.597 billion with interest at the rate of 7% starting from 20 March 2013. The sum had increased to $10 billion as of September 2020.[26] As has been argued by Ohio Omiunu,[27] if enforced, the award would also create contingent liabilities for Nigeria because it poses a significant threat to Nigeria's economy, with the damages amounting to over 20% of the country's foreign exchange reserves as of December 2020,[28] and 10% of the total public debt stock for the third quarter of 2020.[29]

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[24] Orta and others, 'Allegations of corruption in investment treaty arbitration'.

[25] Orta and others, 'Allegations of corruption in investment treaty arbitration.

[26] Oludara Akanmidu, 'Explainer: How Nigeria got hit with a $9.6 billion judgment debt in London*', The Conversation,* 10 September 2019; (Akanmidu chronicles the series of events that resulted in the judgment debt awarded against Nigeria and also highlights the potential negative impact on Nigeria's foreign reserve).

[27] Ohio Omiunu and Oludara Akanmidu 'Reflections on *Nigeria v Process & Industrial Developments Limited*', *New York Journal of International Law and Politics* (May 2021).

[28] See The Nation, '$9.6bn judgment: Fraudulent target on our foreign reserve – FG', (30 August 2019); (The article highlights the damaging effect of the judgment debt on Nigeria's foreign reserves. The Minister for Information and Culture Lai Mohammed is quoted saying that '$ 9.6 billion (about N3.5 trillion) translates to 20 per cent of the nation's foreign reserves.').

[29] Nigeria's total public debt stock for the third quarter of 2020 stood at N32.223 trillion or USD84.574 billion; Debt Management Office Nigeria, 'Public debt stock as at 30 September 2020', *Press Release,* 31 December 2020.

4. Proceedings before English courts

Two years after the Final Award was delivered, P&ID filed an application for enforcement in England. On 16 August 2019, an English court ruled in favour of P&ID's application for enforcement of the award which had increased to US$ 9.6 billion due to the interest on the award.[30] However, on 26 September 2019, the court granted Nigeria permission to appeal against its decision and stay enforcement considering Nigeria's investigations into P&ID, and suggestions of fraud, tax evasion and conspiracy.

Thereafter, on 5 December 2019, Nigeria commenced challenge proceedings under Section 67 and 68(2) (g) of the English Arbitration Act 1996 and filed an application for extension of time to bring the challenge.[31] Nigeria based its application for extension of time on investigation and evidence of alleged bribery from procurement of the contract to arbitration proceedings resulting in the award. Nigeria asserted that it has a *prima facie* case of fraud against P&ID, which justifies the extension of time required to challenge the arbitral award.[32]

Nigeria's lead counsel, Mr Howard QC, focused on three key aspects in his submissions. First, he argued that P&ID fraudulently obtained the GSPA by paying bribes to Nigerian government officials. Second, he argued that Mr Quinn (the former chairman of P&ID) gave perjured evidence to the tribunal to give the impression that P&ID was able and willing to perform its obligations under the GSPA. Third, Mr Howard asserted that Nigeria's counsel in the arbitration failed in bad faith to challenge Mr Quinn's false evidence. More shockingly, Howard QC argued that the arbitration counsel for Nigeria had colluded with P&ID to defend the case thinly such that the tribunal would find

[30] See *Process & Industrial Developments Ltd v Federal Republic of Nigeria* (Judgment of the High Court of Justice of England and Wales) EWHC 2241 (Comm) (Eng.) (2019).

[31] *Federal Republic of Nigeria v Process & Industrial Developments Limited (Nigeria v P&ID* 2020) (Judgment of the High Court of Justice of England and Wales) EWHC 2379 (4 September 2020). Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

[32] Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

in favour of P&ID.[33] Overall, he asserted that the GSPA was obtained by fraud as part of a larger scheme to defraud Nigeria.[34]

On 4 September 2020, Sir Ross Cranston found that there was a strong prima facie case that the GSPA was procured by bribery and granted FRN's applications for an extension of time to challenge the Awards and for relief from sanctions to adduce new evidence.

