

An analysis of the role of AfCFTA investment facilitation protocol and strategies in the promotion of sustainable development in SADC Developing Countries:

A comparative study.



Minor dissertation presented for the approval of Senate in partial fulfilment of the requirements for the Degree of Master of Laws (LL.M.) (Commercial Law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

**Candidate: NONGEE FAYE KANDJII**

**KNDNON004**

School for Advanced Legal Studies

University of Cape Town

Supervisor: Professor Faizel Ismail

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## Declaration

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (LL.M.) (Commercial Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

## Acknowledgments and Dedications

Above all else, all glory to God. It is solely by His great mercy & faithfulness that I am able to succeed.

I extend my special gratitude to my parents, Mr. Mesag Uatjaera Kandjii and Mrs. Manfredine Uahuhumina Kandjii, my baby sister, Utjina Ningiree Kandjii and our dog, Roxanna. I am the product of your constant prayers, love, support, guidance, and encouragement. I will never take for granted the sacrifices you all made for my success. You remain my greatest blessing.

To my entire Kandjii & Kandjeo families and all my friends, I am forever indebted to you. It took a village to raise this child, and I stand proudly on the shoulders of those who came before me and of those who remained the wind beneath my wings.

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I will never be self-made, I am entirely and completely, but a product of generations of love and resilience that never failed.

“...But with God all things are possible.”- Matthew 19:26.

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## Chapter 1: Introduction

### 1 Introduction

#### 1.1 Background to the study

As a popular topic in modern International Trade Law, particularly in the African context, the new African Continental Free Trade Agreement (AfCFTA) establishing the African Continental Free Trade Area presents a plethora of new and exciting opportunities to reimagine African development in a way that prioritises the overall good and benefit of the continent. Now more than ever, the world has placed unprecedented focus on advancing efforts and dialogue on curbing the devastating effects of rapid climate change and ensuring that current populations are able to live and work in a way that not only maximizes present resources, but also protects future generations. This thinking is the basis of the concept of sustainable development and places an obligation upon current populations to work and structure in a way that does not rob future generations of the limited resources needed to maintain progress and optimise production.

Environmental sustainability is anchored as a key component of Africa's Agenda 2063: The Africa We Want, in which an emphasis is placed on the importance of building "environmentally sustainable and climate resilient economies and communities."<sup>1</sup> The new AfCFTA, however, fails to mirror this focus with the same level of urgency, with only minimal references to the environment. With African economies now beginning to resurrect from the devastating effects of the Covid-19 pandemic's harshest waves, the introduction of AfCFTA policies and annexes that innovatively address environmental problems, and their subsequent public health issues, is not only timely, but undeniably essential. Beyond the damage brought about by the pandemic, Africa is also predicted to be the continent most vulnerable to climate change, with a change in climate patterns threatening rapidly-expanding populations and investment opportunities.<sup>2</sup> This further supports the need for investment facilitation protocol and strategies that speak to this issue.

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<sup>1</sup> African Union (2015), "Agenda 2063: The Africa we want." Accessed at: [https://au.int/sites/default/files/documents/33126-docten\\_year\\_implementation\\_book.pdf](https://au.int/sites/default/files/documents/33126-docten_year_implementation_book.pdf).

<sup>2</sup> <https://www.weforum.org/agenda/2018/12/africa-s-fastest-growing-cities-are-the-most-vulnerable-to-climate-change-globally>. Accessed on 06 March 2022.

As a Regional Economic Community (REC), the Southern African Development Community (SADC) recognises the importance of sustainable use and management of the environment in the fight against poverty and food insecurity, and its member states have all, to varying extents, further committed themselves to integrated efforts towards sustainable development. This commitment is reflected by the SADC Treaty establishing the organisation, as well as their active participation in the negotiations and ratification of major Multilateral Environmental Agreements (MEAs), such as the United Nations Framework Convention on Climate Change (UNFCCC) and the United Nations Convention to Combat Desertification (UNCCD), amongst others.<sup>3</sup> This recognition and commitment reflects the global understanding that sustainable development indeed remains an essential element of efficient economic development. However, with the commencement of trade under the AfCFTA in January 2021, and the policies and framework to be negotiated for its implementation, sufficient efforts are yet to be organised towards the promotion of sustainable development through integrated economic structures and activity, particularly through investment. This research aims to highlight this unique nexus and outline the ways in which AfCFTA investment can aid in the efforts towards SADC sustainable development.

## 1.2 Research questions

Through an elaborative study of the nexus between investment and sustainable development, this research will investigate the influence that the AfCFTA Protocol on Investment and its structured strategies can have on sustainable development in the SADC. This exploration will be conducted through a focus provided by the following research questions.

### Research Questions:

- i) What is the impact of Investment on sustainable development in general and specifically, in the SADC?
- ii) What are the current gaps in the existing SADC investment framework for the promotion of sustainable development?

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<sup>3</sup> Available at <https://www.sadc.int/themes/environment-sustainable-development/>.

iii) How can AfCFTA Investment Facilitation protocol and strategies effectively promote sustainable development in the SADC?

An analysis of both the long-standing and contemporary literature on the topics of investment and sustainable development will reveal the lack of intentionality that often plagues modern instruments for sustainable development in various countries around the world. Beyond highlighting shortcomings in these niche areas, these research questions will continuously direct the discussion towards Africa's-, and particularly the SADC's, dire need for policies and instruments that are both centered on the promotion of production, while remaining environmentally conscious.

### 1.3 Objectives of the study

The overall objective is to identify the role of the AfCFTA investment facilitation protocol and strategies in the promotion of sustainable development in the SADC. Considering the research questions outlined above, the research objectives are as follows:

Objective 1: To identify the process followed to ascertain the impact of investment on sustainable development in the SADC.

Objective 2: To identify the SADC investment mechanisms aiming to promote sustainable development and identify strengths and shortfalls.

Objective 3: To identify the ways in which AfCFTA Investment Facilitation protocol and strategies can be structured to better promote sustainable development in the SADC.

### 1.4 Research motivation

It is the urgent need to address gaps in the essential legal, environmental and trade framework creating regional economic integration, which forms the motivation for this research. In this study, the subject is the AfCFTA and the impact it can have in the promotion of sustainable development in the SADC region. Although wide in its scope, covering several issues ranging from services to sanitary standards and beyond, there is little mention of how exactly the AfCFTA can be structured, through its Protocol on Investment in particular, to advance methods for environmental protection.

The new AfCFTA presents a historic opportunity for African countries to investigate the existing shortcomings in investment facilitation protocols and strategies, and intentionally gear these frameworks towards the promotion of sustainable development. Sustainable development should be highly prioritized by policymakers, governmental structures, strategists, and all other stakeholders in the process of developing framework for development, especially in African Regional Economic Communities. Dr Amire outlines that despite the introduction of the United Nations Sustainable Development Goals in 2015, several African countries are still struggling to achieve all or one-third of these objectives.<sup>4</sup> These depressing figures underscore the need for not only this research, but also for a region-wide acceleration in the process of centering sustainable development in the conversation of investment for development.

## 1.5 Literature review

### 1.5.1 Investment and Sustainable Development

As the process by which funds are allocated into financial schemes, programmes or initiatives in order to generate profit, establish advantages and/or accumulate interest,<sup>5</sup> investment, and its particular effect on sustainable development in the SADC forms the basis of this study. The meaning of investment, especially as developed through landmark case law such as *Salini Costruttori S.p.A and Italstrade S.p.A v. the Kingdom of Morocco*,<sup>6</sup> and that of *Fedax N.V. v. The Republic of Venezuela*,<sup>7</sup> is of particular importance in this study. This is because investment, in the context of trade in a free trade area, differs significantly from its most basic, commercial understanding. Due to the clearly outlined parameters these cases have provided for the definition of an investment, and thereby outlining a clearer scope for the items that would fall within such definition, various scholars such as Garcia V and Maria M<sup>8</sup> often refer to these historic cases in unpacking the term. As a driving force that has been powering and shifting whole economies even prior to the rise of colonisation across the world, investment remains an essential role-player in the ways economies develop through trade. These economic developments have created a blueprint

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<sup>4</sup> Amire 2020: 59.

<sup>5</sup> <https://dictionary.cambridge.org/dictionary/english/invest>. Accessed on 16/03/2022.

<sup>6</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

<sup>7</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Objections to Jurisdiction, 11 July 1997

<sup>8</sup> Garcia V and Maria M 2018: 30.

for what global investment in trade has looked like, and has, as is more relevant to this study, shaped the trends through which investment has been prevalent in Africa. From the colonial era when Western economic giants used military force and dominance, and later more democratic and diplomatic strategies, to protect and promote their interests in various regions across the globe, to the early-post and post-colonial eras in which newly independent States sought development through integration and an embrace of foreign investment, investment has continued to be a significant role-player in the ways societies have transformed. This has been comprehensively elaborated by the scholarship of Melber and Southall,<sup>9</sup> as well as Miles.<sup>10</sup>

Understanding the meaning, significance and historical development of investment renders depth to the discussion that will detail how sustainable development can occur through investment, a discussion which is at the core of this research. Boon reiterates that sustainable development should be understood as a development strategy for improving the living conditions and meeting the needs of the current human population, without degrading the quality of the environment and negatively affecting future generations.<sup>11</sup> As a concept birthed in the 1970s-1980s, the act of utilising the lens of sustainability to view development became popular when researchers and economists realised the link between the wellbeing of the environment and the rate of economic development. This was first acknowledged at the Stockholm Conference on Human Environment in 1972, as explained by Kates et al.<sup>12</sup> Furthermore, this was later displayed in the 1987 findings of the World Commission on Environment and Development (WCED), entitled *Our Common Future*, and known as the Brundtland Report.<sup>13</sup> Berger et al further expose this controversial link between economic development and environmental wellbeing as they outline how investment facilitation frameworks can be designed to help attract sustainable Foreign Direct Investment for sustainable development, as well as for the achievement of other environmental and societal goals in general.<sup>14</sup>

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<sup>9</sup> Melber and Southall

<sup>10</sup> Kate Miles 2013: 19.

<sup>11</sup> Boon 2009: 3.

<sup>12</sup> Kates et al 2005.

<sup>13</sup> Ibid.

<sup>14</sup> Berger et al 2021.

As a fairly new point of tension in international trade law, the nexus between investment and sustainable development remains controversial for a number of reasons, including the subsequent obligation this nexus places upon States to address the underbelly continental obstacles to environmentally-conscious investment practices, such as regional fragmentation issues in legal-investment framework, faulty conflict resolution mechanisms, as well as the long-standing and profitable, but environmentally-damaging production systems, amongst others.

In the earliest chapters, this research outlines the historic and current realities of investment and sustainable development globally and then with a narrower focus on Africa, before expanding on the AfCFTA and the realities existing within the SADC.

### 1.5.2 AfCFTA Protocol on Investment and the AfCFTA position on Sustainable Development

As a culmination of a long series of integration efforts on the African Continent, the new AfCFTA promises to deliver exponential growth across various sectors through integrated efforts. Free Trade Agreements (FTAs) are agreements that establish free trade zones and are essentially treaties between various countries to facilitate trade and abolish trade obstacles. These tariffs are removed either immediately or gradually over time in order to promote an open and competitive international market.<sup>15</sup> The West African Custom Union was the product of Africa's first Regional Trade Agreement, which was signed in June 1959 between Benin, Ivory Coast, Mali, Senegal, Niger, Mauritania and Upper Volta, which later became Burkina Faso. These Francophone countries were able to exercise a version of Free Trade as allowed by the Agreement establishing the Custom Union, and could therefore reap the benefits that such agreements provide such as integrated methods for poverty reduction and organised systems for the gradual removal of technical barriers to trade.<sup>16</sup>

As a Free Trade Agreement, the AfCFTA aims to, *inter alia*, promote integration and cross-border trade through its various pillars, strategies and protocols. Per Article 3 of the Agreement establishing the African Continental Free Trade Area outlining the general objectives of the AfCFTA, the Agreement aims to, *inter alia*, facilitate investments building on the initiatives and developments in the State Parties and Regional Economic Communities, as well as promote and

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<sup>15</sup> <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/free-trade-agreement-fta>. Accessed on 03/05/2022.

<sup>16</sup> Rameau 2020: 62.

attain sustainable and inclusive socio-economic development.<sup>17</sup> Additionally, Article 4 outlines that for purposes of achieving the general objectives as detailed in Article 3, the State Parties shall, *inter alia*, cooperate on investment.<sup>18</sup> On investment, several factors have suggested that investment facilitation could form part of the negotiations. Considering the history of investment in international trade, particularly in the African context, this is a relatively fresh perspective in the discussion of regional investment treaty negotiations. "New" because, historically, African states have opted to enter into older-style investment treaty models, which were established in the post-colonial era to protect former colonial powers' holdings in Africa. This treaty approach was first used with European countries, but eventually became a blueprint for discussions with other countries and within themselves. These treaties typically focused on investment protection rather than promotion and facilitation of investment flows.<sup>19</sup> Negotiation of investment facilitation would be momentous, especially in the environmental context, as it would allow States to adequately consider the ways in which investment can be facilitated for sustainable development in Africa, and grant more room and flexibility for African countries, particularly in the SADC, to contextualise investment facilitation for sustainable development to their country's specific needs and realities.

In addition, the Pan African Investment Code (PAIC) was drafted as a model investment treaty from the perspective of lesser developed countries under the auspices of the African Union, and presents its main objective as the promotion of sustainable development in Africa. It is therefore essential to also understand the role this tool has played in advancing the role of investment in the promotion of sustainable development on the continent. Often revered to be a guide for the negotiation of the AfCFTA Investment Protocol, the PAIC provides key insight into how investment and sustainable development can be reconciled in newer investment tools on the continent. The PAIC promotes sustainable development by deviating from the traditional Bilateral Investment Treaties and considering all factors to strike a balance between the investor and host-state's rights and obligations, this being done through the revision of old concepts such as the Most

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<sup>17</sup> Article 3(c) and (e).

<sup>18</sup> Article 4.

<sup>19</sup> Nikiema & Maina 2021: 1-2.

