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The scope of application of the AfCFTA Protocol on Investment to existing investment disputes: Lessons from the Baba Ahmadou Danpullo saga

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ABSTRACT

This article critically analyses the scope of application of the African Continental Free Trade Area (AfCFTA) Protocol on Investment in the light of the Baba Ahmadou Danpullo saga and highlights the need for better protection of investors' rights under the AfCFTA. It asserts that the AfCFTA must provide adequate mechanisms to address contentious issues between host states and investors. Baba Ahmadou Danpullo is a Cameroonian citizen who had invested in the real estate business in South Africa. In 2017, he contracted a debt from the First National Bank (FNB), originally repayable over 10 years. However, the repayment period was abruptly shortened due to allegations that he failed in monthly repayments. FNB consequently demanded full repayment of the remaining balance in 2020 and proceeded to liquidate Danpullo's properties to settle the outstanding amount. Danpullo alleges that FNB liquidated properties worth about R4 billion to repay a loan that was only about R507 million. Unsuccessful in his various claims in South Africa, he turned to the Government of Cameroon for assistance. Initially seeking a diplomatic resolution, he later initiated a case against South African companies based in Cameroon (which he believed were affiliated with FNB). The actions undertaken in Cameroon have resulted in significant disruption, and the companies concerned have experienced serious negative repercussions. The AfCFTA brings about significant changes in trade integration in Africa. Adopted in February 2023, its Protocol on Investment is expected to provide efficient and effective solutions to dispute settlement between investors and states.

Keywords: foreign direct investment (FDI); investment disputes; AfCFTA Investment Protocol; South Africa; Cameroon

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1 INTRODUCTION

Negotiating a comprehensive Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment ("PoI") was part of Phase II of the African Continental Free Trade Agreement (AfCFTA) agenda.[1] The draft of this Protocol was concluded in 2022 and adopted at the AfCFTA Council of Ministers. The text was then submitted to the Assembly of Heads of States for review and adoption, which took place in February 2023.[2] At the time of writing, the adopted Protocol has not yet been released publicly; the discussion in this article is thus based on the latest draft.[3]

Article 2 of the Protocol defines its main objectives as being to promote, facilitate, and protect investments; establish a transparent and sound continental legal framework on investment; provide security and predictability in reducing and handling investment disputes; enable a level playing field for African investors; and drive common positions and cooperation on matters surrounding investment. The AfCFTA aims to achieve sustainability in regard to investment in Africa and provide a unique framework for the management of all matters relating to investment in the continent and thereby provide predictability for every dispute arising in the field.

In a context where issues arise out of investment[4] and consistently create a hostile atmosphere between investors and states, this instrument is expected to provide much-needed assurance to investors (and states, as the case may be). This is the assurance they did not have previously under various international investment agreements or bilateral investment treaties (BITs). As the overall AfCFTA agenda unfolds, and as the rules on investment are agreed upon, questions arise as to how the Free Trade Area under this

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1 Phase I comprises trade in goods and services and dispute settlement; Phase II includes intellectual property rights, investment, and competition policy; Phase III, the final phase, is meant to tackle issues of digital trade and women and youth in trade. See articles 6 and 7 of the AfCFTA original Agreement.

2 Danish et al. "The protocol on investment to the agreement establishing the African Continental Free Trade Area: What's in it and what's next for the continent?" (1 July 2023) *Investment Treaty News* available at https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/#_ftn1 (accessed 26 October 2023).

3 See African Union, Protocol to Agreement Establishing the African Continental Free Trade Area (draft) available at https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf (accessed 30 August 2023).

4 See the United Nations Council for Trade and Development (UCTAD) "Investment dispute settlement navigator" available at https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 8 November 2023).

specific Protocol intends to handle "unresolved and pending" disputes opposing its member states. The Baba Danpullo case has been chosen to determine how well the AfCFTA, through this Protocol, is prepared (or should be preparing itself) to respond to realities on the ground.

Considering the above, it is important to look first at the facts of the Baba Danpullo saga. Thereafter, we scrutinise the scope of application of the PoI, before proceeding to critically analyse the shortcomings of the PoI and the way in which the case was handled in South Africa, especially given the integration goal of the AfCFTA.

2 AN OUTLINE OF THE DANPULLO SAGA

Baba Danpullo, a Cameroonian and real estate businessman in South Africa for more than 30 years, faced a complex situation.[5] He owned a group of companies[6] managed by Bestinver. In October 2017, the group of companies acquired a loan of between R520 million and R615 million[7] from First National Bank (FNB). The loan was utilised to purchase a property at the building One Thibault in Cape Town, with the repayment period spanning 10 years and amounting to a monthly repayment of R10 million, including interest.[8]

Danpullo's daughter, Yasmina Baba,[9] together with Bestinver's legal counsel, alleged that FNB, without cause, terminated the credit agreement, demanding immediate repayment.[10] The acceleration of the debt repayment was confirmed in the founding

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5 Since the 1990s. See Ngala H "Nearly 1000 South Africans could lose their jobs following seizure of Danpullo's assets in the country" (22 November 2022) *Cameroon News Agency* available at https://cameroonnewsagency.com/nearly-1000-south-africans-could-lose-their-jobs-following-seizure-of-danpullos-assets-in-the-country/ (accessed 27 October 2023).

6 Made up of Leopont 193 (Pty) Limited, Joburg Skyscraper (Pty) Limited, and Bestinver Prop 01 (Pty) Ltd Properties, which were all subsidiaries of Bestinver. See Manyane M "Hundreds lose jobs as FNB seizes Cameroon tycoon's properties in SA to settle debt of R520 million" (2022) *IOL* available at https://www.iol.co.za/business-report/companies/hundreds-lose-jobs-as-fnb-seizes-cameroon-tycoons-properties-in-sa-to-settle-debt-of-r520-million-ac42a8f7-e594-4354-b690-84251db633d0 (accessed 27 October 2023).