On 23 January 2023, the substantive application to set aside the Awards began before Mr Justice Robin Knowles in the Commercial Court. Oral closing arguments were concluded on 9 March 2023.

4.1 The determination by the Court

In what can now be termed as a landmark judgement on extension of time in challenges of arbitration awards by English courts, the Court in determining the application, took note of the Kalmneft factors,[35] which are factors to be considered material in exercising discretion to extend the time limits for challenging an award. These include: the strength of the application, the length of the delay, whether the respondent contributed to the delay, and whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. The strength of Nigeria's case on the merit was particularly relevant to the court's discretion.

4.1.1 Fraud in the GSPA and in the arbitration proceedings

The Court held that there was a strong *prima facie* case of bribery involved in procurement of the contract and in the arbitration proceedings. Payments were made to senior officials of Nigeria's Federal Ministry of Petroleum Resources whose positions ensured the approval of the GSPA notwithstanding its deficiencies. Although some of the payments were explained as payments for medical expenses or bonus payments for unrelated projects, the Court found that there was no evidence to support these assertions.

[33] *Nigeria v P&ID* 2020, para 211.

[34] *Nigeria v P&ID* 2020, para 211.

[35] The Kalmneft factors were adopted from Colman J's judgement in *AOOT Kalmneft v Glencore* [2001] 2 All ER (Comm) 577, [2002] 1 Lloyd's Rep 128.

Regarding the arbitration proceedings, the Court found that there was a strong *prima facie* case that one of the witnesses for P&ID – Mr Quinn – had given perjured evidence. It further stated that there is a possibility that Nigeria's counsel at the jurisdiction and liability stages of the arbitration had been corrupted. Payments were made by counsel to government officials involved with the GSPA and the Court accepted Nigeria's submission that these payments were made to buy their silence in relation to the arbitration and settlement negotiations.

4.1.2 Delay in raising challenge

On this issue of whether Nigeria took too long on raising the challenge and whether the finding of evidence would warrant an extension, the Court found that Nigeria had made a good case that 'it did not know and could not with reasonable diligence have discovered the grounds it now advances.'[36] Although the Court admitted that Nigeria's investigation of P&ID proceeded with a stronger sense of urgency after August 2019 when enforcement of the award was granted, it ultimately found from the circumstances, that the alleged fraud was deliberately concealed and that Nigeria had exercised reasonable diligence in its investigation and pursuit of settlement. The Court noted that although the delay in this case was extraordinary and weighs heavily on the side of the balance against extension of time, other factors bring down the balance in favour of granting the extension.

4.1.3 Public policy and finality

Section 68 (2)(g) of the 1996 English Arbitration Act provides for fraud and public policy considerations as criteria for challenging an arbitration award for serious irregularity. However, Nigeria's significant delay in bringing this challenge within the statutory time limit (28 days as stipulated under the Arbitration Act) was a significant hurdle to surmount.[37] This is especially

[36] *Nigeria v P&ID* 2020, para 233.

[37] By virtue of Section 70(3) of the Arbitration Act, a challenge brought under Section 68 must be filed within 28 days of the contested arbitral award. If there has been any arbitral process of appeal or review, the challenge must be brought within 28 days of the date on which the claimant was notified of the outcome. 1996 Act, *supra* note 14, § 70(3).

so, considering that speed and finality are deemed essential features of arbitration under the English Arbitration Act.[38] Indeed, P&ID argued that given the length of time since the final award was issued, it would be 'unprecedented' for the courts to grant the extension of time requested by Nigeria.[39]

Addressing the public policy of finality and non-intervention, the Court stated that there is no rule of law which automatically prioritizes the finality of arbitral awards over the public policy of refusing to endorse illegal conduct. It stated that 'not only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme.'[40] The Court therefore granted Nigeria's application for extension of time**.**

5. 'Match fixing by Nigerian counsel?