Favoured Nation (MFN), National Treatment (NT) and Free and Equitable Treatment (FET) principles within the Code.<sup>20</sup>

The AfCFTA takes a stance on sustainable development similar to the PAIC, for instance through the resistance that both tools have towards Investor State Dispute Settlement (ISDS). This perspective inadvertently places focus on the obligations and rights of investors and host-states, and in this way, the AfCFTA considers sustainable development in a manner similar to the logic illustrated in the PAIC.<sup>21</sup>

More importantly, the expected benefits of the AfCFTA Protocol on Investment for sustainable development and how these can be practically included in the strategies for its implementation must be considered. The AfCFTA will build on existing investment agreements in the RECs, and thus shed light on both traditional issues in investment agreements, such as investment protection and promotion, as well as newer topics such as investment facilitation and investors' obligations. In addition, the AfCFTA Protocol on Investment can reduce risks associated with Intra-Africa investment by fostering a stable, and predictable regulatory regime. This could promote cross-border investment flows in various sectors and industries, such as renewable energy and low emissions technology, waste management, and pollution control. This would present a two-fold benefit to Member States as it would significantly develop the requisite green infrastructure, while simultaneously strengthening intra-African value chains. In terms of specific provisions, State Parties negotiating the Protocol on Investment should consider including a general exceptions clause similar to the provisions set out in the Protocol on Trade in Goods and Services, and further include language requiring investors not to undermine environmental obligations to create a more favorable investment climate.

### 1.5.3 The SADC and Investment for Sustainable Development

Many recently ratified free trade agreements include provisions on trade and the environment, as well as trade and sustainable development. FTAs negotiated by the European Union (EU) include a chapter on trade and sustainable development that, among other things, requires trade partners to follow international environmental standards, effectively enforce environmental laws, trade sustainably in natural resources, combat illegal trade in threatened and endangered species,

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<sup>20</sup> Rameau 2020: 64.

<sup>21</sup> Ibid.

encourage trade that helps mitigate climate change, and promote corporate social responsibility.<sup>22</sup> Due to their comprehensive references to the nexus between investment, the environment and sustainable development, as well their commitment to a greener future in trade, the EU and the the United-States-Mexico-Canada Agreement (USMCA) will be compared to the SADC and the various Agreements and tools that speak to investment and sustainable development in these regions.

As an REC, the SADC has developed and adopted legal framework that regulates and promotes investment, as well as mechanisms for the protection of the environment with references to sustainable development.<sup>23</sup> These include the SADC Treaty in general, the SADC Protocol on Finance and Investment , the 2012-finalised Model Bilateral Investment Treaty Template, as well as the extended SADC Protocols on various environmental issues, amongst others. These will all be discussed in the context of the AfCFTA, and more comprehensively, the AfCFTA's Protocol on Investment.

In addition, the AfCFTA currently lacks a Protocol on Environment and Sustainable Development. As the AfCFTA negotiations are still underway, the AfCFTA State Parties could yet incorporate such a protocol.<sup>24</sup> The discussion of the role of the AfCFTA in bolstering sustainable development in the SADC would be incomplete without mentioning the instruments that will most likely be substantially influenced, and the extent of such influence, in their application and interpretation by the AfCFTA, these include the as the Pan African Investment Code and the SADC Finance and Investment Protocol. These gaps in understanding, interpretation and application reveal new pathways for the AfCFTA Investment and Sustainable Development.

All in all, although the AfCFTA in its current form, as well as the progress on the negotiations for its various Protocols, include references to the environment and sustianble development, it is evident that there is still much room for improvement in both tackling the obstacles to investment for sustainable development, as well as sufficiently promoting and prioritising sustainable development, through intentional and environmentally conscious investment framework on the continent. The same is true for the SADC in particular, where the current legal, investment and

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<sup>22</sup> Van der Ven and Signe 2021: 6.

<sup>23</sup> Kuhlmann and Agutu 2020: 784-792.

<sup>24</sup> Ibid: 7.

environmental framework can be better aligned to the Agenda 2063 Goals and the general momentum with which the entire global community is advancing sustainable development.

## 1.6 Methodology

### Research Methodology and Scope

The research will be carried out by means of literature review and comparative exercises. Contemporary literature on the matter will allow an intensive study into the current realities of sustainable development in developing countries. Older authorities, on the other hand, will provide wider context into the evolution of the nexus between Free Trade Areas and sustainable development across the world in different RECs. Comparative practices will allow for a critical analysis between the SADC realities, and those existing in other, international RECs.

## 1.7 Dissertation outline

The minor dissertation will be structured into five comprehensive chapters detailing a progressive discussion of the influence that the AfCFTA Investment Protocol and strategies will have for sustainable development in the SADC.

### Chapter 1

Introduction

### Chapter 2

Investment and Sustainable Development

### Chapter 3

AfCFTA Protocol on Investment and Sustainable Development

### Chapter 4

The SADC and Investment for Sustainable Development: Strengths, weaknesses and how AfCFTA can bolster SADC Sustainable Development

### Chapter 5

Conclusion

## 1.8 Dissertation work schedule

November 2021 - January 2022

Compilation of Materials & completion of draft Chapter 1

February 2022 - March 2022

Complete draft Chapter 2 & 3

April 2022 - May 2022

Complete draft Chapter 3 & 4

May 2022

Complete draft Chapters 4 & 5

May 2022 – June 2022

Finalisation: correcting and editing of draft thesis and submission

## Chapter 2: Investment and Sustainable Development

### 2.1 Introduction

As pillars upon which the African Continental Free Trade Agreement (AfCFTA) is to be negotiated and implemented for the efficient development of trade in Africa, investment and sustainable development operate as two essential elements in a unique, symbiotic relationship, ultimately geared towards the achievement of certain economic, trade and environmental goals.

This research unpacks the ways in which AfCFTA investment facilitation strategies and protocol can be structured to promote sustainable development in SADC Developing Countries. However, in order to adequately explain these methods, a thorough understanding of investment, particularly in the context of Trade in a Free Trade Area, as well as sustainable development would first need to be grasped. Through a complimentary two-part system, this chapter firstly provides an overview of key literature in understanding these concepts, then demystifies the important juncture of investment and sustainable development before finally establishing a clearer approach to understanding the discussion of formulating AfCFTA investment protocols and strategies conducive for sustainable development.

### 2.2 Investment

#### 2.2.1 The meaning of investment

Often understood to be the fuel that drives the machine of beneficial exchange in the complex world of International Trade, the concept of investment in the context of trade has been extensively expanded upon in both academia and commercial legal practice. In its most primary sense, investment entails the allocation of money into financial schemes, programmes or initiatives with the purpose of generating profits, accumulating interest or gaining an advantage.<sup>25</sup> The act of investing is also described as the process of loaning money upon securities of a more or less permanent nature, placing it in business ventures or real estate, or otherwise laying it out, so that it may produce revenue or income.<sup>26</sup> The discussion is, however, seldom this straightforward in international investment law. Several experts in the field agree that there is no uniform definition

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<sup>25</sup> <https://dictionary.cambridge.org/dictionary/english/invest>. Accessed on 16/03/2022.

<sup>26</sup> <https://thelawdictionary.org/invest/>. Accessed on 15/03/2022.

to the term, mainly because the concept is largely nuanced by the object and purpose of the different investment instruments that encompasses the term.<sup>27</sup>

In further investigating the meaning of investment, reference is often made to the criteria outlined in the arbitral decision of *Salini Costruttori S.p.A and Italstrade S.p.A v. the Kingdom of Morocco*,<sup>28</sup> one of the early decisions delivered through an arbitral tribunal constituted under the framework of the International Centre for Settlement of Investment Disputes (ICSID).<sup>29</sup> Despite making clear reference to the term for purposes of declaring that the Centre's jurisdiction would extend to any legal dispute arising directly out of an investment,<sup>30</sup> the ICSID framework had intentionally left investment undefined. This was mainly because the original writers could not unanimously decide on a suitable meaning, and further as a subsequent means to promote and protect the autonomy of contracting parties in deciding which items would fall within the scope and ambit of such term.<sup>31</sup> The Award granted in *Salini* crystallised clear criteria for an improved, more uniform definition of the term, and these criteria then comprehensively became known as the "Salini Test." The *Salini* Test succeeded the criteria previously presented in the case of *Fedax N.V. v. The Republic of Venezuela*,<sup>32</sup> where the first legitimate criteria for identifying an investment were described. The Tribunal in the *Fedax* matter proclaimed acts of investment to be ones that involved certain duration, exercised regularity of profit and return, involved assumption of risk, displayed a substantial commitment, and presented significance for the host State's development. These five criteria in *Fedax* were reduced to four in the *Salini* Test, exempting the regularity of profit and return. The four criteria highlighted by the ICSID-born *Salini* Test became a defining structure for many international investment disputes to follow, however much debate and controversy continue to exist in defining the term, and such ambiguity has even extended to non-ICSID structures, as was illustrated in matters such as *White Industries Australia Limited v. The Republic of India*,<sup>33</sup> as well as *Flemingo Duty-Free Shop Private Limited v. the Republic of*

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<sup>27</sup> Garcia et al 2018: 30.

<sup>28</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

<sup>29</sup> Sattorova 2012: 269.

<sup>30</sup> Chapter 2: Article 25(1).

<sup>31</sup> Garcia et al 2018: 31.

<sup>32</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Objections to Jurisdiction, 11 July 1997

<sup>33</sup> *White Industries Australia Limited v. The Republic of India*, UNCITRAL Rules, Final Award, 30 November 2011.

*Poland*.<sup>34</sup> It can therefore be said that the definition of investment in general international trade law, as well as in the narrower instances found in Free Trade Areas and Regional Economic Communities (RECs), is still greatly subject to the terms decided upon by the contracting parties, in as far as it also keeps to the generally accepted criteria as displayed in *Salini*. This decision is reflected in, *inter alia*, the Bilateral Investment Treaties (BITs), national legislation, dispute resolution framework, private contracts, etc. that the parties become bound to.

More specifically in the African context, investment is further described across a plethora of investment literature, BITs, national legislation and other investment sources and binding agreements. The Pan African Investment Code (PAIC), for instance, describes investment as an enterprise or a company (being any duly constituted entity or otherwise incorporated, under the applicable laws and regulations of a Member State provided that it maintains substantial business activity in the Member State in which it is located) which is established, acquired or expanded by an investor (being any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State). Similarly worded to the *Salini* Test, investments in terms of the PAIC are thus characterised to include a commitment of capital or other resources, the expectation of profit or gain, the assumption of risk, substantial business activity and a substantial contribution to the economic development of the host State.<sup>35</sup>

It is thus evident that the meaning of investment in international trade law stretches far beyond its primary, financial definition. This wider understanding of the term not only promotes and protects party autonomy, but further extends the scope of applicability of the items that will constitute an investment. This ultimately allows for greater benefit to be extracted out of the investor-host state relationship.

### 2.2.2 Understanding the significance of investment

Beyond the direct benefit of generating profit, investment remains an essential driver of national economic growth. For African developing countries, this is particularly important. On a macroeconomic level, investment can improve production capacity through the acquisition of new

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<sup>34</sup> Flemingo Duty-Free Shop Private Limited v. the Republic of Poland, UNCITRAL Rules, 12 August 2016.

<sup>35</sup> Mafurutu 2021.

equipment which incorporates technical progress and thus increases national labour productivity. Furthermore, investment can also exponentially improve productivity through the increase in aggregate demand as well as increasing employment and wages, as most investment is designed to create employment in the host country.<sup>36</sup> Additionally, Mafurutu outlines that investment and its associated investment protocols can present far-reaching benefits. These include regional and economic growth and integration, the stimulation of industrial development, the alleviation of poverty through skills and technology transfer, augmented export diversification, as well as the reinforcement of forward and backward linkages that support regional and global value chains.<sup>37</sup> Although evidently advantageous, investment also presents certain macroeconomic drawbacks that must be mitigated in order to fully leverage investment on this scale. These drawbacks include the birth of heightened protectionist ideals in the development of strategic industries, such as Defence or Agriculture, in order to maintain pure control, as well as negative long-term capital movement directed back to the investor state once the investment in the host state becomes profitable.<sup>38</sup>

On a less abrasive scale, the microeconomic impact of investment extends to the everyday lives of the businesses, people and exchanges occupying and characterising the community within the country into which the investment is ploughed. Lederman outlines that one of the ways in which investment produces positive microeconomic results is through the relaxing or addressing of capital shortages and financial constraints that limit the scale of domestic institutions. This, in turns, boosts productivity and the growth of the recipient structures.<sup>39</sup> Furthermore, Neal details the ways in which recipient countries of investment are able to benefit through taxes. Through taxing the mining or felling of natural resources, for example, countries that are rich in these resources are able to maximise the positive impact of investment for the country. He illustrates that in the United Kingdom, for instance, most of the North Sea oil is drilled by foreign-owned multinationals. Through the introduction of a flat rate tax on each barrel produced, the British have profited from such foreign direct investment. In the instance of less-developed countries, there is a greater need to pitch more attractive taxation rates so as not to deter multinational investment or

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<sup>36</sup> Iheonu 2019: 3.

<sup>37</sup> Mafurutu 2021.

<sup>38</sup> <https://www.thebalance.com/what-is-foreign-direct-investment-1979197>. Accessed on 18/03/2022.