7 The total amount owed by Danpullo was apparently the combination of two loans taken respectively in 2016 and 2017. See Dinga Pefok J "The untold story of the liquidation of Baba Danpullo's companies in South Africa (Part 3)" (2023) *Atlantic Chronicles* available at https://www.atlanticchronicles.com/the-untold-story-of-the-liquidation-of-baba-danpullos-companies-in-south-africa-part-3/ (accessed 6 March 2024).

8 See Dinga Pefok (2023).

9 Some articles refer to her as Yasmina Baba, and others, as Maimouna Baba Danpullo. We shall use either of these names depending on the source.

10 Manyane (2022). See also Ottou A "Danpullo-FNB: Court approves seizure of XAF243 bln South African assets in response to judicial liquidation proceedings" (15 November 2022) *Ecofin Agency* available at

affidavit of FNB's Head of Recoveries in one of the urgent applications brought by Yasmina Baba in 2021.[11] According to the Court, around about March 2019, the group of companies' failure to settle its debt to FNB led to FNB's instituting "four winding-up applications, four business rescue applications, various meetings in the business rescue proceeding as well as urgent applications".[12] These winding-up applications were instituted on 19 December 2019. The business rescue plans were published on 27 November 2020 and approved on 18 December 2020.[13]

According to media reports, Danpullo and his lawyers submitted that FNB had demanded that additional guarantee documents be signed and the outstanding loan repaid immediately despite the fact that the outstanding amount still had seven years for full settlement.[14] At that point, the outstanding amount was R550 million.[15] Allegedly, during the course of this legal dispute, the rental payments due to Danpullo from his rented properties,[16] which were deposited into his other FNB accounts, were diverted and collected by the bank as part of the repayment of the debt owed to it.[17]

The alleged amount so collected was about R540 million.[18] It is further alleged that FNB extended its actions to properties that did not form part of the guarantee list initially agreed upon.[19] Some reports even suggest that FNB hindered Danpullo from raising funds

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https://www.ecofinagency.com/finance/1511-44040-danpullo-fnb-court-approves-seizure-of-xaf243-bln-south-african-assets-in-response-to-judicial-liquidation-proceedings (accessed 14 April 2024).

11 *Baba and Another v Van Rensburg NO and Others* (2594/2021) [2021] ZAWCHC 85 at para 37.

12 *Van Rensburg* (2021) at paras 37 and 38.

13 *Van Rensburg* (2021) at paras 26 and 39.

14 The Observer "Cameroon business tycoon Baba Danpullo robbed in South Africa, loses landmark investments to FNB Bank" (November 2022) *The Observer* https://www.observer237.com/2022/11/cameroon-business-tycoon-baba-danpullo.html (accessed 27 October 2023).

15 The facts of this case were gathered online, where different articles report different amounts. Some report that the balance due to FNB at the time it demanded immediate payment was R504 or R507 million. The important fact to note is that there was a loan between Baba Danpullo and FNB and that to settle the balance due on it, the latter proceeded to liquidate the properties of the former.

16 Which properties were seized and were in the process of liquidation.

17 *Van Rensburg* (2021) at para 37 where it is states that FNB held a cession of the rental income from the group of companies.

18 See generally Ndofor "PM Dion Ngute wades into MTN-Danpullo saga!" (2023) *The Guardian Post Cameroon* available at https://theguardianpostcameroon.com/post/1561/en/pm-dion-ngute-wades-into-mtn-danpullo-saga-# (accessed 30 November 2023).

19 These included some buildings, huge amounts in bank accounts, and all rentals due to him. See The Observer "Cameroon business tycoon Baba Danpullo robbed in South Africa, loses landmark investments to FNB Bank" (2022) *The Observer* available at https://www.observer237.com/2022/11/cameroon-business-tycoon-baba-danpullo.html (accessed 27 October 2023).

in Cameroon to settle the loan,[20] allegations which FNB denied.[21] There are further allegations to the effect that Danpullo attempted to raise loans from Standard Bank to settle the FNB debts.[22] Others suggest that he had begun defaulting on his loan repayment in the year after the second loan was taken, that is, from 2018 and subsequently in 2019.[23] As there was already a record of defaults in payment during these years, FNB allegedly gave Danpullo extensive opportunities to remedy the default but Danpullo's group of companies still failed and from April 2020 onwards, no payment was forthcoming.

The group of companies blamed their default on the COVID-19 pandemic, stating that "[t]he pandemic has caused the companies' tenants to default on rentals, and as a result, the Respondent's companies have not paid the full monthly instalments due to FNB since April 2020".[24] They hence requested a moratorium of six months, which was denied, considering that the prior defaults occurred before the pandemic, that is, in 2018 and 2019.[25] Danpullo is also said to have defaulted in providing FNB with an audited monthly financial statement of the group's affairs.[26] Consequently, on 19 June 2020, the group of companies was placed on provisional business rescue, leading to final liquidation thereafter.[27]

At some stage in the liquidation initiated by FNB, Danpullo's daughter brought an urgent application to halt the transfer of one of the set of companies before the High Court of South Africa.[28] The Court dismissed the application. There are many reasons that the High Court invoked in dismissing the urgent application, chief of which was that the application had been brought by someone who had no *locus standi*. The Court noted that, contrary to Yasmina Baba's claim in the founding affidavit that she was a shareholder in one company in the group of companies,[29] the company so identified had only one

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20 The Observer (2022).

21 *Van Rensburg* at para 38.

22 Dinga Pefok (2023).

23 Dinga Pefok (2023).

24 Dinga Pefok (2023).

25 Dinga Pefok (2023).

26 Equinoxe TV "Unclassified files Saturday December 16, 2023" (2023) available at https://www.facebook.com/watch/live/?ref=watch_permalink&v=324021977159740 (accessed 19 April 2024).