Nigeria's defence has placed particular blame on the former Attorney General of Lagos State, Olasupo Shasore. In 2014, Mr Shasore was appointed as counsel for Nigeria in the arbitration leading to the legal tussle considering his expertise in the legal profession and his position as a former president of the Lagos Court of Arbitration. Mr Shasore was paid $2 million to assist in the first and second stages of the arbitration.[41] The Nigerian government has presented evidence that suggests that he failed to act dutifully to defend Nigeria's interests but rather kept pushing for settlement, thus suggesting that he was compromised.[42]

Nigeria has alluded that right from when Mr Shasore's service was engaged in 2014, he alongside members of the settlement team, discouraged

[38] See *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* (Judgment of the High Court of Justice of England and Wales) EWHC 3283 (2012), [2013] 1 Lloyd's Rep 86 para 27 (per Popplewell, J.) (Eng.) (Popplewell (at para 27), commenting on the 28-day period given under the English Arbitration Act, argued that 'This relatively short period of time reflects the principle of speedy finality which underpins the Act').

[39] *Nigeria v P&ID* 2020, para 261-63.

[40] *Nigeria v P&ID* 2020, para 273.

[41] *Nigeria v P&ID* 2020.

[42] *Nigeria v P&ID* 2020.

the Nigerian government from strongly contesting claims of the British firm. Rather, they encouraged the then Minister of Petroleum, Diezani Alison-Madueke, to pursue settlement discussions. The team consisted of Mr Shasore, the legal representative of the Ministry of Petroleum Resources, Folakemi Adelore, Legal Adviser of the Ministry of Petroleum Resources, and Ikechukwu Oguine, who was the Coordinator, Legal Services at the Nigerian National Petroleum Corporation (NNPC).[43]

On 11 November 2014 the Attorney-General wrote to Mrs Alison-Madueke, on the advice of Mr Shasore, urging her 'to pursue settlement discussions'.[44] Thereafter, Ms Adelore, Legal Adviser to the Ministry from 2013 to 2017, sent a memorandum to the Permanent Secretary of the Ministry recommending a settlement with P&ID.[45] In December 2014, Mr Shasore, Ms Adelore and Mr Oguine travelled to London for settlement negotiations with P&ID.[46]

The allegations go further in showing how Mr Shasore conducted a shoddy job in defending Nigeria. During the liability hearing, which began on 1 June 2015 and ended early in the afternoon the same day, Mr Shasore stated that he hoped to cross-examine Michael Quinn, the founder of the company, on the matter.[47] The chairman of the Tribunal responded that there had been no application to cross-examine Mr Quinn, a procedural mistake on the part of Mr Shasore, a senior arbitrator. What is even more worrying is that Mr Quinn was already dead at the time Mr Shasore wanted to cross-examine him, an attempt believed to aid the argument of P&ID.[48]

Mr Shasore allegedly made a questionable payment of $100,000 each to Ms Adelore and Mr Oguine.[49] Mr Shasore argues that he gave them as a gift. The close following of the gift with their recommendations for a settlement remains questionable.

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[43] *Nigeria v P&ID* 2020.
[44] *Nigeria v P&ID* 2020.
[45] *Nigeria v P&ID* 2020.
[46] *Nigeria v P&ID* 2020.
[47] *Nigeria v P&ID* 2020.
[48] *Nigeria v P&ID* 2020.
[49] *Nigeria v P&ID* 2020.

6. The hearing

In his opening statement for Nigeria, Mark Howard KC said he only needed to prove that only one person who touched the contract was bribed. 'There are many documents that are as close to a smoking gun as one will ever see in a fraud case,' he said. 'There are so many incriminating documents in this case, there is a risk of being desensitised. If only one document was found in another case, it would be extraordinary. What we have uncovered is a whole cascade'.[50]

Howard told the Court that P&ID paid bribes prior to the awarded contract and after in a bid to conceal evidence of earlier corruption. P&ID's documents used codewords for bribes such as 'PR' and 'Dublin Expenses'. Spreadsheets were highlighted during the claimant's opening which, Howard said, listed PR, marketing, and Dublin Expenses payments made to ministers. The Court heard many bribes were made in cash.[51]

Howard said: 'What do P&ID say about this? Very little indeed, as you will see in cross examination, witnesses have given explanations that are contradictory and nothing short of ridiculous. As I say it is difficult to keep the smile of one's face – but payments to ministers, "PR", brown envelopes, are you serious?'[52]

WhatsApp messages were also read out in court which, Howard argued, showed obvious corruption and bribery including messages talking of the need to be 'discreet' between the legal director and Cahill. '$10m was being spent on bribes, [you've] got to remember this is not over the entire life of P&ID and these other companies. We do not have any record after 2012,' Howard said.[53]

P&ID denied it paid any bribes and denies any wrongdoing. The company claimed it was entitled to the tribunal's arbitration award as Nigeria breached the contract.