<sup>39</sup> Lederman et al 2013: 3638.

redirect it to competing economies. These may result in slightly lower revenues, but revenues nonetheless, that if well managed, can be used to draw in further investment, which will, in turn, strengthen their economies, and enrich their citizens.<sup>40</sup>

### 2.2.3 The history of international investment law, and trends in investment in Africa

It is widely believed that the starting point of international investment law dates back to the Treaty for the Promotion and Protection of Investments signed between the Federal Republic of Germany and Pakistan in 1959. Scholars argue, however, that an in-depth study of the series of events that led to the development of international investment law will reveal a far more detailed history of this complex branch of the Law, a history riddled by much debate in the literature.<sup>41</sup>

As a sub-discipline of public international law existing with a distinctive private element,<sup>42</sup> international investment law has its most notable origins in the expansion of European trade and investment activity from the seventeenth to early twentieth centuries. Miles elaborates, however, that the very expansion that birthed what is now regarded as international investment law could not have been contemplated if indigenous trading networks had not already been in place. The twelfth-century Fatimid Caliphate and Mamluk Sultanate period, for instance, where commercial privileges and fiscal exemptions were granted to non-Muslim foreigners with the aim of making the Mediterranean an attractive region for trade, serves as evidence of this.<sup>43</sup> Oriental states also granted a plethora of concessions such as extraterritorial jurisdiction during the eleventh and twelfth centuries, seemingly due to the recognition of the wide differences between Western and Eastern civilizations, as well as differences in their laws, manners and customs. Following the Fatimid Caliphate and Mamluk Sultanate, the Ottoman Empire signed Capitulation treaties with Western countries, the earliest being with France in 1535, which included various concessions such as conducting trade according to the French law. This early 1500s relationship between the Ottoman Empire and the West displayed that property rules extended beyond Europe in the seventeenth century, and the capitulation treaties developed during this time granted commercial privileges to Europeans on a reciprocity basis. These reciprocal treaties placed various obligations upon the parties, such as protecting victims of shipwrecks, compensating for damages inflicted at sea, and

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<sup>40</sup> Neal et al 1994: 19.

<sup>41</sup> Miles 2013: 19.

<sup>42</sup> Whitsitt et al 2013: 209.

<sup>43</sup> Alshahrani 2021: 122-131.

seizing fugitive debtors.<sup>44</sup> Furthermore, the Friendship, Commerce and Navigation treaties concluded from the eighteenth century onward contained similar provisions. The United States adopted several of these treaties, the first with France in 1778, which is widely seen as the blueprint of modern treaties. These Friendship, Commerce and Navigating treaties were initially structured as bilateral commercial treaties that worked to facilitate trade and create a stable diplomatic and economic relationship between the parties signed thereto. The treaties, however, were not confined to commerce as they also extended to military matters and ensured freedom of worship and movement, in addition to granting most-favoured-nation and national treatment status. Alshahrani explains that these Friendship, Commerce and Navigation treaties, although their influence in shaping contemporary Bilateral Investment Treaties is heavily debated, played an undoubtedly vital role in creating a network of reciprocal trade protection measures, which created a framework for the international protection of foreign capital. This, in turn, created the groundwork for modern international investment law.<sup>45</sup>

Miles further outlines that this reflection is particularly significant for considering the inevitable competition for supremacy between the European expansion of trade and investment activity and the indigenous political, social, economic and legal frameworks in existence at the time, a competition which later curated the refined European understandings of the key concepts of property, private wealth, economy and regulation. As hinted above, the expansion of European treaties beyond the borders of Europe resulted in an alteration of their character from a reciprocity base to one of enforcement, reflecting the waves of European colonialism, exploitation and oppression that characterised this period. The rules on foreign investment protection that developed during the “colonial encounter” facilitated European investment, which was largely made in the context of colonial expansion.

The emergence of European legal regime supremacy translated to, as Benton puts forth, the development of capitalist relations of production through repetitive assertions of power and responses to power. Ultimately, it was the European form and content of international investment law, along with its particular conceptions of the characterising terms, which emerged out of this contest as the foundation for the modern international legal system.<sup>46</sup> Consequently, as non-

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Miles 2013:19-70.

European partners lost political strength because of this expansion, overly favourable investor interpretations of these treaties were imposed on the host state. Furthermore, to further trade and investment activity, incursions into their sovereignty systematically increased in scale and scope. This gradual strengthening of Western economic and political control of non-European territories was a complex and multi-layered process, facilitated through the granting of far-reaching concessions to foreigners, the extraterritorial application of laws from European states and the United States of America to their nationals, and the imposition of what came to be known as ‘unequal treaties’, or Capitulation Treaties as highlighted above.<sup>47</sup>

Moreover, the period after the Second World War brought developments which ushered the earliest references of contemporary Bilateral Investment Treaties (BITs), which were a product of an era of “widespread nationalisation and developing country efforts in multilateral settings that threatened the sanctity of foreign contracts, property rights, and international doctrines of state responsibility.”

#### 2.2.4 Trends of investment in Africa

To gain context into the growth and trends of investment in Africa, a brief explanation of the history of investment in Africa, particularly from foreign sources, is firstly required.

After the wave of political independence of African countries during the 1960s, the new leadership, hinged on history, ideology and cold war politics, was sceptical about the value of foreign investment and free trade. This view stemmed from fears that competition resulting from Foreign Direct Investment could force domestic firms into bankruptcy, disintegration and subsequent liquidation due to competition and lead to the loss of sovereignty. As a result, several countries in the continent imposed trade barriers and foreign exchange controls as part of a policy of import-substitution industrialization and in an attempt to protect local entrepreneurs. Unfortunately, this process delivered unsatisfactory results, as it discouraged trade as well as Foreign Direct Investment and had adverse effects on economic growth. While other developing regions experienced an increase in the Gross Domestic Product income, Africa on the other hand, experienced an average decline. After the late 1970s to mid-1990s presented continuous unsatisfactory economic performance by African nations, it became evident that these nations

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<sup>47</sup> Ibid.

would need to embrace and adopt external sources of funding to aid the depressing economic situation prevalent at the time. This new approach translated to reforms that created incentives that, in turn, generated more domestic and foreign investment, reserves, exports, efficient functioning of markets with a view to unleashing private initiative, as well as enterprise. By 1981 and throughout the years until 2000, a small number of investor countries became responsible for the majority of the Foreign Direct Investment flows into Africa. The United States was the largest investor, followed by the United Kingdom, and France. During this timeframe, the United States was solely responsible for more than 28% of the total flows from countries who were members of the Organisation for Economic Co-operation and Development (OECD), while the United Kingdom was responsible for 20% of the total investment inflows, followed by France for 20%. Germany remained a relatively small investor at a far distance with 9% of the flows from developed countries. This indicates that during the early years of the twenty-first century, more global investment was flowing into the continent than at any time since at least the 1960s and local stock exchanges were flourishing. World Bank indicators revealed that the average growth rate of real Gross Domestic Product per capita, which was negative 0.9% over the period 1975-1984, increased to positive 0.7% in the period from 1995 to the year 2002. This climbed to an average of 6.68% between 2002 and 2007, and then 4.37% between the years 2008 to 2015, before slowing down to 1.97% between 2016 and 2017. These statistics strongly suggest that that the improvements in Africa's economic growth occurred greatly because inflows of Foreign Direct Investment into the continent.<sup>48</sup>

Melber and Southall further highlight that there was a drastic inflow of foreign investment, more attention placed upon the continent of Africa as a functioning market, a greater rate of exports, and overall enhanced economic growth in the earliest years of the twenty-first century. Most significantly, there was a small increase in the average per capita income in numerous African countries as a result of the increased investment activity. Without question, the slow but steady positive turn in the African economic landscape presented an inspiring perspective of the continent's future and bore testament to the economically auspicious times the continent had

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<sup>48</sup> Mburu 2019: 21.

entered into. This difference in perspective advanced a reality so disparate from that painted by The Economist during the year 2000 when they labelled Africa as ‘the hopeless continent’.<sup>49</sup>

More specifically, it was the global demand for African resources that significantly contributed, directly or indirectly depending on the context, to the higher levels of economic growth recorded in most African countries during this time. The demand was notably for oil, but also for gas and other energy sources, minerals, metals and natural products such as timber and fish. Observers also agree that this increased demand was driven mainly by the advent of China, an aggressive champion for modern-day industrialisation, as an influential economic party. Where Africa had initially been cast aside during the immediate post-Cold War era as an undisputed sphere of Western influence, China, along with other key industrial actors from the South like India and Brazil began to narrow this geopolitical map and distance.<sup>50</sup>

In more recent times, scholars have debated whether contemporary investment trends in Africa have begun to mirror the historic “Scramble for Africa” that set the path for African colonisation and economic control and oppression. With China steadily taking over several markets across the continent through investment in particular, Fu suggest that China is leading a quiet China-Africa revolution, and that this seemingly reflects a new system for control over the African continent. She puts forth that annual flows of Chinese Foreign Direct Investment to Africa have increased dramatically since 2003, the earliest year for which official statistics is available, with figures rising from \$74.8 million in 2003 to \$5.4 billion in 2018. Chinese Foreign Direct Investment into Africa fell to \$2.7 billion in 2019, but rebounded to \$4.2 billion in 2020, despite the COVID-19 outbreak. Over the same time span, Chinese FDI stocks in Africa increased over 100-fold, from \$490 million in 2003 to \$43.4 billion in 2020, with a high of \$46.1 billion in 2018. Since 2014, China has been Africa's fourth largest investor, surpassing the United States.<sup>51</sup> These investments have also been concentrated in a few critical sectors. For the past five years, the construction sector has been the major channel for Chinese FDI, accounting for 35 percent of total investment in 2020. Examples include the construction of Chinese-operated special economic zones, toll highways, and bridges. Additionally, the mining sector has also received significant focus. While Chinese

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<sup>49</sup> Melber & Southall 2009: 440.

<sup>50</sup> Ibid.

<sup>51</sup> <https://thedi diplomat.com/2021/11/the-quiet-china-africa-revolution-chinese-investment/>. Accessed on 25/04/2022.

Foreign Direct Investment into mining (21 percent in 2020) is far lower than that of other countries such as the United Kingdom, France, and the United States (43 percent, 43 percent, and 37 percent, respectively, in 2019), growth in other sectors such as manufacturing, tourism, and financial services, which tend to generate more jobs and wider economic spill overs, has been more limited. As these latter sectors have less of an impact in the ultimate macroeconomic plane, they create less of a buzz than the sectors like construction and mining that greatly impact the grander economic scheme of a country.<sup>52</sup>

On the other hand, Melber and Southall outline an opposing perspective to the alleged new “Scramble for Africa” and China’s influence in this process, being that it is mostly a result of fast rising global demand for natural resources, which is linked to the growth of China and India as industrial powers, in particular. From this vantage point, longstanding Western dominance in Africa in areas such as oil, minerals, finance, and manufacturing, is being challenged by the recent emergence of new actors, with all the benefits and drawbacks that come with new and rapid capitalist expansion. Despite the essential need for some Great Power to enforce order over unruly lesser nations in a highly volatile world, this may mean, as British historian Niall Ferguson (2004) argues, that the age of American informal empire is coming to an end. Melber and Southall further explain that haste to label China’s investment plans and actions on the continent as imperialistic presents an approach that tends to deny that the US and other Western powers have any significant imperial goals in Africa. Per this view, the US and other Western powers may merely want to carve out spheres of influence, but they aim to limit their long-term direct participation in African countries to extending and safeguarding their direct investments and sources of supply. This view is easily nullified by the rate at which the US and other Western actors continue to pour economic tools to ultimately advance their interests. To put it another way, the new scramble is therefore, essentially, about business and investment. Meanwhile, some writers from this perspective join many left-wing critics in claiming that, paradoxically, Chinese imperialism is eclipsing Western imperialism.<sup>53</sup>

Overall, it is evident that Africa now has a wide range of external actors, both old and new, with varying motivations and interests in both short- and long-term gains. As a result, labelling or

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<sup>52</sup> Ibid.

<sup>53</sup> Melber & Southall 2009: 440.

understanding their activities as imperial makes little sense to no sense. The modern world is significantly more complex than it was in the late 1800s, and there is no meaningful comparison to be made between the original and current scrambles, no matter how appealing the latter moniker may be.<sup>54</sup>

## 2.2.5 Investment and sustainable development: a brief introduction

### 2.2.5.1 Investment for production

As illustrated above, Foreign Direct Investment is a long-term investment in which the investor has a significant degree of influence over the management of an enterprise in the host state, and this relationship is evidenced by ownership of more than 10% of the voting power in a foreign enterprise.<sup>55</sup> In the context of development, this investment can contribute significantly towards the advancement of a country, as it essentially operates as an important “fuel” for the factors of production. Factors of production, explained briefly, is an economic concept that refers to the inputs required to produce goods and services. There are four major factors of production, namely land, labour, capital, and entrepreneurship. As will be explained below, these four factors consist of resources required to create a good or service, which is measured by a country’s Gross Domestic Product, which is the standard measure of a country’s economic health and a general indicator of its standard of living.<sup>56</sup>

The first of the four major factors of production, land, can be described as a broad term that includes all natural resources that can be found on land such as oil, minerals, water and vegetation. These natural resources can be grouped into two categories, namely renewable and non-renewable resources. This distinction remains of utmost importance in the structuring of national and international investment policies focused on development that remain conscious of limited resources. Water, vegetation, wind energy, and solar energy are examples of renewable resources that can be regenerated. Oil, coal, and natural gas, on the other hand, are examples of non-renewable resources that can be exhausted in supply. All resources, whether renewable or non-renewable, can be employed as inputs in the manufacturing of a good or service. Furthermore, land

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<sup>54</sup>Ibid.

<sup>55</sup> Bonnitcha 2016: 2.

<sup>56</sup> <https://corporatefinanceinstitute.com/resources/knowledge/economics/factors-of-production/>. Accessed on 27/04/2022.

can be used for a variety of purposes, including agricultural, residential housing, and commercial buildings, in addition to its natural resources, and rent is the revenue generated by the use of land and its natural resources. This factor of production, however, varies from the other components of production in that some natural resources are scarce, and so its supply cannot keep up with demand.<sup>57</sup>

Secondly, as another factor of production, labour refers to the effort that persons exert in the production of a good or service, and widely includes all types of labour performed for economic reward. Human capital, which is determined by an individual's talents, training, education, and productivity, influences the value of labour. The quantity of output a person can create in each hour of work is further referred to as productivity. Wages, which are the earnings that are derived from labour, are another significant determinant in the efficiency of development policies. It is also worth noting that work done just for one's own personal gain is not considered labour in the grander economic sense.<sup>58</sup>

As a factor of production, labour has several distinct features. For starters, labour is thought to be heterogeneous, which refers to how each person's efficiency and quality of work differs. As it is dependent on an individual's unique abilities, knowledge, motivation, work environment, and job happiness, it differs. Furthermore, work is perishable by nature, which means that it cannot be conserved or stored. If an employee misses a shift on a particular day of work, they will not be able to make up the time on another day. Lastly, labour is closely linked to human endeavours. This means that aspects such as work schedule flexibility, fair treatment of employees, and safe working conditions are vital in the labour market.<sup>59</sup>

Thirdly, capital, or capital goods, refers to the money used to purchase assets that are utilised to generate commodities and services. A corporation that buys a factory to create goods or a truck to undertake construction work, for instance, are both considered capital goods. Computers, machines, properties, equipment, and commercial structures are all examples of capital goods. They are all considered capital goods because they are used in a manufacturing process and help workers be more productive. Interest is the term for the revenue derived from capital. As a factor

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

of production, capital also has several key characteristics. Firstly, capital is created by humans, and it is in this way that it differs most from the first two factors of production. Individuals, unlike land and natural resources, develop capital commodities such as machines and equipment. Furthermore, capital is an element that can survive a long period, but its value depreciates over time. A structure, for example, is a capital good that can last for a long time, but its value diminishes as the building ages. Capital is also called mobile since it, like computers and other technology, can be relocated to new locations.<sup>60</sup>

As the fourth factor of production, entrepreneurship is a combination of the former three factors. Entrepreneurs utilise land, labour, to create a product or service for customers. Entrepreneurship, as a process, entails developing unique ideas and putting them into action through production planning and organization. Entrepreneurs are crucial since they are the ones who take the business risks and find prospective opportunities. Profit is the term used to describe how much money an entrepreneur makes.