27 *Van Rensburg* (2021) at para 9.

28 *Baba and Another v Firstrand Bank Ltd and Others* (14520/2021) [2021] ZAWCHC 216.

29 The fourth respondent.

shareholder,[30] which was not Yasmina Baba.[31] In fact, the shareholder named on the company documents she referred to was not even cited in the founding affidavit.

Besides the *locus standi* issue, the court noted that the application was faulty in other respects.[32] The correct people were not cited in the proceedings, and the application was not served on all the creditors of the fourth respondent that Ms Yasmina Baba ostensibly represented. Another defect was that she failed to comply with section 133(1) of the Companies Act,[33] which deals with the general moratorium on legal proceedings against companies.

Considering that the case discussed here was an urgent application seeking an interim order to prevent the liquidation of some of the properties, the initial case remains unresolved before the court to this day.[34] Danpullo contended that FNB misled the court, liquidating properties worth R4 billion for the repayment of the R507 million owed;[35] for its part, FNB refuted these claims, asserting that its actions were aimed solely at recovering the money owed by the group of companies for which they were in arrears and struggling to pay.[36]

Independent Online (IOL) reported that Maimouna highlighted the efforts that her father, the Cameroonian embassy in South Africa, and the President of Cameroon made (to no avail) to seek the intervention of his counterpart, President Cyril Ramaphosa. Maimouna, alongside her father, is said to perceive FNB's abrupt decision to terminate the

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30 The sole shareholder was Bestinver Holdings (Pty) Ltd.

31 *Firstrand Bank* (2021) at para 5.

32 *Firstrand Bank* (2021) at para 5.

33 Section 133(1) of Companies Act 71 of 2008 reads as follows: "During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except- (a) with the written consent of the practitioner; (b) with the leave of the court and in accordance with any terms the court considers suitable; (c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began; (d) criminal proceedings against the company or any of its directors or officers; (e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

34 Manyane (2022).

35 *Van Rensburg* (2021) at para 9.

36 *Van Rensburg* (2021) at para 21.

loan agreement as a malicious move intended to "pave the way for white people to dominate the sector".[37] Maimuna reportedly stated:

> Very few, not to say no South Africans individually, own such an impressive real estate portfolio, which is why when the players in the real estate sector realized that these real estate properties belonged to a foreigner, moreover black … they decided to kick him out.[38]

A discussion of the possible racist and xenophobic motives behind FNB's decision is beyond the scope of this work. Equinoxe TV[39] sent a team of investigative journalists to South Africa in 2023 to gather information about this case. In their report,[40] it was revealed that the liquidation documents they obtained did not contain all of Danpullo's properties. These findings prompted the team to conclude that Danpullo did not, in fact, lose all of his properties to FNB as alleged. The team made an effort to visit almost all of the locations at which Danpullo had properties, and it appears that not all had been seized or liquidated. The report mentions several other properties Danpullo owns. According to the liquidation report, five immovable properties were seized, along with movable assets and cash in the bank. The total amount of the assets was R833,327,000; the liabilities were the same amount, thus balancing the account. According to the liquidation report, banks other than FNB also had accounts to settle with the group of companies.

Unsatisfied with the outcome of proceedings in South Africa, Danpullo decided to retaliate in Cameroon.[41] When the alleged diplomatic efforts failed to yield fruit, he went on to obtain a court[42] order in Cameroon authorising the seizure of bank accounts and assets of Chococam (Tiger Brands) and MTN, which he believed to be subsidiaries of the

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37 Manyane (2022).

38 Manyane (2022).

39 A TV channel in Cameroon.

40 Equinoxe TV (2023).

41 Pending a decision by the Court in South Africa.

42 On 9 June 2023, the Douala-Bonanjo Court of First Instance (TPI), at the request of Baba Danpullo's lawyers, issued an order to the various banks that hosted previously frozen accounts owned by MTN Cameroon. The order was to transfer the monies in these accounts to an escrow account managed by the Registrar of the said court, failing which these banks would be fined severely. The accounts of the Cameroon-based South African companies were initially frozen from September 2022. See generally Paula G "MTN faces headache in Cameroon over bizarre bank account seizure" (15 June 2023) *Connecting Africa* available at https://www.connectingafrica.com/author.asp?section_id=761&doc_id=785322 (accessed 14 March 2024).

Public Investment Corporate (PIC), a shareholder of First Rand Bank, which owns FNB. The garnishee order disrupted MTN's operations for several months, with MTN asserting its innocence and labelling the garnishment as abusive and fraudulent.[43]

According to MTN's Director General in Cameroon, these actions were an attack on what MTN had achieved in the country over 23 years. MTN denied association with FNB and held that the garnishment was an attempt to illegally access funds that lawfully belong to it and its clients.[44] FNB submitted that due process was followed for Danpullo's group of companies as would be the case with any company that failed to meet its credit repayment commitments. The Equinoxe TV journalists who visited South Africa said in their report that their attempts to contact FNB did not yield any results. The bank told them they could not have access to the records of the client without the client's consent. As for MTN South Africa and Tiger Brands, these companies provided the journalists with official statements to the effect that they are were no way connected to FNB and therefore had no part in the dispute between Danpullo and FNB. The aim of the proceedings initiated in Cameroon, according to online commentators, was to pressure the South African government into intervening in the matter and enabling the restoration to Danpullo of what he was allegedly unduly and unfairly deprived of.[45] Indeed, Danpullo protested at what he called the spoliation of his properties in South Africa.[46]

With the main aspects of the Danpullo case having been outlined, it is necessary to ascertain how the AfCFTA PoI relates to this type of conflict.