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[50] Bianca Castro, 'Bid to overturn $11.1 bn arbitration opens in High Court' *The Law Society Gazette* [England & Wales] 23 January 2023.

[51] Castro. 'Bid to overturn $11.1 bn arbitration opens in High Court'.

[52] Castro. 'Bid to overturn $11.1 bn arbitration opens in High Court'.

[53] Castro. 'Bid to overturn $11.1 bn arbitration opens in High Court'.

7. Lessons for African states?

Ohio Omiunu argues and in my view correctly so, that the uncertainty about how foreign courts will decide sensitive disputes involving sovereign states (including Nigeria's main challenge against the P&ID arbitral award) raises more fundamental issues about the dependence of African countries on foreign courts and arbitration tribunals as fora for settling their disputes with foreign investors.[54] The reputation and track record of the well-known global arbitration centres remains an attraction to arbitration users from Africa.[55]

However, recent cases like *Nigeria v P&ID* and *Mozambique v Credit Suisse International,*[56] which present high economic stakes and public policy considerations, underscore the need to develop the capacity of arbitration centres across Africa to provide viable fora for settling arbitration disputes. Similar to the Nigeria GSPA scandal, Mozambique alleged in its case that the commercial loan contracts between Proindicus, MAM and two foreign creditors – Credit Suisse and VBT Bank – were procured in breach of Mozambican law. Mozambique also alleged fraud, with Mozambique arguing that '. . . bribes had been paid to government officials and to Credit Suisse employees and that the supply contracts were shams and instruments of fraud.'[57]

8. Conclusion

Be as it may, it is high time that we reexamine at the conduct of counsel in arbitration. Thus far, tribunals have been blamed, and rightly so, for

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[54] See Akanmidu, 'Explainer: How Nigeria got hit with a $9.6 billion judgment debt in London'.

[55] See Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh and Opeyemi Longe, 'Institutional arbitration in Africa: Opportunities and challenges: Africa's arbitration options and caseloads continue to rise', *White & Case LLP,* 17 September 2020, ('In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two institutions.').

[56] See *Mozambique v Credit Suisse International,* (Judgment of the High Court of Justice of England and Wales) EWHC 1709 (2020).

[57] *Mozambique v Credit Suisse International,* (Judgment of the High Court of Justice of England and Wales) EWHC 1709.

questionable awards against global South states. However, it seems a 'match fixing' of investment arbitration proceedings, which in many instances are confidential, is creeping in, and it is most likely that *P&ID v Nigeria* is not the only case. Inevitably, many more will be unearthed in due time. The courts where these awards are to be enforced must take a more purposive approach into looking at these allegations. While we do not know the outcome of Nigeria's challenge of the award when the case commences in 2023, we all hope that good precedence would be set in combatting corruption in ISDS. Just like 'match fixing' corrupts the authenticity of competitive sports, so does it corrupt the ISDS system and must be dealt with firmly.

Equally eagerly awaited are possible disciplinary proceedings by the Nigerian bar association against the counsels if the allegations against them are proven. Take a look at it, the current outstanding amount, including interest, is some US$11.1 billion, this is equivalent to almost one third of the budget of Nigeria in 2023 and is about 4 times more the allocation for the health budget and about 6 times the education budget. The amount in the ward could change the fortunes of the health sector of Nigeria as well as assure a bright future through education for the Nigerian kids for at least 5 years. The children of Nigeria and the people seeking health services should not pay this high price at the altar of corruption in ISDS and especially one from corrupt practices by investors and government officials as well as 'match fixing' by counsels.