With an understanding of the factors of production, it is clear that investment into the production processes that allow for development can occur with a conservationist focus, in essence one that is sustainable and cognisant of the needs of future generations, or through destructive systems that are entirely oblivious to their long-term, damaging effects. The thinking that underpins the former is what anchors the term of sustainable development. This is discussed below.

#### 2.2.5.2 Unpacking sustainable development

Sustainable development is understood to be a development strategy for improving the living conditions and meeting the needs of the current human population, without degrading the quality of the environment and negatively affecting future generations.<sup>61</sup> Finding its roots in the late 1980s, the concept of sustainable development became popularised upon the realisation of the interconnectedness of the wellbeing of the environment and the rate of economic development. This was displayed in the findings of the World Commission on Environment and Development (WCED), entitled *Our Common Future*, and known as the Brundtland Report.<sup>62</sup>

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<sup>60</sup> Ibid.

<sup>61</sup> Boon 2009: 3.

<sup>62</sup> Ibid.

Sustainable development remains a focal point in the development of modern investment negotiations across the African continent, and will therefore remain a focal point in this research as well. Beyond its impact on investment facilitation and the conservation of existing stocks of natural resources, sustainable development allows for development processes that are equitable and socially responsive.<sup>63</sup>

Moreover, Kaniaru emphasises sustainable development as an imperative response to the African environmental problem that gradually evolved over time. He suggests a categorisation of distinctive periods, being the pre-independence, colonial and post-independence eras,<sup>64</sup> in which different resource management systems existed, and later, where various phases of far-reaching environmental harms and threats came about for the continent. The pre-independence era was characterised by African institutional arrangements, strategically organised for the management of communal resources. Although efficient in conserving resources, these systems were grossly unprepared for the environmental demands that would be ushered in through colonialism. The succeeding colonial period split the African institutional arrangements that once had the resource users and decision-makers as one body, into two separate affiliates, united only by the natural resource as the subject of commercial interests in the new colonial administration. The Western principles that sustained colonialism created for a commercial focus and demand that could only be met through an aggressive exploitation of natural resources. The final stage outlined by Kaniaru is the post-independence period. In this period, the newly independent African governments failed to alter the status quo established by colonial administration, and many colonial institutions were able to found their aspirations in the new dispensation by indirectly featuring in various legal and economic instruments across the continent. The effects of this range from deforestation and epidemics to floods and fuel shortages, and these were further exacerbated by internal political instability and trans-border conflicts.<sup>65</sup>

Considering this history, sustainable development therefore operates as a bridge that moves the continent from the devastating environmental effects of the colonial and early post-independence eras, to its prospective future where it can thrive through the intentional creation and maintenance of systems for development. Amongst these systems for development are various economic tools,

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<sup>63</sup>        *Ibid.*

<sup>64</sup>        *Ibid*: 4.

<sup>65</sup>        *Ibid*: 5.

such as investment, which, if implemented correctly, will allow African governments to cater to the needs of both current and future populations.

## Chapter 3: AfCFTA Protocol on Investment and the AfCFTA position on Sustainable Development

### 3.1 Introduction

Introducing the African Continental Free Trade Agreement (AfCFTA) as the focus instrument of this research, this chapter specifically expands on the instrument's perspectives and structures for investment and sustainable development. Prior to this, however, the chapter will provide comprehensive explanations and historical overviews of Free Trade Agreements as tools purposed for particular economic goals in a region. Hereafter, a brief background of the AfCFTA will be provided, followed by insights on the AfCFTA Protocol for Investment and the AfCFTA's position on sustainable development. Lastly, the AfCFTA will be compared to other Free Trade Agreements, particularly in the context of investment for sustainable development, before finally concluding the findings of the chapter.

### 3.2 Free Trade Agreements: General context and history

Agreements establishing Free Trade Areas are known as Free Trade Agreements (FTAs) and they are essentially a treaty between multiple countries to facilitate trade and eliminate trade barriers. These tariffs are eliminated either immediately upon the establishment of the FTA, or gradually over a period of years in order to create an open and competitive international market.<sup>66</sup> Additionally, barriers to trade are any items that act as obstacles to trade goods and services across borders. These can range from financial trade barriers such as tariffs, to technical trade barriers such as prerequisite certifications, legal requirements and regulations, and trade standards.<sup>67</sup>

The concept of free trade has existed since the development of economic structure within society. While free trade is supported as a tool that can benefit all parties involved, it can also be used as a weapon of economic warfare through the strategic exclusion of others. As outlined in the previous chapter, the latter has largely characterised the imperial history of global trade, and more so, the

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<sup>66</sup> <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/free-trade-agreement-fta>. Accessed on 03/05/2022.

<sup>67</sup> <https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-business-guides/glossary/barriers-to-trade>. Accessed on 03/05/2022.

Free Trade Agreements that created the first foundations for the modern FTAs known today. To elaborate further, as the political wave of "free trade imperialism" took hold in Great Britain, which was the emerging global economic power at the time, the essence of free trade changed significantly. The key distinction in Britain's approach was that the empire's focus moved from traditional colonisation and territory expansion to commercial dominance through market forces and diplomacy. This new concept aimed to persuade areas of interest that open economic connections are beneficial to both parties. Despite a concentration on diplomacy, military strength was required to enforce free trade agreements. Additionally, Britain also ensured protection of its own weaker industries, such as agriculture, from international competition through the high tariff imports, while simultaneously promoting the idea that international agreements could secure trade interests of all parties. Although the empire primarily employed diplomatic force to establish foreign markets for its "free trade" ideas, military strength remained a critical component in assuring the system's continued operation. If another nation defied their foreign policy, the empire was always prepared to utilise its superior force. China was an excellent illustration of this, as its economy was essentially self-sufficient, and there was no need for Western commodities. However, its refusal to open markets resulted in the Anglo-Chinese War that lasted from 1839-1842, that the Britons quickly won. The empire was granted access to five treaty ports as well as most-favoured nation status, which established a trading framework in which no nation is favoured over another in terms of trade issues. Considering the economic and military imbalances at the time, this approach meant that Britain had a significant effect on China's trade policies.<sup>68</sup>

International trade collapsed during the Great Depression of the early 1930s. The United States (US) was a perfect example of a protectionist nation until the Great Depression. Import tariffs on products were at an all-time high in 1930, but the United States already had a long history of firmly shielding its economy from free trade influences in order to avoid being exploited by other powers, especially Britain. The United States, however, took a different strategy in the following decade, which was dominated by terror and turmoil, with the world on the verge of another great conflict, ensuring its later worldwide supremacy. It began establishing more than 20 bilateral free trade agreements, mostly in Latin America, but also with the United Kingdom and Canada later on.<sup>69</sup>

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<sup>68</sup> <https://esthinktank.com/2016/06/14/free-trade-agreements-a-brief-history/>. Accessed on 04/05/2022.

<sup>69</sup> Ibid.

Furthermore, the GATT (General Agreement on Tariffs and Trade) was founded two years after WWII ended, and it was on its way to establishing a new global economic system. It was the first international treaty to be established on the principles of multilateralism, which is the ability for various parties to participate, and the most-favoured nation concept. The latter is a status granted by one trade party to another, in order to guarantee that equal status to the “most-favoured nation” in regards to trade. Effectively, it means that no trade party is discriminated. This Most Favoured Nation (MFN) principle is a significant element to modern free trade agreements. When the treaty was signed, 23 countries were joined; however, the aim was that many more would join later. Along with GATT, the International Monetary Fund (IMF) and the World Bank were established to maintain a stable currency rate and provide reconstruction funds to war-torn countries.<sup>70</sup>

Following the disintegration of the Soviet Union in 1991, the United States became the sole remaining superpower. As a result of its unrivaled worldwide position, the United States was able to advocate for an international framework to promote its commercial interests around the world, resulting in the establishment of the World Trade Organization (WTO) in 1995, which now includes over 150 countries. The World Trade Organization oversees the GATT, GATS (General Agreement on Trade in Services), and TRIPS (Trade-Related Aspects of Intellectual Property Rights). In the Uruguay round of negotiations, GATS and TRIPS were negotiated and added to the WTO's major pillars. They reflect a "new" US trade policy agenda that emphasises thematic problems like investment, services, and intellectual property in a multilateral trading system. In the years following World War II, European countries negotiated various accords with one another, and European trade became increasingly intertwined, resulting in the establishment of the European Union (EU) in 1992.<sup>71</sup>

In analysing the modern era of FTAs, it has become evident that since the inception of the US-dominated World Trade Organisation (WTO), the global power balance has shifted once more. The European Union has become an economic superpower, as one might expect. However, it lacks a cohesive military, and its member states are also members of NATO, which is dominated by the United States. As a result, the EU is not a clear contender to become a new global supreme leader. Moreover, the rise of the BRICS countries, particularly the growth of China as an influential party

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

in international trade, has profoundly altered the global trading order. As a result, there has been an explosion of bilateral and regional free trade agreements in recent years, with negotiations having changed away from the multilateral method to more interest-oriented talks as the global south and other developing countries have begun to raise their voices in the World Trade Organisation. Global trade has consequently become more intertwined, and power has been more widely distributed.<sup>72</sup>

### 3.3 Background of the AfCFTA

A significant milestone in Africa's economic integration was marked on 21 March 2018 in Kigali when 44 African Union member states signed the Agreement Establishing the African Continental Free Trade Area at the Union's 10th extraordinary meeting of Heads of State and Government. This tremendous political achievement culminated in the official start of trading under the Agreement on 1 January 2021, following approximately 5 years of technical efforts from the initial launch of discussions in June 2015. By January 5, 2021, the first consignments of commodities exchanged under the AfCFTA, being containers of cosmetics and drinks from Ghana to South Africa, were said to have arrived.<sup>73</sup> By May 2022, 43 of the 54 signatories to the AfCFTA had deposited their instruments to ratify the Agreement.<sup>74</sup> The AfCFTA is expected to deliver significant economic benefits to Africa, with some analyses estimating that by 2030, the continent's combined consumer and business spending will reach \$6.7 trillion.<sup>75</sup> Moreover, the AfCFTA could raise real income gains by 7% by 2035, boost African exports by \$560 billion, and bring 30 million Africans out of extreme poverty, according to World Bank estimates.<sup>76</sup>

This accomplishment culminates a more than 50-year-old vision of continental economic unity. In 1963, the Organisation of African Unity's (OAU) inaugural gathering, the Summit Conference of Independent African States, established a preparatory economic committee to explore the prospect

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<sup>72</sup> Ibid.

<sup>73</sup> Songwe, MacCleod & Karingi 2021: 12.

<sup>74</sup> <https://african.business/2022/02/trade-investment/what-you-need-to-know-about-the-african-continental-free-trade-area/>. Accessed on 12/9/2022.

<sup>75</sup> Landry Signe 2020: 20-21.

<sup>76</sup> World Bank Group 2020: 11.

of establishing a free trade area between the various African countries. Previous attempts at continental integration, on the other hand, have all failed.<sup>77</sup>

### 3.4 AfCFTA Protocol on investment

As outlined earlier, Phase II of the AfCFTA contains the protocols on investment, intellectual property and competition, this being in line with Article 7 of the AfCFTA.<sup>78</sup> Mafurutu explains that the AfCFTA aims to build on the existing initiatives and developments in the State Parties and the RECs, and this is especially true as well for the Protocol on investment. The Protocol on investment itself is predicted to operate as both a guiding tool for investment on the continent, while simultaneously providing a harmonising effect for the multiple, often overlapping legal investment framework that regulate African investment. This would mean that existing investment framework will not suddenly be erased by the Protocol, but will instead be able to be expanded to more adequately address the African contemporary investment climate.

With considerable momentum behind the AfCFTA, some negotiations such as those pertaining to Phase 1 on Trade in Goods and Services are nearing completion. Keeping this momentum, the Phase II negotiations, particularly those establishing the Protocol on investment, are in full swing and expected to be finalised around September 2022.<sup>79</sup> A “Draft Zero” Protocol on Investment to the AfCFTA has been developed and negotiations for the Protocol on Investment will be held on the contents of this Draft Zero framework. References to this Draft Zero Protocol will be made in this paper.

For African economies, the Investment Protocol's drafting, adoption, and implementation present both opportunities and difficulties. The Protocol's effect on investment will depend on what is negotiated, how it links to regional investment laws already in place, and whether it can result in stronger regulations for a more favourable investment environment. Expanding on its anticipated advantages, the Investment Protocol, which includes a variety of approaches to improve investment, might result in a more coordinated approach to investment. Moreover, it has the ability to assist economic integration and growth on a regional or continental scale, increase cross-border investment, promote industrial development, work towards poverty alleviation through technology

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<sup>77</sup> Songwe, MacCleod & Karingi 2021: 12.

<sup>78</sup> Mafurutu 2021.