3 SCOPE OF APPLICATION OF THE AFCFTA PoI AND EXCLUSIONS

The AfCFTA PoI[47] specifies that it applies only to investments made by investors in state parties after its enactment.[48] The present provision diverges from the draft zero's article 3(2)(b), which encompassed investments made prior to its enactment but excluded investment disputes that had arisen or been resolved prior to the Protocol's entry into force. The latest draft only includes investments made prior to its enactment if they meet

43 Manyane (2022).
44 Manyane (2022).
45 Ottou (2022). See also Equinoxe TV (2023).
46 See Ottou (2022).
47 Adopted in February 2023.
48 Article 3(2)(a) of the AfCFTA PoI.

the criteria of an investment as defined by article 1 and are still present on the host state's territory at the time the Protocol comes into existence.

Danpullo's investments, while qualifying as investments, are not all still present in South Africa. The question arises: Is the PoI referring to all or (even) part(s) of investments? If it refers to all investments, then the Danpullo investments are excluded. However, if the existence of part(s) of the investments still qualifies, then those investments are covered by the PoI. The latest draft is less inclusive than draft zero, albeit that both of them exclude disputes settled before the Protocol's enactment.[49] Whether the Danpullo case may be considered a settled dispute or claim is a matter of perspective. From FNB's vantage-point, the dispute has been settled but the investor (Danpullo) obviously does not share this view. One could add that the matter remains problematic as long as retaliatory acts are taking place in Cameroon.

Furthermore, the Protocol does not apply to disputes arising solely from an alleged breach of contract between the state party and the investor.[50] In this context, FNB, though not the state, acted in collaboration with the state's organs (the court and other government bodies). The Danpullo dispute arose from a contractual agreement between FNB and the investor over the alleged failure of the latter to fulfil his contractual obligations under the loan agreement. The PoI therefore offers no hope to investors involved in these types of disputes. The expectation was that the AfCFTA would not only establish a system for proper scrutiny of such disputes, but also address (much-needed) oversight by the state in such scenarios, especially when the latter lead to adverse consequences like those seen in Cameroon.[51]

Excluding disputes arising out of an alleged breach of contract limits the scope of the PoI in dealing with existing disputes, or any disputes that may fall under its jurisdiction in future. The law of contracts is clear on the fact that parties to a contract are bound by the terms to which they consented.[52] When a breach occurs because one party reneges, the defaulting party is usually bound to remedy the situation by fulfilling the contract's

[49] Article 3(4)(a) of the AfCFTA PoI.

[50] Article 3(5) of the AfCFTA PoI.

[51] Oversight is discussed further below.

[52] Christie RH & Bradfield GB *Christie's law of contract in South Africa* 8th ed Durban: LexisNexis (2022) 585.

objectives or addressing its shortcomings.[53] The probability that disputes covered by the PoI will arise out of breach of contract is high; a clause addressing this crucial component was thus presumably excluded on the surmise that such issues could be dealt with internally via national courts or diplomatic channels. In the case under consideration, a solution could not be found internally, so what guarantees are there that similar scenarios will not arise under the PoI?

Perhaps, then, it would have been wiser to establish a body within the AfCFTA, or assign an oversight role to an already established body, to address such unresolved matters (current and future). This could have given investors greater confidence in embracing the new rules under the PoI. The proposed body would engage the disputing parties under the laws and regulations (national and international) that govern their agreements, with the aim of finding durable solutions to these problems and so removing obstacles to African integration. In South Africa, the Protection of Investment Act 22 of 2015[54] excludes international arbitration unless the host state itself consents to it.[55] In the Danpullo case, where there was no reported request for consent to international arbitration (as far as could be established), and in an instance where such request was made by the investor and the Government of South Africa refused to give consent, then such a dispute resolution body within the AfCFTA would play a key role in the resolution of this dispute.

Moreover, if the AfCFTA PoI were to have covered disputes arising prior to its existence, its article 17 could have offered a way out for the Danpullo case, as it calls on state parties to avoid any act that could constitute a fundamental denial of justice, evident denial of due process, or manifest arbitrariness in administrative and judicial matters – all of which are what Danpullo allegedly complained of. This could have enabled, as explained above, proper scrutiny and diplomatic intervention into this case so to avoid the damning consequences that followed.

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53 Van Der Merwe S et al. *Contract general principles* 4th ed Cape Town: Juta (2012) at 328.

54 The main investment framework in South Africa.

55 Section 13(5) of the PIA.

3.1 Physical protection and security of investors and investments

Article 18(2) of the AfCFTA PoI requires host countries to provide physical protection and security to investors and their investments. This includes restitution, indemnification, compensation, or other forms of settlement equal to that offered to local investors in the event of loss due to war, armed conflict, revolution, revolt, insurrection, or riot. However, the examples in article 18(2) are close to *force majeure* circumstances.[56] In cases like Danpullo's, where allegations of fraud and unfair treatment lead to the loss of investments, the PoI's exclusion of such disputes from its scope might present challenges. The duty to protect and secure investors should be all-encompassing, holding the host state accountable, especially in cases involving allegations of fraud. Article 18 uses the words "subject to its capabilities", which implies an obligation of due diligence by the host state. The question arises of whether South Africa, as the host state, exercised due diligence in dealing with the Danpullo case, considering the various turns of events and the outcry from the investor.

The term "subject to its capabilities" in article 18 (2) of the Protocol refers to the "obligation of due diligence that a State Party shall exercise".[57] "Due diligence" is generally defined as "an investigation, audit, or review performed to confirm facts or details of a matter under consideration".[58] Another definition holds that it is "the use of reasonable care ordinarily required by the circumstances".[59] In other words, the first aspect of article 18 is saying that a host state should afford equal protection and security to local and foreign investors and their investments. If due diligence here is taken to mean a thorough investigation into a matter to ascertain facts or details that would assist in making a final decision, could we perhaps say (in reference to Danpullo's case) that South Africa as the

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[56] *Force majeure, vis maior,* and *casus fortuitus* all refer to events – emanating from "nature" or mankind – which are irresistible, beyond the control of the ordinary person, and possibly unforeseen or unforeseeable. Concrete examples are catastrophes of nature, death, illness, acts of state, war, and strikes. See Van Der Merwe et al. (2012) at 466.