<sup>79</sup> Sherilyn Raga, Dirk Willem te Velde et al 2022: 7.

and talent transfer, and also promote job creation. Other advantages that may result from an efficiently negotiated AfCFTA Investment Protocol include reduced prices of goods and services for domestic consumption as well as increased export diversification, because of the consequent economies of scale. The forward and backward links that sustain regional and international value chains are therefore also strengthened by effective investment. Mafurutu further outlines that it is also probable that the protocol on investment will emphasise the value of regulatory space (for instance, as those relating to environmental issues) and rebalance rights and obligations in favour of sustainable investment.<sup>80</sup> It might, unfortunately, not result in a significant liberalisation or provide investors more access to the market, as Raga et al opine, however, a common African voice on vital matters such as dispute resolution, investor protection, and investment facilitation remains of utmost importance in the advancement of the African economic agenda. Additionally, debates on investment in the AfCFTA will result in complementary national policies that will improve the collective African investment climate.<sup>81</sup>

More importantly, the AfCFTA could serve as a legal foundation for revising international investment law so that it better incorporates the interests of African countries, businesses of all sizes, and communities. All UN Sustainable Development Goals are relevant in the context of investment, however some Sustainable Development Goals, such as SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 3 (Good Health and Well-Being), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation and Infrastructure), and SDG 13 (Climate Action) each have a clear relationship with investment. This speaks to the greater need to ensure an AfCFTA investment protocol that efficiently serves to facilitate and promote investment for the greater, sustainable development of the African continent.

The current intra-African investment environment has some inherent problems and deficiencies that the AfCFTA investment protocol is expected to address. Regulations that are fragmented, occasionally at odds with one another and overlap each other already make it difficult to promote and defend investments across the continent. Investors face a great deal of uncertainty as a result of this dispersed landscape of financial vehicles. Countries with an evolving investment framework, as is seen with the most recent adjustments to South Africa's investment system,

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<sup>80</sup> Mafurutu 2021.

<sup>81</sup> Ibid: 5.

further require harmonisation at least at a regional level in order to remain as active as possible within the region's investment activity.<sup>82</sup> The AfCFTA protocol on investment is anticipated to do precisely this.

In addition, equitable growth and sustainable development are projected to serve as major goals and guide the negotiations as important drivers of intra-African investment. Striking a balance between the rights and obligations of States and Investors is required in order to draw in Foreign Direct Investment that will support growth and sustainable development. It will further promote equitable growth and sustainable development to include clauses that address anti-corruption, transparency, and other human rights problems related to investment. The best course of action is to engage in extensive negotiations and create legally binding investment commitments in the form of investor obligations, investment protection and State commitments. These promises ought to stand out as the fundamental tenets of the revolutionary and binding intra-African investment protocol established by the AfCFTA to regulate intra-African investment. Non-binding commitments and clauses are a guaranteed recipe for unreliable and failing investment governance. Environmental protection, consumer protection, labour protection, and financial reporting standards are some of the important concerns up for discussion and acceptance under legally obligatory State obligations. These ought to be distinct and foreseeable. To include substantive issues under investor commitments, clarity and predictability must also be emphasised. Business ethics, human rights, compliance with domestic laws, anti-corruption, rights of indigenous peoples, corporate social responsibility, taxation, human rights, and capacity building should further be considered as substantive problems under the investor obligation commitments.

Pertaining specifically to the investment promotion and facilitation pillar, certain commitments that need to be legally enforceable and effectively addressed are crucial and need to be considered thoroughly. These include technical cooperation, information exchange between investment promotion agencies, principles or norms for administrative operations, and information dissemination to investors.

As an intra-African investment protocol that takes into account the use of dispute prevention, de-escalation, and alternative dispute resolution mechanisms, the AfCFTA protocol on investment is

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<sup>82</sup> Kuhlmann and Agutu 2020: 784-785.

expected to meet high expectations. Some of the dispute prevention and dispute resolution techniques that are anticipated to be included in the Protocol include conciliation, mediation, and exhausting of available domestic remedies, as elaborated by Mafurtu.<sup>83</sup>

### 3.5 AfCFTA and Sustainable Development

Africa is currently facing significant environmental challenges. Despite making the least overall and per-capita contributions to global warming, research indicates that Africa will be the region to bear the brunt of the catastrophic effects of climate change.<sup>84</sup> The Intergovernmental Panel on Climate Change (IPCC) warns that Africa should anticipate negative climatic impacts on port infrastructure, buildings, roads, trains, airports, and bridges as a result of increasing sea levels and a rise in the frequency of extreme weather events. Furthermore, deforestation and land degradation trends are harming delicate ecosystems, leading to irreversible biodiversity loss, water scarcity, floods and mudslides. These environmental disasters are causing crippling effects on the poorest communities, especially those residing in underdeveloped or rural settlements. Air pollution and inefficient waste management are also major issues that are getting worse in urban areas. In fact, the World Bank estimates that sub-Saharan Africa alone generates 62 million tons of waste annually, including plastic waste, and this number is expected to double by 2025.<sup>85</sup> These threats to environmental wellbeing affect not only the populations residing in the region, but also their commercial activities, and in turn, the greater economy of Africa as a whole.

Furthermore, the expected economic gains of the AfCFTA run the major risk of being seriously undermined by climate change and environmental deterioration.<sup>86</sup> According to a research by the International Monetary Fund (IMF), depending on how much the temperature rises, Africa's GDP might decline by 2.25 percent to 12.12 percent.<sup>87</sup> According to a different study, the GDP of the continent is susceptible to harsh weather patterns.<sup>88</sup> Extreme weather conditions may also harm transportation infrastructure, slowing- and raising the cost of intra-African trade. The region's new

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<sup>83</sup> Mafurtu 2021.

<sup>84</sup> <https://www.weforum.org/agenda/2018/12/africa-s-fastest-growing-cities-are-the-most-vulnerable-to-climate-change-globally>. Accessed on 22/06/22.

<sup>85</sup> <https://www.un.org/africarenewal/web-features/africa%E2%80%99s-bumpy-road-sustainable-energy>. Accessed on 22/06/22.

<sup>86</sup> [http://www.xinhuanet.com/english/2020-02/27/c\\_138823514.htm](http://www.xinhuanet.com/english/2020-02/27/c_138823514.htm). Accessed on 22/06/22.

<sup>87</sup> <https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa>. Accessed on 22/06/22.

<sup>88</sup> <https://www.weforum.org/agenda/2018/12/africa-s-fastest-growing-cities-are-the-most-vulnerable-to-climate-change-globally>. Accessed on 22/06/22.

but expanding tourism industry is expected to be negatively impacted by warmer climates and more intense weather patterns that are also expected to diminish agricultural yields and damage biodiversity, with sub-Saharan Africa expected to have the largest declines.<sup>89</sup> These harsh climate changes reveal an urgent need, especially for the AfCFTA as a modern trade agreement, to intentionally regulate trade and commercial activity on the continent so as to ensure the sustainable use of environmental resources.

As discussed by van der Ven and Signe, understanding the relationship between trade agreements and the environment is fundamental in grasping the extent to which trade agreements can influence the discourse driving environmental considerations in the world of trade and climate change. Van der Ven and Signe further explain that trade agreements may affect the environment in a favourable or negative way. Trade agreements aim to boost trade and economic growth, which, among other things, results in emissions connected to transportation and deforestation. This tends to speed up climate change. Additionally, many trade agreements limit a country's capacity to implement particular environmental policies: for instance, trade agreements frequently have restrictions on the kinds of subsidies that nations may offer, which restricts the alternatives for funding renewable energy sources. However, trade agreements are also able to achieve environmental goals, if geared with this objective from the onset. Trade agreements offer a chance to leverage economies of scale and exchange know-how by establishing new markets, fostering economic efficiency and innovation in support of environmental results.<sup>90</sup>

In this regard, Lopes explains that energy remains Africa's most important priority, and that the continent will be affected differently by clean energy transitions, when compared to more industrialised nations like Europe.<sup>91</sup> Despite being an agreement that has great potential to influence the grander continental framework for environmental protection, the AfCFTA fails to establish substantive links between trade and the environment anywhere beyond the introductory preambular language. Establishing a comprehensive approach to sustainable development therefore remains a challenge for the AfCFTA, one that can surely still be overcome as various

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<sup>89</sup> Luke & Sommer 2020.

<sup>90</sup> Colette van der Ven and Landry Signe 2021: 5.

<sup>91</sup> <https://oecd-development-matters.org/2021/01/04/europe-and-africa-need-to-see-eye-to-eye-on-climate-change/>. Accessed on 22/06/22.

protocols, such as that of investment, are still being negotiated, as Kuhlmann and Agutu emphasise.<sup>92</sup>

Kuhlmann and Augutu further put forth that the AfCFTA's new regulations should strike a balance between state parties' regulatory autonomy and the agreement's goals for industrial, economic, and agricultural development. This will allow for flexibility and the development of distinct regulatory approaches while creating a set of regulations that can draw investment to a historically fragmented market of 55 countries.

Drawing from this, it is clear that the AfCFTA currently fails to introduce strong, comprehensive ties between trade and the environment, and particularly, trade and sustainable development. The contributions the AfCFTA is anticipated and/or suggested to make in this regard are expanded upon below.

### 3.6 Investment and Sustainable Development: The AfCFTA Investment Protocol vs Other Trade Agreements

#### 3.6.1 Investment and Sustainable Development

Sustainable foreign direct investment, or sustainable FDI, is an investment that, while remaining commercially viable, makes efforts to directly contribute, in a reasonable manner, to the economic, social, and environmental development of the host country and that does so within the framework of supportive governance mechanisms.<sup>93</sup> Incorporating a focus on sustainable development within investment protocol allows for sustainable investment that speaks to the economic, social and environmental development of a country.

Furthermore, international frameworks for investment facilitation, especially sustainable investment facilitation, can direct and motivate national reforms to support FDI flow. However, Berger et al explain that although the global conversation on investment facilitation is in full swing, it seldom presents a clear focus on the support of increasing investment flows in a way that promotes sustainable development.<sup>94</sup> For developing countries in particular, this omission can be highly detrimental for their environmental and economic protection and progress. The majority of

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<sup>92</sup> Kuhlmann and Augutu 2020: 774.

<sup>93</sup> Berger et al 2021: 888.

<sup>94</sup> Ibid: 889.

developing nations are attempting to position themselves in this new post Covid-19 pandemic climate in order to draw in and hold onto FDI.<sup>95</sup> Doing so with a focus on sustainable investment remains essential for sustainable growth.

As explained above, the AfCFTA, although displaying an ambition to promote sustainable development, currently fails to decisively and directly outline methods for the strategic promotion of sustainable development. As the AfCFTA investment protocol is anticipated to be largely based on the 2016 PAIC, this same failure to comprehensively outline strategies to address climate issues through investment is expected. As a key guiding principle, Berger et al explain that frameworks for foreign investment facilitation should contain provisions that directly support sustainable development. Unfortunately, however, the vast majority of international investment facilitation frameworks still only passively support sustainable development through an emphasis on growing FDI flows, which then, on balance, contribute to development. In this regard, experts have proposed a number of additional investment facilitation clauses that directly boost the contribution of FDI to sustainable development. Examples include supplier development programmes to boost the quantity and capacity of capable local businesses that can enter into agreements with international affiliates, and supplier databases to assist investors in locating prospective business associates and subcontractors. Assessments of the development, environmental, and social impacts as well as behavioural incentives may be useful strategies to increase FDI's commitment to sustainable development.<sup>96</sup>

### 3.6.2 Other International Agreements

#### 3.6.2.1 World Trade Organisation's Trade Facilitation Agreement

With regard to promoting sustainable development through investment, The AfCFTA can obtain a great deal of guidance from drawing from investment regulations from other international treaties and agreements. For one, the AfCFTA can draw much from the World Trade Organisation's Trade Facilitation Agreement (TFA) which contains a clause on "Authorised Economic Operators." This clause mandates that importing and exporting businesses are eligible for certain trade facilitation benefits if they adhere to a set of predetermined conditions and supply chain management criteria.

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

A special category of "Recognised Sustainable Investors" has been developed to encourage investors to make sustainable investments in response to this TFA provision. If such acknowledged investors achieve certain predetermined, nation-specific FDI sustainability characteristics (i.e., sustainable development benefits produced by investment, such as jobs or training) and global Responsible Business Conduct (RBC) requirements, they will be eligible for additional benefits. Responsible business conduct is yet another tool with which the role of investment in promoting sustainable development can be significantly strengthened. Often used in conjunction with responsible business conduct, sustainability impact assessments further support sustainable investment facilitation. Through these assessments, an ongoing process occurs which reviews, monitors and assesses the impact of investments in the territory of a state in order to better adjust and identify the sectors which require more intensified facilitation efforts.<sup>97</sup> Incorporating these measures into the AfCFTA Protocol on Investment, as a comprehensive avenue to prioritise environmental considerations, would therefore enhance sustainable development through investment in the AfCFTA.

### 3.6.2.2 The European Union

Furthermore, the legal foundations, political commitments, and civil society demands of the EU trade relations in general, and its bilateral trade agreements in particular, promote the accomplishment of the Sustainable Development Goals both internally and globally.<sup>98</sup> The 2011 European Union's decision to include within their trade agreements a Trade and Sustainable Development (TSD) chapter provides another example of how trade agreements can be structured to emphasise sustainable development, especially through investment. This unique chapter provides for environmental and labour commitments, and forms part of the EU-Korea Free Trade Agreement (FTA) of 2011, the first FTA concluded between the EU and an Asian country, and also the first EU agreement containing a TSD chapter.<sup>99</sup> Four provisions are included in this chapter. The first outlines that the parties must agree to and adhere to the International Labour Organisation Conventions, as required by the substantive criteria. The second set of procedural commitments requires that the parties "maintain levels of domestic labour protection" and includes

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<sup>97</sup> Ibid: 890.

<sup>98</sup> E. Blot, A. Oger and J. Harrison (2022), Enhancing sustainability in EU Free Trade Agreements: The case for a holistic approach, Policy report, Institute for European Environmental Policy (IEEP)

<sup>99</sup> Demy van 't Wout 2021: 1.

"conversation and cooperation between the parties, transparency in proposing new labour standards measures, monitoring and review of the sustainability consequences of the agreement." Thirdly, the EU-Korea Agreement further requires that institutional controls oversee how the chapter is put into practice. Finally, and as a manner to ensure accountability and continued relevance, the Agreement mandates that a panel of experts reviews complaints and makes recommendations.<sup>100</sup>

The TSD chapter within the EU-Korea Agreement contains specific measures throughout the chapter to ensure that it promotes sustainable development. For one, as an institutional mechanism to facilitate the implementation of this chapter, each Party shall establish an office within its administration that will operate as a contact point between the Parties. Senior administrators from the administrations of the Parties should make up the Committee on Trade and Sustainable Development formed in accordance with Article 15.2.1 (Specialised Committees). Each Party shall form a Domestic Advisory Group (DAG) on sustainable development (environment and labour) with the responsibility of providing recommendations on how this Chapter should be put into practice. The Domestic Advisory Groups are made up of independent civil society organisations that are fair and balanced in their representation of industry, labour, and environmental organizations. Additionally, a Civil Society Forum between the DAGs and civil society organisations will be organised to conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties, as outlined in Article 13.13.1 of the EU-Korea FTA.<sup>101</sup> Although there has been criticism of the ultimate effectiveness of the DAGs, the AfCFTA's Investment Protocol can benefit significantly by the introduction of a similar requirement for a structured body comprised of environmental and legal experts and civil society organisations that are tasked with the regular reviewing, observation, study and recommendations towards a living TSD element within the Trade Agreement.<sup>102</sup>

Moreover, the EU-China Comprehensive Agreement on Investment (CAI) announced by the world's two largest economic giants on 30 December 2021 provides a more extensive guiding light for the methods for promoting sustainable development within the AfCFTA Investment Protocol. Investment lawyers were interested in the CAI because of its unusual design from a legal sense.

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<sup>100</sup> Ibid: 2.

<sup>101</sup> EU-Korea Free Trade Agreement- Trade and Sustainable Development Chapter: 13(13)(1)

<sup>102</sup> Ibid: 10.

Although trade and investment are intertwined since many foreign investments in China are focused on export-oriented production, the CAI specifically addresses investment. In considering the issues that EU businesses in China have reported, the CAI primarily addresses issues like market access conditions, the prohibition of forced technology transfers, non-discrimination by state-owned enterprises and regulatory bodies, and transparency in economic governance, including subsidies. These themes reflect important demands made by the EU in the negotiation discussions that ultimately created the CAI. In contrast, the majority of investment treaties focus on investment protection and investor-state dispute settlement (ISDS).

While the CAI sets new norms for how foreign investment is handled, its part on sustainable development mostly adopts the EU's tried-and-true strategy for negotiating trade agreements. The CAI makes reference to human rights, environmentally sound development, climate change, ethical business practices, and "high standards of environmental protection" in its preamble. These aspirational, introductory clauses offer a broad framework for connecting investment to the "goal" of sustainable development and for urging parties to support enterprises' "voluntary uptake" of ethical standards. However, the CAI, like other recent EU trade agreements, focuses particularly on two more specific issues: the environment and labour. In terms of the environment, the treaty specifically addresses environmental protection, reaffirming the parties' "power to regulate", requiring them to "strive" to ensure that laws provide for "high levels" of environmental protection, and acknowledges that it is inappropriate to promote investment by reducing environmental protection. Other CAI clauses prohibit the parties from ignoring their own environmental or labour regulations or failing to properly enforce them in order to promote investment. The CAI also mandates parties to comply with environmental treaties they have ratified, including climate agreements. Furthermore, the CAI establishes the Sustainable Development Working Group, that facilitates and monitors the implementation, and provides for dispute settlement agreements that enable parties to present issues of compliance with independent bodies. However, as per EU treaty practice, sustainable development issues include coordinated dispute resolution processes that involve consultation between the parties, with referral to an expert panel if no amicable agreement is reached, unlike other disputes that are resolved through state-to-state arbitration. Under the CAI, independent third parties (*amicus curiae*) may also submit written submissions to the panel.

As displayed by both the EU-Korea FTA and the EU-China CAI, the AfCFTA is able to prioritise sustainable development through investment by introducing and following specific measures. These include establishing a Domestic Advisory Group on sustainable development tasked with the responsibility of providing recommendations on how an Investment Protocol geared towards the promotion of sustainable development should be put into practice and with the monitoring and review of the sustainability consequences of the AfCFTA Investment ambitions as a whole. Fortunately, the AfCFTA Draft Zero Protocol on Investment steers in this direction in Article 30(1)(c-d) by suggesting an obligation upon Investors to conduct environmental impact assessments and introduce mitigating measures where necessary to avoid environmental harm.<sup>103</sup> In addition, the AfCFTA Investment Protocol can include comprehensive clauses that specifically address environmental protection, that create an obligation for parties to actively work towards high level environmental protection laws, that reaffirm the parties' regulatory powers and that directly condemn investment strategies that undermine environmental protection. The AfCFTA Draft Zero Protocol on Investment thankfully makes brief mention of these in Article 7 (Investment Promotion and Facilitation, Article 21 (Right to Regulate), Article 22 (Minimum Standards on the Environment, Labour and Consumer Protection), and Article 30 (Environmental Protection)).<sup>104</sup> However, the AfCFTA Protocol on Investment would more adequately promote sustainable development through investment if these provisions contained detailed, practical measures to this end, as seen in the abovementioned EU Agreements. Furthermore, sustainable development can be promoted in the AfCFTA investment protocol through the inclusion of prohibition clauses that will deter and prohibit the parties from ignoring their own environmental regulations or failing to properly enforce them in order to promote investment. Learning from the CAI, the AfCFTA can also mandate parties to comply with environmental treaties they have already ratified, including those specifically relating to climate and general environmental matters.

### 3.6.3 The United States Mexico Canada Agreement

As the new instrument replacing the 1992 North American Free Trade Agreement (NAFTA), the United States-Mexico-Canada Agreement (USMCA) was concluded in 2018 and came into force

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<sup>103</sup> Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area – Zero Draft (Nov 2021): Art. 30(1)(c)-(d).

<sup>104</sup> Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area – Zero Draft (Nov 2021).

during July 2020.<sup>105</sup> In order to fully expand upon the USMCA's favourable contributions vis-à-vis the nexus between investment provisions and sustainable development, wider context of its predecessor, as well as the circumstances that necessitated the new USMCA, is required.

The NAFTA was regarded as a landmark agreement not only because it was the largest free trade agreement when it was established and the first time two developed countries signed a trade agreement with an emerging economy country, but also because it was one of the first to include environmental clauses in trade and investment agreements. This agreement was the first time that politicians consciously attempted to address the intricate connections between environmental protection and trade liberalisation. Through the elimination of tariffs, the NAFTA increased investment opportunities and brought about growth and development for the co-signers.<sup>106</sup>

Despite being a significant step in trade discussions, and especially in investment and sustainable development negotiations, the NAFTA was not without imperfection, and this attracted significant criticism from critics of International Investment Law (IIL). These critics identified several gaps, particularly as it relates to the environmental consequences of its investment strategies, and this prompted the re-negotiating of the NAFTA and the development what is now the USMCA. These gaps, their adaptation in the USMCA, as well as the lessons that can be learned for the AfCFTA discussion for investment and sustainable development, are identified below. The reader must note that although the criticism against the NAFTA and general IIL have been wide and covering a plethora of key trade and investment areas, for the purposes of this research, focus is placed specifically on the criticism relevant to investment and sustainable development. Chapter 14 of the USMCA, the Agreement's Investment Chapter which only applies to the U.S and Mexico, shall hence be most frequently referenced in this analysis.

Several IIL critics such as the Sierra Club, which is an American environmental NGO founded in 1892, have outlined that investment treaties' protection of foreign investors does not promote sustainable development, and that it instead only serves to safeguard the interests of wealthy, foreign (typically Western) multinational corporations by giving them access to rights that local communities are not granted.<sup>107</sup> Chapter 14 of the USMCA has addressed this by introducing

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<sup>105</sup> Yong, Liang, and Hou Chu-chen 2020: 1-20.

<sup>106</sup> Ibid.

<sup>107</sup> Avidan Kent and Valentine Kunuji 2021: 293.

changes to investment protection rules in such a way that protects sustainable development. These are elaborated below.

Firstly, the host state's right to regulate has been reviewed in the adaptation of the USMCA. The preamble of the agreement outlines the member states' inherent right to regulate and resolve to protect legitimate public welfare goals such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, aligned with the rights and obligations provided in the USMCA. Relating to investment in particular, Article 14.6 of the agreement provides an important clarification for investment for sustainable development. It outlines that nothing in the Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.<sup>108</sup> This clarification allows for a wider interpretation for investment rules, and can therefore be extended to ensure an emphasis on ultimate environmental protection. The right to regulate, with the possibility of this extending to ensure consistency with sustainable development goals and principles, is also outlined in the AfCFTA Draft Zero Protocol on Investment in Article 21.

Secondly, Article 14.10 of the USMCA concerns the prohibition of performance requirements. The commitment embodied in this Article exists to refrain from placing restrictions on investment, such as obligations to transfer technology, include domestic content criteria, export a specific amount of goods, and more. Since performance standards can be utilised to accomplish social and environmental advantages (such as the employment of particular green technology or the achievement of a specific environmental outcome), they are directly relevant to the discussion of promoting sustainable development through investment strategies. The Member States maintained the previous NAFTA Article 1106(6) (now USMCA Article 14.10(3)(c)) in order to carve out adequate policy space and permit the application of performance requirements in environmental regulation. The host state's right to safeguard, among other things, human, animal, or plant life and health, as well as living or non-living exhaustible natural resources, is safeguarded by this Article,

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<sup>108</sup> Ibid: 298.

which provides an exception akin to Article XX of the GATT.<sup>109</sup> This emphasis placed on performance requirements presents another strategic way of ultimately ensuring that sustainable development is prioritised through investment. Articles 22 and 29 of the AfCFTA Draft Zero Investment Protocol, being Minimum Standards on the Environment, Labour and Consumer Protection, as well as Environmental Protection, respectively, shed some light on this matter.<sup>110</sup> These two provisions do not expand upon performance requirements,

Third, the Minimum Standard of Treatment of foreign investors, including the Provision of Fair and Equitable Treatment, has also been reviewed in the USMCA. A consequence of this minimum standard is that there has been a widely held presumption that investors could genuinely expect the regulatory environment at the date of the conclusion of an investment agreement to be set in stone for the duration of their investment. This belief holds that any new regulation could increase costs for investors, lowering the value of the investment, and so be viewed as going against what investors would have "legitimately" expected. The protection that was previously offered has been severely reduced by the recently inserted USMCA Article 14.6, which significantly narrows the definition of fair and equitable treatment. Fair and equitable treatment (FET) is defined in this Article to include "the need not to deny justice in criminal, civil, or administrative adjudicatory processes in line with the principle of due process as contained in the major legal systems of the world." To put it another way, the previously "all-inclusive" FET criterion now guarantees that investors are entitled to very basic due-process rights. This allows for host nations to, as far as the Article allows, continuously ensure environmental protection in investment strategies and protocols. In comparison, Article 13 of the AfCFTA Draft Zero Protocol on Investment presents its stance on the Most-Favoured Nation Treatment. Although not as directly correlated to the USMCA Article 14.6 as preferred, Article 13 and its supporting Article 14 of the AfCFTA Draft Zero Protocol ultimately support environmental protection by guarding against treatment of parties in a way that allows for the harm of the environment.<sup>111</sup>

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<sup>109</sup> Ibid: 300.

<sup>110</sup> Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area – Zero Draft (Nov 2021): Article 22 and 29.

<sup>111</sup> Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area – Zero Draft (Nov 2021): Article 13-14.

Fourth, the non-discrimination rule prohibiting nationality-based discrimination held in Article 1102 and Article 1103 of NAFTA has also been reviewed in the USMCA via Article 14.4 and Article 14.5. In essence, reservations were held that certain investors would argue that the act of using strictly environmental considerations to differentiate between investors would be regarded as discriminatory. This is because foreign investors that follow lower environmental standards may argue that the better treatment provided to “greener” local investors is discriminatory against them. The review in the USMCA, both in the abovementioned provisions under Article 14, as well as in Article 9 allows for including relevant treatment that distinguishes between investors or investments on the basis of legitimate public welfare objectives. As explained, these public welfare objectives extend to environmental protections. Article 13 and 14 of the AfCFTA Draft Zero Protocol on Investment also reflects the same sentiments as above by ensuring the consistent and unwavering protection of the environment.<sup>112</sup>

In addition, the fifth NAFTA review done by the USMCA in regard to investor protection rules places focus on the prohibition on expropriatory (or nationalising) measures. Although a clear legal understanding of direct expropriation has been established, indirect expropriation or nationalisation remained an ambiguous area, resulting in opportunity for exploitation by investors, and rising concerns for critics of IIL. In an attempt to expand upon the meaning of indirect expropriation, the Tribunal in *Tippets v. Iran* expressed; “deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.” This vague expression attracted the attention of IIL critics mainly because they feared that measures taken for a public purpose, such as health or environmental protection, could be considered an indirect expropriation, since they may affect the value of an investment. Chapter 14 added a new clarification to eliminate this kind of argument. According to Annexure 14-B, unless there are exceptional circumstances, non-discriminatory regulatory actions by a Party that are intended and implemented to safeguard legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.<sup>113</sup> This small clarification provides an avenue for environmental protection, regardless of the status of the party holding rights to the use and enjoyment of certain property. Article 16(2) of the AfCFTA Draft Zero Investment Protocol

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<sup>112</sup> Ibid.

<sup>113</sup> Avidan Kent and Valentine Kunuji 2021: 305.

mirrors this USMCA principle on expropriation measures. In terms of this provision in the Draft Zero Protocol, the protection of the environment shall not constitute indirect expropriation. In this way, the AfCFTA Investment Protocol may be well positioned to ensure environmental protection, and ultimately sustainable development through investment.