[57] See article 18(1) para 2 of the AfCFTA PoI.

[58] See Chen J "Due diligence" (2023) *Investopedia* available at https://www.investopedia.com/terms/d/duediligence.asp#:~:text=Due%20diligence%20is%20an%20investigation,proposed%20transaction%20with%20another%20party (accessed 1 November 2023).

[59] Cornell Law School "Diligence" (2021) available at https://www.law.cornell.edu/wex/diligence (accessed 1 November 2023).

host state (through the relevant institutions) did not exercise the due diligence expected of it in dealing with this case?

This approach is based on assumptions, in full knowledge that the current PoI does not apply to our case but on the certainty that future cases falling under its scope would definitely experience similar challenges. The banking institution at which the finger is pointed is FNB, which operates under specific banking authorities established by law.

3.2 Legal framework governing investments in South Africa

In South Africa, as in other countries, foreign direct investment (FDI) is governed by bilateral and multilateral investment treaties[60] as well as national laws. Between 2007 and 2010, the South African government sought to review and do away with certain BITs to which it was a party and allow others to lapse.[61] The review aimed to assess "the role of foreign investment in South Africa, the levels of protection afforded to investment, and the risks and benefits of BITs".[62] Many BITs with different countries were subsequently terminated.[63] These BITs enabled foreign investors to rely on principles of international law in arbitration with South Africa.[64] As part of the changes that followed, South Africa refrained from taking the approach of the International Centre for Settlement of Investment Disputes (ICSID)[65] to dispute resolution. This was motivated by two (specific) cases which were decided against it.[66] The country noted that

> the international investment regime mainly focused on narrow issues of economic interests, while matters of national interests were exposed to unpredictable

[60] See UNCTAD (2023).

[61] Gazzini T "Rethinking the promotion and protection of investment: The 2015 South African Investment Act" (2017) *SSRN* 1 at 4.

[62] Xavier C "Lessons from South Africa's BITs review" (2013) available at https://www.econstor.eu/bitstream/10419/253943/1/fdi-perspectives-no109.pdf (accessed 18 April 2024).

[63] Qumba MF "South Africa's move away from international investor-state dispute: A breakthrough or bad omen for investment in the developing world?" (2019) *De Jure Law Journal* 358 at 360.

[64] Schlemmer ES "Dispute settlement in investment-related matters: South Africa and the BRICS" (2018) available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/4646F3C2126A0C725305C1DF9097D168/S2398772318000636a.pdf/dispute-settlement-in-investment-related-matters-south-africa-and-the-brics.pdf (accessed 17 April 2024). See also Xavier (2013).

[65] Qumba (2019) at 360.

[66] *Piero Foresti, Laura De Carli & Others v The Republic of South Africa* ARB(AF)/07/01; *Swiss Investor (Werner Schlaefer) v Republic of South Africa* (2003).

system of international arbitration, which undermined the constitutionality of the state and its space to determine domestic policy.[67]

This is what prompted the adoption in 2015 of the Protection of Investment Act (PIA),[68] which came into being in July 2018. The PIA's main aim is to protect investment in accordance with and subject to the Constitution and in a manner that balances the public interest and the rights and obligations of investors.[69] The PIA regulates all investments in the Republic so long as they meet the requirements of investments as specified in section 2 of the Act. It obligates the government to ensure that administrative, legislative and judicial processes are not conducted arbitrarily or in a manner that could amount to a denial of justice to investors in relation to their investments.[70] Furthermore, in all these proceedings, investors have the right to be provided with written reasons for any decision or review, and are also entitled to government-held information in a timely manner.[71] In like manner, all disputes relating to investments are to be decided by application of law in a fair public hearing before a court or, as the case may be, another independent and impartial tribunal, forum, or statutory body.[72] Section 6 of the PIA as a whole is replicated in article 17 of the AfCFTA PoI.

Section 13 of the PIA describes the procedure for the resolution of disputes. Alongside the various avenues[73] open to investors who are involved in disputes, there is a suggestion that an investor who alleges that any provision of the Act has been breached by the government may seize the Department of Trade and Industry (DTI) within the prescribed timeframes following the relevant procedure and provide the latter with all information regarding the dispute as well as the relief sought. The DTI is to facilitate the resolution of the matter by appointing a mediator.[74] The highlight of this Act is that it removes the investor-state dispute resolution approach (ISDS) and subjects potential

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67 Qumba (2019) at 360. See also Chidede T "Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol" (11 December 2018) *Tralac* available at https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html (Accessed 16 April 2024).

68 Protection of Investment Act 22 of 2015.

69 Section 4(a) of the PIA.

70 Section 6(1) of the PIA

71 Section 6(2)(3) of the PIA.

72 Section 6(2) and 13(4) of the PIA.

73 Mediation, litigation and international arbitration (the latter is subject to government's consent).

74 Section 13(1) of the PIA.

international arbitration to the government's consent.[75] Should the government agree to go for international arbitration, it will not be against the investor but against the home state of the said investor.[76]

The PIA approach to dispute resolution has been criticised for not providing enough protection for investors and so adding to the plethora of factors that might scare them off.[77] While BITs and their approach to dispute settlement have been deemed to be more favourable to investors,[78] the current Act fails to provide the balance expected; rather, it places the state in a position of power that leaves the investor almost at the former's mercy. This applies mostly where the state refuses to consent to international arbitration.[79] Besides these local and potential international remedies, Annex 1 of the Southern African Development Community Finance and Investment Protocol (SADC FIP) – to which South Africa is a signatory – could also provide relief.

Removing international arbitration as one of the optional avenues for resolving issues between investors and the state at the ICSID by the South African government was a retrogressive move, leaving limited options for recourse available to investors like Danpullo. National courts may be an alternative, but international arbitration at the ICSID could have provided a more neutral and independent forum for resolving such a dispute. It is also true that South Africa is not a member to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[80] but has accepted its authority as many other countries have.[81]

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75 Section 13(5) of the PIA.

76 Section 13(5) of the PIA.

77 Gazzini (2017) 1 at 4; Mhlongo L "A critical analysis of the Protection of Investment Act 22 of 2015" (2019) *Southern African Public Law* 1 at 17–19; McKenzie S, Movshovich V & Versfeld T "South African investment laws: Key changes of which foreign investors should be aware" (2018) *Webber Wentzel* https://www.webberwentzel.com/News/Pages/south-african-investment-laws-key-changes-of-which-foreign-investors-should-be-aware.aspx (accessed 18 April 2024).

78 Masamba M "Africa and bilateral investment treaties: To 'BIT' or not?" (23 July 2014) *Polity* available at https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23 (accessed 19 April 2024).

79 Qumba is of the view that the legislature's choice of the words "may consent" is a wise move that gives the government "wide discretion to refuse to consent to such arbitration for fear that the international tribunal might scrutinise its domestic policies". See Qumba (2019) at 372.

80 Otherwise called the ICSID Convention, it was adopted in Washington in 1965, and entered into force in 1966.

81 Qumba (2019) at 359.

In the matter under review, Danpullo seems to have lost confidence in the South African court system, which is why he had to retaliate in his home country. Like South Africa, many other nations were unhappy with the ICSID's rulings on investor-state dispute settlement and consequently withdrew from the said provision.[82] In short, the Danpullo saga highlights the complexities of investment disputes, the role of regulatory bodies, and the impact of policy decisions on the resolution of such disputes. It also underscores the need for transparent investigations and inquiries in order to ensure justice, peace, and confidence in the investment framework.

The 2006 version of the SADC FIP contained investor-state arbitration provisions. Under its provisions, parties in an unresolved dispute could – after a period of six months from written notification of a claim and having exhausted all local remedies – submit the matter to the international arbitral platform of their choice.[83] When the *Campbell*[84] case was decided upon in 2008 and the tribunal rendered a judgement against Zimbabwe for private land expropriation without compensation,[85] Zimbabwe refused to abide by the court's ruling,[86] which was in favour of the applicants. This led to a revision of the SADC tribunal's scope of operation. Some of the factors that contributed to the tribunal's demise (or suspension of activities) was that all the cases it dealt with were brought by individuals;[87] its scope of operation was not restricted to specific matters;[88] and there needed to be proper delineation of the tribunal's jurisdiction.

In 2016, SADC countries proceeded to amend the 2006 version of the SADC FIP. The main reasons for the change of stance in matters of dispute resolution lay in the "perceived lack of transparency and legitimacy of the international arbitration process,

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82 Qumba (2019) at 359.

83 The international arbitration platforms referred to are the SADC Tribunal (suspended); the International Centre for the Settlement of Investment Disputes (ICSID); and an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). See article 28(1)(2) of the SADC FIP.

84 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

85 See Tralac "Questions & answers" (2018) *Tralac* available at https://www.tralac.org/documents/resources/faqs/2281-dispute-settlement-faqs-september-2018/file.html (accessed 15 July 2023).

86 Kondo T "A comparison with analysis of the SADC FIP before and after its amendment" (2017) 20(1) *Potchefstroom Electronic Law Journal* 1 at 29.

87 Erasmus G "The SADC Tribunal … and its demise" in Erasmus G et al. *African trade and integration law, practice and the courts* Cape Town: Trade Law Centre (2022) 133 at 134.

88 The decision for suspension was made at an Extraordinary Summit in May 2011.

conflicting arbitral jurisprudence, the independence of arbitrators and the prohibitive legal costs associated with international commercial arbitration and excessive damages".[89] Consequently, the 2016 version of the SADC FIP amending the 2006 version also did away with the investor-state dispute settlement, leaving it entirely to national processes[90] and embracing state-state arbitration.[91]

In this instance, disputes are to be handled in the manner prescribed by the Protocol of the SADC Tribunal.[92] This means that should there be an investor in South Africa who is unsatisfied with local remedies, he or she must seek government consent to escalate the matter to an international dispute resolution forum, consent which may be denied or granted. Should consent be granted – which is not guaranteed – the dispute at the international level may only be between the investor's state and the host state; there is no guarantee either that the investor's state will be ready to stand for the investor. The SADC Tribunal, which could have granted relief if consent were obtained, is not in operation.[93] The government's consent, therefore, seems to be the key that can unlock doors for international relief in investment disputes involving SADC countries.

The AfCFTA PoI gives all existing BITs between member states a grace period of five years, after which they will all cease to operate.[94] State parties are thus not allowed to conclude other BITs after the PoI comes into operation; at the same time, they are expected to work towards achieving alignment with the PoI in all investment treaties signed by regional economic communities. This should also be done between five to 10 years of the PoI's entering into force.[95] There is currently no BIT between Cameroon and South Africa.[96]

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89 "Summary of the key amendments to Annex 1 of the SADC Finance and Investment Protocol (2016)" available at https://static.pmg.org.za/150922summary.pdf (accessed 16 April 2024).

90 Article 25 of the 2016 Agreement Amending Annex 1 (Co-Operation on Investment) of the SADC Protocol on Finance and Investment.