Lastly, the USMCA took a more deliberate stance than its predecessor, the NAFTA, by expounding upon the language on Corporate Social Responsibility. In Article 14.17 of the USMCA, The Parties reiterate the significance of each Party encouraging businesses operating on its territory or under its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines, and principles of corporate social responsibility that have been endorsed or supported by that Party. These may include the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. These norms, rules, and principles may cover topics like corruption, gender equality, indigenous and aboriginal rights, the environment, and labour.<sup>114</sup> These sentiments are mirrored nearly identically in Article 34 of the Draft Zero AfCFTA Investment Protocol that explains Corporate Social Responsibility under the Protocol. This provision provides outlines that investors and their investments shall, inter alia, “stimulate economic, social and environmental progress, aiming at achieving sustainable development”.<sup>115</sup>

### 3.7 Conclusion

From this chapter, the diligent reader will observe that Free Trade Agreements, or at least the earliest versions of these economic tools, have always had the power to influence the progress, peace, stability and growth of a society. From allowing for the protection of investors in foreign countries to catalysing economic catastrophe during the political wave of free trade imperialism, the agreements that underlined free trade have constantly been shaping economic dynamics across the world for decades.

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<sup>114</sup> Ibid: 305-306.

<sup>115</sup> Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area – Zero Draft (Nov 2021): Art. 34(2)(a).

As an item gradually developed as a culmination of regional integration efforts over decades throughout the African continent, the AfCFTA brings a great hope for more integrated, seamless trade and economic activity between African states. The Agreement's Protocol on Investment, currently still in its Draft Zero negotiation phase, supports the Agreement's auspicious developments, especially where sustainable development is concerned.

As can be observed in this comparative chapter, the AfCFTA promises great opportunity for the promotion of sustainable development through investment in its Investment Protocol. However, as the final outcome of the negotiations finalising the Protocol are yet to be published at the date of this paper, these opportunities, as can be gleaned from the Draft Zero Protocol as well as from the projections by trade experts, legal practitioners, International Investment Law critics, scholars and others, are either still underdeveloped, vague and/or lacking in substance.

In this chapter, comparisons are drawn between the AfCFTA's Protocol on Investment (although still in its draft phase) and other, standing international investment agreements in the light of sustainable development through investment strategies and protocol. Although it can be seen that the AfCFTA has adopted fairly modern approaches to the matters that most directly impact the nexus between sustainable development and investment, such as the member's right to regulate, the issue of performance requirements, Fair and Equitable Treatment, accountability issues and general dispute resolution matters, to name a few, this chapter reveals that the AfCFTA's Investment Protocol will have to be more intentional, practical, precise and binding across these named areas and others in order to be as effective as some of its international investment counterparts. On the other hand, the modern approaches, as can be seen in the AfCFTA Draft Zero Investment Protocol's stance on Corporate Social Responsibility and matters of Expropriation, for instance, indicate that negotiations for the AfCFTA Investment Protocol, particularly around the issues that affect sustainable development, are well on track to not only keeping up with international standards, but also providing bespoke African solutions to African sustainable development issues.

Chapter 4: The SADC and Investment for Sustainable Development: Strengths, Weaknesses and how the AfCFTA can bolster SADC Sustainable Development.

#### 4.1 Introduction

Consisting of 16 member states and a population of over 363 million,<sup>116</sup> the Regional Economic Community (REC) known as the Southern African Development Community (SADC) was officially established by Treaty in 1992, in response to the unique socio-political and economic realities of the time. Preceded by two Southern African regional integration initiatives, the SADC only came about after the Frontline States alliance of 1975 and the Southern African Development Coordination Conference (SADCC) of 1980 evolved and noted a need for enhanced economic focus, for the ultimate development of the region.<sup>117</sup> The Frontline States alliance was birthed as a concept out of the Organisation of African Union (OAU) and its Liberation Committee, and maintained its primary focus on providing political and military support in the anti-colonial struggles of several Southern African countries.<sup>118</sup> The SADCC was later launched to complement the political independence that characterised development in Southern Africa at the time, with economic emancipation.

As is evident from the earliest stages of the SADC, the political independence enjoyed by several Southern African states required additional support in the form of economic transformation, and more specifically, economic and legal framework that would adequately structure the path ahead and establish the foundation upon which such political independence would thrive and be sustainable. Membership in the REC would further allow for effective coordination towards shared goals, through an emphasis on important sectors and the development of common initiatives.<sup>119</sup> Amongst these shared goals was the concept of sustainable development, which, as will be outlined below, is a key element in the development of any African REC. The SADC, through its economic and legal framework, has displayed a commitment to sustainable development, particularly through investment. However, this focus on investment historically occurred by way of older-style

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<sup>116</sup> <https://hsf.org.za/publications/hsf-briefs/the-southern-african-development-community-i-population#:~:text=Population%20growth%20in%20SADC%20is,of%202.6%25%5B1%5D>. Accessed on 17/05/2021.

<sup>117</sup> Meira 2021: 191.

<sup>118</sup> Arya et al 2005: 8.

investment treaty models, designed in an early post-colonial era and aiming mainly at protecting assets in Africa of former colonial powers.<sup>120</sup> These treaty models failed to prioritise the environmental realities, structural shortcomings and economic needs of newly independent African States. This gap later prompted the inclusion of relevant and responsive investment facilitation processes as a new mechanism in International Investment Agreements (IIA) involving developing African States, as is becoming popular in the investment negotiations for the AfCFTA. With all SADC countries having signed the Agreement and majority having officially commenced the ratification process,<sup>121</sup> the investment protocols produced from the negotiations would be particularly relevant for developing countries in the REC. The role of these investment protocols in promoting sustainable development in the SADC forms the purpose of this research, and in investigating this role, the research further probes into whether investment facilitated through these protocols could also bridge the gaps in the existing investment facilitation legal framework for the promotion of sustainable development.

## 4.2 The SADC position on Sustainable development

### 4.2.1 The influence of development levels on the approach to sustainable development

As an REC consisting of developing countries, the SADC approach to sustainable development differs significantly from that exercised by developed countries. The purpose and scope of sustainable development depends largely on the level of economic development attained by the country, or REC, in question. As Khumalo explains, the primary concerns of developing countries are economic growth and poverty reduction, while on the other hand, environmental protection and intergenerational equity are the primary concerns of developed countries. While both developing and developed countries advocate for the intergenerational equity that adequate sustainable development presents, they are concerned about different aspects of it. Khumalo argues that developing countries place greater focus on their current development and allege that developed countries have historically exploited the environment. Khumalo further explains that developed countries, by comparison, often argue that governments should not be only concerned

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<sup>120</sup> Nikiema et al 2021: 1.

<sup>121</sup> <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>. Accessed on 29/12/2021.

with improving the lives of its inhabitants in the short term, but adopt a focus on the future as well. The method taken by developing countries unfortunately limits the possibilities available for achieving immediate poverty relief, and may even prolong it.<sup>122</sup>

Another important difference between the approach taken by developing and developed countries in the context of sustainable development are the kinds of legal provisions adopted for this purpose. Developed countries argue for a broad-based universal approach by establishing defined minimum compulsory standards that require all countries to adopt positive steps or refrain from conduct, in order to achieve sustainable development. This was made evident in the now supplemented European Union Regulation 2019/2088, which directed certain sustainability-related disclosure obligations upon Member States and further outlined definitions on key terms such as “sustainable investment”, “sustainability risk” and “sustainability factors” that dictated how sustainable development would be interpreted for the greater goal of “greening” development activity in the European Union.<sup>123</sup> In contrast, developing countries feel that mandatory minimum standards should be narrow and focused on specific issues. The establishment of universal obligatory standards is viewed by developing countries as prescriptive and overbearing, and these countries therefore approach such standards with caution. Declaratory provisions that are not obligatory on developing countries are therefore preferred. Developing countries prefer these because they allow for nuance, flexibility, and unique State reaction. Developing countries have consistently resisted granting too much legal weight to sustainable development.<sup>124</sup> Their laws on sustainable development are broad in scope and rarely allude to specific pillars of sustainable development. Whether this less demanding approach by developing countries is best in the specific context of investment that concerns and promotes sustainable development is a question this chapter will shed more light on.

#### 4.2.2 The SADC and sustainable development

The SADC has the following items tabled as its objectives;

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<sup>122</sup> Khumalo 2020: 142.

<sup>123</sup> Jendroska et al 2021:

<sup>124</sup> Khumalo 2020: 142.

- the achievement of; development, economic growth, complementarity between national and regional strategies and programmes, and sustainable utilisation of natural resources and effective protection of the environment
- the promotion of; peace and security, and self-sustaining development on the basis of collective self-reliance and interdependence among Member States,
- poverty alleviation,
- enhancement of standard and quality of life through regional integration,
- evolution of common political values, systems and institutions,
- maximisation of productive employment and utilisation of resources of the Region, and
- consolidation of the long standing historical, social and cultural affinities and links among the people of the Region.<sup>125</sup>

From these objectives, it is clear that the SADC recognises the important interrelatedness present between sustainable development and economic development.

Moreover, in order to better ascertain, reinforce and keep record of the sustainable development efforts across the REC, the SADC has several assessments, legislation, policies and standards in place structured to this end. The most relevant of these are highlighted below.

Firstly, the Environmental Impact Assessment (EIA) plays an important role in ensuring sustainable development is prioritised in projects or, in relation to this sub-chapter, the various investments brought to the REC. As Barret explains, the EIA is a methodical procedure for determining, anticipating, and assessing probable environmental effects of a proposed project or activity. It is carried out prior to project implementation to inform decision-makers of the effects of the proposed action so that ecologically sound and sustainable development can be encouraged by identifying relevant enhancement and mitigation measures.<sup>126</sup> Although the specific phases in the EIA process differ from one country to the next, there are some generic steps that are followed globally.<sup>127</sup> These are screening, scoping, assessment, decision-making and implementation, and they are followed by most SADC countries. To elaborate briefly, the process of screening establishes whether or not a certain project proposal needs a comprehensive EIA and what level

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<sup>125</sup> Olowu et al 2018: 7175.

<sup>126</sup> Mubanga et al 2020: 1.

<sup>127</sup> Weaver 2003: 3.

of evaluation is appropriate, scoping establishes the type and scope of the necessary impact assessment, and assessment aims to determine how the proposed development's activities would affect the various environmental factors. In addition, the decision-making process involves the final authorization or approval of the proposal, and finally, the developer may be obliged to adopt an environmental management plan (EMP) for the project's construction, operation, and, in some cases, decommissioning if the development is allowed. The EMP is a technique used to make sure that all project phases consistently employ the mitigation measures and monitoring requirements indicated in the EIA. This frequently overlooked EIA component guarantees that commitments are kept.<sup>128</sup> As an institution established to oversee EIA in the region, the Southern African Institute for Environmental Assessment operates as a non-profit environmental trust with the aim of encouraging the effective and efficient use of environmental assessment as a planning tool to support sustainable development in Southern Africa. Governments, development organisations, NGOs, and clients in the commercial sector who are becoming more and more aware of the need to incorporate Environmental Assessment as an integral component of their planning receive strategic help from SAIEA. Amongst the bodies receiving strategic assistance is the SADC.

In addition, the SADC as an African REC also subscribes to the Africa Agenda2063, which operates as, inter alia, a blueprint for achieving the “Pan African vision of an integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena.”<sup>129</sup> Agenda2063 is an endogenous transformation plan that aims to strategically and competitively reposition the African continent to enable poverty eradication and equitable people-centric socio-economic and technical development.<sup>130</sup> Outlined as part of its first aspiration, the Agenda2063 strives to introduce and establish measures to manage the continent's abundant biodiversity, forests, lands, and rivers sustainably, primarily through utilizing adaptable strategies to mitigate the threats posed by climate change.<sup>131</sup>

Furthermore, the United Nations Framework Convention on Climate Change (UNFCCC) is another influential tool for the promotion of environmental protection in general, especially through the structuring towards sustainable development. Per Article 2 of the Convention, the Convention's

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<sup>128</sup> Ibid.

<sup>129</sup> Africa Agenda2063: 1.

<sup>130</sup> Mhangara et al 2019: 1.

<sup>131</sup> Muigua 2019: 2.

ultimate goal is to stabilise greenhouse gas concentrations in the atmosphere at a level that would stop potentially disastrous anthropogenic climate change.<sup>132</sup> Although the majority of these principles are not legally obligatory, they are universally acknowledged and lay a moral duty on nations to establish laws that allow for the development of climate change responses, including adaptation and mitigation. It is required of all Convention signatories to develop and put into action adaptation measures. The Convention also includes a number of support mechanisms, such as funding, insurance, technology transfers, and scientific and technical assistance, for adaptation in developing nations.<sup>133</sup> The SADC member states, as signatories to the UNFCCC are further empowered, encourages and equipped to promote sustainable development through the Convention.

Additionally, the SADC Protocol on Environmental Management for Sustainable Development of 2014 further promotes sustainable development through its objectives. The Protocol addresses cross-cutting issues on gender, science, technology, trade, and investment as well as environmental issues like climate change, waste and pollution, management of chemicals, biodiversity and natural heritage, sustainable land management, marine and inland resources, and sustainable land management. The Protocol's specific goals include promoting fair and sustainable use of natural resources and the environment, shared management of transboundary environments and natural resources, and effective management and response to the effects of climatic variability and change. In order to improve regional coordination of environmental management and regional integration, the protocol makes it easier to harmonize policies, plans, and legal frameworks. It also offers a legal framework for trans-boundary environments and natural resources.<sup>134</sup>

#### 4.3 The SADC and Investment facilitation

As stated by the United Nations Conference for Trade and Development (UNCTAD) Global Action Menu for Investment Facilitation, effective investment facilitation efforts should support the mobilisation and channelling of investment towards sustainable development. Furthermore, such investment facilitation efforts should remain an integral part of the overall investment policy framework, aimed at maximising the benefits of investment and minimising negative side

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<sup>132</sup> Kimaro et al 2015: 3.

<sup>133</sup> Ibid.

<sup>134</sup> Mapulane 2017.

effects.<sup>135</sup> The economy is one of the four dimensions of sustainable development,<sup>136</sup> and even the slightest changes in the economy can drastically influence sustainable development. Guven explains that investment facilitation for sustainable development, in particular, can hence be understood as a mixture of tools, policies and processes that foster a regulatory and administrative framework to facilitate investment that maximises, and does not undermine, sustainable development objectives. However, the insufficient empirical evidence as to precisely what tools, policies and processes are necessary or desirable for countries to facilitate investment for sustainable development, and at which levels these should be implemented, often frustrates these objectives.<sup>137</sup>

SADC Member States have adopted different framework for the introduction and/or support of investment facilitation. In attempts to efficiently drive development in the region, the framework presents a gradual shift from the sole prioritisation of investors, and a shift towards clarifying and prioritising the interests and issues of the host country, and then making it easier for the right investments to reach the host country. The framework includes items such as the SADC Finance and Investment Protocol, the SADC Model Bilateral Investment Treaty and various others. The frameworks most relevant to this research, as well as how they are geared towards investment facilitation and sustainable development, are outlined below.