91 Article 26 of the 2016 Agreement Amending Annex 1 (Co-Operation on Investment) of the SADC Protocol on Finance and Investment.

92 Article 26 of the 2016 Agreement Amending Annex 1 (Co-Operation on Investment) of the SADC Protocol on Finance and Investment.

93 Tralac (2018); Center for Global Law and Justice (n .d.) available at https://cglj.org/human-rights-oversight/regional-communities/southern-african-development-community-tribunal/ (accessed 14 July 2023).

94 Article 49(1) of the AfCFTA PoI.

95 Article 49(3) of the AfCFTA PoI.

96 See UNCTAD (2023).

Over and above setting out these aspects of the case study, there is a need to look at how the banking industry in South Africa dealt with the Danpullo matter.

3.3 Supervisory role of banking institutions in South Africa

South Africa's banking industry is well regulated, with specific laws and regulations that establish bodies to oversee the activities of banks. The main statute in the sector is the Banks Act (previously known as Deposit-taking Institutions Act).[97] This primary Act is supplemented by other, subordinate legislation. Among them, those of interest to this analysis are, first, the South African Reserve Bank Act,[98] which regulates the South African Reserve Bank, the monetary system in general and all matters thereby connected.[99] Secondly, the Financial Sector Regulation Act ("FSR Act")[100] regulates financial sector laws and regulators, and provides for prudential standards applicable to, and the supervision of, financial institutions, including banks.[101] Inter alia, the FSR Act seeks

> to achieve a stable financial system … a regulatory and supervisory framework that promotes financial stability; *the safety and soundness of financial institutions*; *the fair treatment and protection of financial customers; the efficiency and integrity of the financial system*; the prevention of financial crime; financial inclusion; transformation of the financial sector; and confidence in the financial system.[102]

The South African Reserve Bank (SARB) is the central bank of the Republic.[103] It is a juristic person responsible for protecting the value of the South African currency in the interests of balanced and sustainable economic growth.[104] The SARB bears the responsibility of protecting and maintaining financial stability in the Republic.[105] It maintains a general supervisory role on the activities of all the banks in the country.[106]

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97 Banks Act 94 of 1990.

98 Act 90 of 1989.

99 See preamble of the South African Reserve Bank Act 90 of 1989.

100 Act 9 of 2017.

101 Coetzer J & Naicker M "Banking regulatory framework in South Africa" (26 May 2021) *Financial Regulation Journal* available at https://financialregulationjournal.co.za/2021/05/26/in-brief-banking-regulatory-framework-in-south-africa/ (accessed 6 November 2023)

102 Section 7(1)(a)–(d) and (f)–(h) of the Financial Sector Regulations Act (emphasis added).

103 Section 223 of the Constitution of the Republic of South Africa, 1996 ("Constitution").

104 Section 224(1) of the Constitution.

105 Section 3(2) of the Reserve Bank Act 90 of 1989.

106 Gagné K "Banking regulation in South Africa: Overview" (2022) available at https://uk.practicallaw.thomsonreuters.com/w-007-6934 (accessed 6 November 2023).

There is also a body called the Prudential Authority (PA), established by Chapter 3 of the FSR Act,[107] operating within the administration of the Reserve Bank.[108] It has several objectives, but for the purposes of this article we simply look at the one that relates to the protection of financial customers against the risk that the financial institutions under its purview may fail to meet their obligations.[109] Amongst the functions to be performed by the PA is that it must "regulate and supervise" financial institutions.[110] Does this supervisory role involve intervening in situations like the one that prevailed between FNB and Danpullo? Given the magnitude of the accusations and the series of events that took place in Cameroon, there has been a call for an inquiry or investigation for the sake of peace. Breaking certain rules of confidentiality may be necessary to resolve this matter effectively.

According to the Cameroon News Agency (CNA), its reporter, in response to a request for comment from FNB about Danpullo's accusations against it, received an email reply which read:

> FNB cannot disclose the details of any specific bank accounts due to client confidentiality. The bank can confirm that its debt collection processes comply with the laws governing credit agreement … If a customer fails to meet their credit agreement obligations, despite our best efforts, the bank may take legal action as a last resort.

A similar response was given to IOL when it approached FNB for comment.[111] In its reply, FNB denied claims of racism and xenophobia and stated that its "debt recovery processes are implemented consistently irrespective of a client's nationality". Although it is within the bank's right to decline to comment on the matter and provide information in that regard, the circumstances surrounding certain cases should prompt the breaking of certain rules of confidentiality if that can lead to putting matters to rest. The recent judgment of *Ndudane and Others v Financial Intelligence Centre,*[112] where the applicants' relationships with various banks in South Africa were terminated simply on the

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[107] Parts 1, 2 and 3 of the said chapter.
[108] Section 32 of the Financial Sector Regulations Act.
[109] Section 33(c) of the Financial Sector Regulations Act.
[110] Section 34(1)(a)(i) of the Financial Sector Regulations Act.
[111] Manyane (2022).
[112] *Ndudane and Others v Financial Intelligence Centre* (EC/01/22) [2024] ZAWCHC 38 (13 February 2024).

assumption that they were carrying out suspicious transactions,[113] could serve as an example, even though it is not an investment dispute and the facts of the case are totally different. The outstanding element here is the relationship between clients and the banks.

The applicants in *Ndudane* sought to be given access to confidential information held by the Financial Intelligence Centre (FIC) under the Financial Intelligence Centre Act (FICA) 2001 regarding the termination and refusal to provide them with banking services and facilities. After proper scrutiny, the court rendered the judgment in favour of the applicants, thereby reiterating the importance of transparency, fairness, and upholding constitutional principles of equality in all dealings.[114] The information sought included reports from the banks regarding suspicious transactions, risk management, and compliance programmes. The FIC opposed the application, relying on principles of confidentiality and procedural issues and arguing that the applicants lacked a legal basis for accessing such information. The applicants contended that the requested documents were crucial to supporting their claims against the banks of unequal treatment.

The court found that the applicants had established their right to the information sought[115] and ordered the FIC to provide the requested documents within 20 days of the order. It is clear from this judgment that issues of confidentiality stand only as long as people's rights are not infringed upon. In a case like that of Danpullo, the records of his company dealings with FNB could enable the ascertainment of whether indeed FNB did take more than what the investor owed it and so determine the way forward. From the liquidation documents presented by Equinoxe TV, the total value of the properties and other assets in the liquidation account does not amount to billions, as alleged by Danpullo. Nevertheless, it is important to remember that there are claims that the liquidated assets were worth R4 billion. Is it possible that properties can be undervalued for liquidation purposes? Probably not.

4 THE IRREVERSIBLE CONSEQUENCES OF THIS PRECEDENT

The Danpullo case could have several adverse consequences. On the one hand, South Africa could be perceived as an "unsafe" territory for investments and, as such, its image

[113] Paragraph 5 of the judgment.
[114] Paragraph 21 of the judgment.
[115] Paragraph 21 of the Judgment.

could be tarnished. This position may be reinforced by the current investment framework (the PIA), under which access to international arbitration is conditional on approval by the government. On the other hand, Cameroon's legal system could be perceived as anarchic, as the legal foundation for the seizure of South African companies' accounts does not exist in the country. This could tarnish Cameroon's image too and scare away potential investors, as the independence of the judiciary and the reasonableness of the legal actions against South African owned companies are being questioned. Additionally, the freezing of bank accounts in Cameroon has affected South African enterprises, which could create a hostile atmosphere between the two countries. There is a need for both governments to engage each other in finding a durable solution to this matter.

5 A GLIMPSE INTO INTERVENTION BY BOTH GOVERNMENTS

The South African Minister of International Relations and Cooperation, Naledi Pandor, visited Cameroon in April 2023 to strengthen trade relationships between the two countries. During her visit she met with senior executives of Chococam and MTN, who briefed her on the situation in Cameroon. She advised them to continue following all legal avenues available to them. In the same vein, when Dion Ngute, Cameroon's prime minister, visited South Africa during the BRICS Summit in 2023, he was approached by the chairman and CEO of the MTN Group about the case and promised to do something upon his return to Cameroon.[116]

It appears that South African-owned companies are facing various similar challenges in other African states. This seems evident in a statement made by a spokesperson for the Department of International Relations and Cooperation (DIRCO):

> The South African government plans to elevate its firms' concerns to the African Union and ask that the continental body adopt protocols on how companies and investors on the continent should be treated, and discuss how to address difficulties in repatriating funds from some markets.[117]

[116] See Ndofor (2023).

[117] Cele S & Prinsloo L "SA will help businesses facing 'extortion' by African states" (17 July 2023) *Erongo* available at https://www.erongo.com.na/mw-main/sa-will-help-businesses-facing-extortion-by-african-states2023-07-1773976 (accessed 16 November 2023).

The statement was made in the context of the challenges South African companies were facing elsewhere in Africa.[118] In the same vein and according to the DIRCO spokesperson, when some governments run short of funds, they tend to turn on and target South African companies.[119] It appears from the first statement that in investment disputes where South Africa is the host state, it is reluctant to participate in "direct" international arbitration, while in situations where South African enterprises hosted in other countries are facing challenges, it is open to international discussion. This stance is somehow unbalanced.

6 HOW WILL THE AfCFTA ACHIEVE SUSTAINABLE DEVELOPMENT?

The exclusion of disputes pre-dating the AfCFTA PoI (especially those arising from alleged breaches of contract) from its scope of application poses challenges to the very integration the AfCFTA is seeking. While the position taken by the drafters of the AfCFTA is understandable given the need to avoid over-burdening the new system with existing problematic cases, it might affect the long-term goals of the AfCFTA. The exclusion appears to contradict the principles of flexibility, special and differential treatment, and preservation of the *acquis*. Additionally, clarification is required as to whether investments excluded from the scope of application of the PoI are excluded in their entirety, or whether a different approach would apply when a portion of those investments remains in the host country. In cases such as ours, this distinction would certainly result in a different approach.

The AfCFTA could have applied flexibility by mandating its Pan-African Trade and Investment Agency, created under article 42 of the PoI, to establish a committee to look into "unresolved" investment disputes between member states as the process unfolds to ensure that all obstacles are cleared; these resolutions could have been given a timeframe of two to three years. The "preservation of the *acquis*" could have meant ensuring that investors' investments are provided a certain degree of "security", even those that are available only in part, like those of Danpullo. These disputes are likely to create a hostile

[118] Examples include the challenges Vodacom has faced in the Democratic Republic of Congo and MTN, in Cameroon.

[119] Cele & Prinsloo (17 July 2023).

environment for businesses and leave investors with no choice but to withdraw from host states – thereby reinstating the very barriers the AfCFTA is trying to remove.

7 CONCLUSION

The AfCFTA PoI, as currently structured, excludes disputes of the likes of the Danpullo matter (disputes arising out of alleged breach of contract) from its scope of application, thereby posing potential risks to the integration and co-operation which the AfCFTA aims to achieve. This article emphasises the need for a balanced approach, one considering the AfCFTA's principles of flexibility and the preservation of the *acquis*. Furthermore, regulatory bodies such as the Prudential Authority and the Reserve Bank in South Africa could play a crucial role in investigating allegations and providing clarity and a lasting solution to this case through their supervisory roles. Transparency is essential for maintaining confidence in the financial system and South Africa as a whole. The resolution of the Danpullo case requires a multifaceted approach, involving legal, diplomatic, and regulatory dimensions, in order to address its complexities and implications for sustainable development and regional co-operation.

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