The SADC Finance and Investment Protocol regulates foreign investment in the SADC region. Recognised at an international level, the Protocol is a legally binding document that creates rights and obligations for all parties. The investor rights created by the Protocol cannot be unilaterally amended as they are of an international nature. As Codeco et al opine, the SADC Finance and Investment Protocol constitutes a milestone of codification of Investment Facilitation measures on the continent, as it introduced new Investment Facilitation elements such as transparency, simplification, cross-border cooperation on investment facilitation, co-ordination between stakeholders and compulsory responsible business conduct for investors.<sup>138</sup> A shift towards investment facilitation, and a consequent gradual shift away from investment protection can thus

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<sup>135</sup> [https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017\\_7pm\\_web.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017_7pm_web.pdf). Accessed on 30/12/2021.

<sup>136</sup> <https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd>. Accessed on 28/12/2021.

<sup>137</sup> Guven 2020: 2.

<sup>138</sup> Codeco and Freitas 2021: 311.

be observed in earlier Protocols such as the SADC Finance and Investment Protocol. This indicates the enhanced understanding of both the influence and benefits that the SADC is able to exploit for development in the region. Moreover, sustainable development becomes more accessible where the host state is able to regulate and negotiate the manner in which investment is implemented and maintained in the country. This practice of investment facilitation, if equally or more prioritised within the AfCFTA Investment Protocol could bring forth remarkable drive towards sustainable development.

In addition, the SADC Model Bilateral Investment Treaty of 2012 seeks to encourage sustainable development-supporting investment, as Laryea et al explain. Traditional requirements such as National Treatment and Fair and Equitable Treatment are included, along with a guarantee against expropriation and provisions for financial transfers. It purposefully omits Most Favoured Nation. The accompanying commentary claims that the goal is to stop "an unintentional multi-lateralisation." The Most Favoured Nation clause has the effect of allowing the importation of more advantageous provisions of a different treaty in place of the fundamental treaty. As a result, its inclusion in international investment agreements may conflict with the precise terms that the treaty parties have agreed upon. Additionally, the SADC Model BIT explicitly acknowledges the host states' right to legislate for sustainable development. With the help of this clause, sustainable development is changed from an implicit right resulting from general exception provisions to a legitimate affirmative right. The SADC Model BIT also includes a provision for the use of experts in arbitration. The already high cost of investment arbitration hearings is anticipated to increase as a result of this clause. The minimum cost of the proceedings is US\$1.3 million, which excludes ancillary expenses like travel and lodging for witnesses or government representatives. The SADC Model BIT holds the investor accountable for the costs and legal fees incurred by the host state when the tribunal denies jurisdiction in order to discourage false claims.<sup>139</sup>

#### 4.4 Bridging the gap: AfCFTA Investment Protocol and Investment Facilitation towards the promotion of Sustainable Development in the SADC

As detailed in earlier chapters, the goal of investment facilitation is to provide new and existing investors with a transparent, predictable, and effective regulatory and administrative environment

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<sup>139</sup> Laryea et al 2021: 48.

for investment in order to promote ethical and sustainable investment. In order to minimise or remove potential and actual hurdles faced by investors once they have made the decision to invest and to maximize the beneficial effects of investment on the economy, host governments should implement a combination of instruments, regulations, and procedures.<sup>140</sup> Novik et al explains that the precise instruments, methods, and services that host governments can offer to investors to assist them in navigating the law and administrative red tape are an essential part of investment facilitation. Online registration systems, e-portals to disseminate regulatory material and procedures, and client service charters outlining all fees and deadlines to be granted a licence are just a few examples of how they can be implemented within the IPA to centralise all administrative procedures under one roof. In light of the incoming AfCFTA Investment Protocol, Chidede supports this view in explaining that through the introduction of investment facilitation rules, the AfCFTA Investment Protocol could address common hurdles to FDI entrance, such as excessive or unnecessary bureaucracy, a lack of openness and disclosure of information relating to investments, inefficiency, and corruption; a lack of harmonisation between national and regional investment laws, regulations, or policies; and a lack of coordination and cooperation between pertinent institutions and authorities.. These clauses ought to emphasise, among other things, reducing bureaucracy, streamlining staff entry, making investment permits easier, and improving institutional collaboration and coordination.<sup>141</sup>

Furthermore, Novik outlines that existing investors should also be eligible for facilitation services. Investor aftercare services are essential, especially for keeping investors. A government ombudsman or mediator may be established as one of these methods. Chidede explains that investors would find ISDS appealing because they would independently pursue treaty violations before tribunals. African States, however, are worried about ISDS, criticizing, among other things, the arbitral courts' bias against investors as well as the verdicts' inconsistency, accuracy, and expense. Some African nations have canceled BITs as a result of this ISDS backlash. Governments seem to be in favor of inter-State dispute settlement based on the experience of the AfCFTA Dispute Settlement Protocol. Since the regional bloc amended the SADC FIP to include inter-State investment dispute resolution, SADC countries may support this. Additionally, the SADC has

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<sup>140</sup> Novik et al 2018: 5.

<sup>141</sup> Chidede 2019: 1.

ratified the new SADC Tribunal Protocol, which will reinstate the SADC Tribunal and limit its purview to interstate conflicts.

In addition, the right to regulate, alternatively known as policy freedom, remains an essential item in investment facilitation protocols. As was previously explained in Chapter 3.6.3, the USMCA reviewed the host state's right to regulate in its predecessor- the NAFTA. Chidede explains that where a host state has regulatory freedom, they are able to promote state or region specific goals. The AfCFTA should therefore prioritise regulatory freedom as a means to ensure the host state's ability to promote sustainable development through investment facilitation.

#### 4.5 Conclusion

As highlighted throughout this chapter, the evolution of Protocols reflecting the nexus between sustainable development and investment requires an overview of various framework in order to reconcile the legal, economic and environmental status quo, expectations and implications into a single, consolidated approach to investment facilitation for sustainable development.

This chapter explained, firstly, the African, and more specifically- SADC, environmental position on sustainable development. As an REC in Southern Africa, considerations of the developmental levels and their undeniable influence on the approach towards sustainable development was explored. As an REC characterised mostly by its developing countries, the SADC approach to sustainable development is more conservative than those found in REC's with more developed countries. At an environmental level, this is reflected in the various framework such as the Environmental Impact Assessment, the African Agenda2063, the SADC Protocol on Environmental Management for Sustainable Development and others.

Additionally, the chapter reflected on the SADC Investment framework as well as the ways in which the AfCFTA Investment Protocol can incorporate investment facilitation and the promotion of sustainable development. This entailed an overview of existing SADC Investment framework such as the SADC Finance and Investment Protocol, the SADC Model Bilateral Investment Treaty, etc.

In summary, Chapter 4 revealed that in order to ensure quality investment facilitation, while prioritising sustainable development in the AfCFTA Investment Protocol, the Protocol should bear certain elements. To mention a few, the promotion of regulatory freedom enables the host state to

prioritise and ensure certain state- or region specific goals, such as an emphasis on sustainable development in the investment dealings. In addition, legal obligations requiring responsible business conduct can also further the sustainable development agenda within investment facilitation. Moreover, the promotion of transparency within the AfCFTA Investment Protocol will further ensure not only a curbing in corruption, but greater predictability and certainty in investment. This can significantly support the agenda of sustainable development in investment. Furthermore, by building upon a reliance on existing SADC framework, instead of entirely replacing them, the AFCFTA Protocol on Investment can ensure that sustainable development will still be prioritised where inconsistencies occur between existing Trade, Investment or Environmental framework.

## Chapter 5: Conclusion

This dissertation analysed the role of the new African Continental Free Trade Agreement's Investment Protocol & strategies in the promotion of sustainable development in SADC developing countries. In executing this analysis, the research has been divided into different chapters, each adding a layer of understanding towards the greater question of the ways in which the Protocol and strategies can promote sustainable development. Firstly, this chapter will refresh the reader's memory by reiterating the primary research question and initial arguments. Secondly, through a review of the research objectives and gathered theoretical findings, the research question will then be answered. Lastly, the general findings and certain recommendations relating to the promotion of sustainable development through the AfCFTA Investment Protocol and strategies will be made to finally conclude the chapter and dissertation.

### 5.1 Contextual background and motivation

The new African Continental Free Trade Agreement (AfCFTA), which creates the African Continental Free Trade Area, is a trending topic in contemporary international trade law, particularly in the dialogue of advancing African development. It offers the opportunities to shift the paradigm and rethink African development in a way that prioritises the continent's overall good and benefit. In achieving this overall "good and benefit" for the continent, the discussions surrounding African development have, in recent times, gradually become more focused on the concept of sustainable development. Although sustainable development has no strict definition in the context of investment and development at large, the concept is understood to be a development strategy that enhances living standards and satisfies the requirements of the existing human population without lowering environmental standards and harming future generations. Dating back to the late 1980s when the interplay between environmental wellbeing and economic development was first observed and displayed in the Brundtland report, sustainable development gained traction across the world in various Trade Agreements, especially where investment was concerned. Sustainable development hence forms one of the two legs of this research and is an underlying theme throughout the paper.

Forming the other leg of this research is investment. The deployment of funds into financial plans, programs, or projects with the aim of making money, earning interest, or gaining an advantage is the essence of investment, however this term assumes greater meaning and responsibility in the

realm of international trade. One of the earliest decisions rendered by an arbitral tribunal established within the framework of the International Centre for Settlement of Investment Disputes, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Kingdom of Morocco*, is frequently cited in further research into the definition of investment (ICSID). The Award given in Salini crystallised distinct standards for a better, more consistent definition of the term, and these standards eventually became widely recognized as the "Salini Test." The Salini Test replaced the criteria that had been established in the case of *Fedax N.V. v. The Republic of Venezuela*, which was where the first legal standards for defining an investment were discussed. In the Fedax case, the tribunal declared investments to be those that had a set term, had consistency in profit and return, required the assumption of risk, showed a sizable commitment, and demonstrated importance for the advancement of the host State. The Salini Test reduced these five Fedax criteria to four, leaving out the regularity of profit and return. The four requirements outlined by the Salini Test, which was developed by ICSID, provided a defining framework for many subsequent international investment conflicts.

It is the symbiotic relationship between these two concepts, investment and sustainable development, that forms the foundation of this research. However, the greater discussion concerns the African Continental Free Trade Agreement of 2018 that has since been rapidly ratified across the continent. The AfCFTA's Investment Protocol, as an item currently still being finally negotiated at the time of this research, promises to deliver not only a modern perspective of the continent's economic realities and expectations, but also direct and relevant measures to improve, better harmonise, promote and facilitate investment for the greater development of the continent. Taking into account the state of the past and current African investment climate, the former being plagued by the remnants of colonial rule and its consequent prioritisation of the interests and assets of colonial states, the latter reflects a drastic shift towards the prioritisation of the environmental and economic struggles of African states. This shift is therefore naturally characterised by the subsequent transformation of African states into rule-makers as they abandon the position of rule-taker in International Investment Agreements.

As the African continent now begins to rebuild economically after the devastating effects of the Covid-19 pandemic, there is a significant incentive to prioritise development in such a way as to remain conscience of its potential environmental impact. Undue and unregulated continuous strain

on the environment and its natural resources has proven to cause often-irreversible harm to human, environmental and economic wellbeing. This understanding underscores the nexus between investment and sustainable development and forms the basis and motivation of this research. With an appreciation for the potential avenues the AfCFTA's Investment Protocol will provide for this dialogue, the research aims, ultimately, to contribute to the important literature advancing sustainable development in the Southern African Development Community (SADC) through intentional investment.

## 5.2 Investment for Sustainable Development

The research explored the ways in which Investment, as a vital element for global economic development, can be structured and facilitated for the achievement of certain state- and regional goals. For sustainable development, in particular, it is evident that certain provisions are required to ensure the advancement of sustainable development in the dialogue of investment facilitation. These include the regulatory freedom granted to host states, accountability and transparency measures, dispute resolution measures that ultimately promote sustainable development and post-service measures that ensure environmental protection.

## 5.3 Summary and Recommendations

Through a comparative analysis of various Regional Economic Communities, it is evident that the approach to sustainable development in the context of trade in general, and investment in particular, is highly influenced by the net level of development of such Regional Economic Community. Where an REC displays greater levels of development, more ambitious provisions will characterise the Investment Protocols and other Economic Framework regulating Finance flow in the region. This was observed in the new USMCA where the previously narrower definitions and objectives detailed in the NAFTA, for example, were adapted to respond to the greater demands for an emphasis on production. This ambition lacks severely in the framework of the SADC, for example, as an REC with entirely different issues and needs. The latter presents a gradual shift to finally becoming more concerned with an emphasis on environmental protection for the ultimate goals of issues such as poverty eradication, the promotion of access to clean water, increasing agricultural output, etc. As can be seen, the focus with developing countries and the REC's they form part of, are more geared towards ensuring growth and survival, as opposed to the developed nations' greater focus on production.

As recommended throughout the research, there are several recommendations for how the AfCFTA Investment Protocol can be structured and strategized to promote sustainable development. For one, the host state can prioritise and guarantee state- and region-specific goals for sustainable development in the investment negotiations through the promotion of regulatory independence. Legal requirements for ethical business behaviour may also help investment facilitation advance the sustainable development objective. Additionally, the AfCFTA Investment Protocol's promotion of openness will further guarantee not only the reduction of corruption but also increased predictability and assurance in investment. This has the potential to considerably support the investment agenda for sustainable development. Furthermore, the AfCFTA Protocol on Investment can ensure that sustainable development will still be prioritized where there are inconsistencies between existing Trade, Investment, or Environmental framework by building upon a reliance on existing SADC framework rather than completely replacing them.

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