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Re-examining *locus standi* of non-state entities and individuals under the African Regional Economic Communities and the African Continental Free Trade Area

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International Trade and Investment Law in Africa

By

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30 September 2021

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LIST OF INTERNATIONAL INSTRUMENTS

Treaties

African Union Agreement Establishing the African Continental Free Trade Area, 21 March 2018.

World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994.

World Trade Organisation Agreement on Technical Barriers to Trade, 15 April 1994.

World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994.

Treaty Establishing the Common Market for Eastern and Southern Africa, 5 November 1993.

Treaty Establishing the Economic Community of West African States Treaty, 28 May 1975.

Treaty Establishing the Southern African Development Community, 17 August 1992.

Treaty for the Establishment of the East African Community, 30 November 1999.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01, 19 December 2007.

Treaty on the European Union, OJ C 325/5, 24 December 2002.

Treaty on the Functioning of the European Union OJ C326, 26 December 2012.

Protocols

Supplementary Protocol to the Protocol on the ECOWAS Community Court of Justice, 19 January 2005

Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

Protocol to the Treaty Establishing the African Economic Community relating to free movement of persons, right of residence and the right of establishment, 29 January 2018.

Protocol on Tribunal in the SADC, 2000.

European Union, Protocol on the Statute of the Court of Justice of the European Union, 16 December 2004.

LIST OF ACRONYMS

AfCFTA	African Continental Free Trade Area
AfCFTA DSB	African Continental Free Trade Area Dispute Settlement Body
AMU	Arab Maghreb Union
AU	African Union
CEN-SAD	Community of Sahel–Saharan States
CJ	European Union Court of Justice
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
COMESA court	COMESA Court of Justice
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
GC	European Union General Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGAD	Intergovernmental Authority on Development
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
SA CC	South African Constitutional Court
SADC	Southern African Development Community
WTO	World Trade Organization
WTO DSB	World Trade Organization Dispute Settlement Body

ABSTRACT

The world of international trade is dominated by non-state entities and individuals as opposed to states. States are at the forefront in rule making and are obligated to implement the various trade rules that stem from trade agreements that they have ratified. In cases where there is non-compliance with these trade agreements, states seldom sue one another to ensure compliance at regional level. The consequences of the failure to enforce provisions laid out in trade agreement affect the non-state entities and individuals the most, as they are predominantly the drivers of international trade. The irony is that some of these trade agreements acknowledge the role of private parties in international trade and award them rights in some instances, but they rarely accord them *locus standi* before international adjudicative bodies to resolve their trade disputes against states.

The role private parties play in regional and economic integration cannot be understated. However, there are multiple challenges that private parties face when they seek to resolve trade disputes. The main objective of this research is to interrogate the importance of awarding private parties *locus standi* before the AfCFTA and the RECs dispute settlement system.

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CHAPTER 1

International trade and the formation of regional trade agreements

1.1 Introduction

People have been exchanging goods amongst each other since before the 1st century BC.[1] These exchanges can be traced back to primitive societies that traded goods such as food, spices, and minerals, to name a few. With time, trade expanded from being amongst people to being between neighbouring communities and eventually to trading between multiple states and regions across the world.[2]

The expansion of trade gave impetus to a rise in disputes which needed to be resolved. The need for trade regulation became important as trading took place between people from different states, who were governed by different laws. The growth of trade between individuals and states, led to the need for a more universal and uniform trade regulation regime. The exchange of goods and services across borders primarily became known as international trade.[3] Some international trade contracts were governed by the *lex mercatoria*, which are a set of rules that developed from customs, and these were used to resolve international disputes. The *lex mercatoria* began to be recognized during the Medieval times, dating back to the 5th century, and during the 12th and 13th centuries, courts in France, England, and Italy applied them in their judgements.[4]

From the 14th to the 19th century, multiple attempts were made to regulate trade amongst states specifically, but this was not fruitful until 1899, when the International Peace Conference was held. This conference gave birth to the Convention for the Pacific Settlement of International Disputes, which introduced a new institution called the Permanent Court of Arbitration (PCA),

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1 World Economic Forum "A brief history of globalization' 17 January 2019 https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization/ (accessed 2021-05-03).

2 E Helpman 'International Trade in historical perspective' Onassis Prize Lecture Harvard University and CIFAR (1 September 2012) 1.

3 A Samue 'International Trade and Its impact on the Global Economy' 09 September 2019 https://www.researchgate.net/publication/335703233_International_Trade_and_Its_Impact_on_the_Global_Economy (accessed 2021-09-29)5; R Heakal 'The Investor's Guide to Global Trade' 18 February 2021 https://www.investopedia.com/insights/what-is-international-trade/ (accessed 2021-09-29).

4 M Martiskova 'What is *Lex Mercatoria*' 21 February 2018 https://lawyr.it/index.php/articles/reflections/1193-lex-mercatoria (accessed 2021-05-03).

which came into force in 1902.[5] The PCA became the first intergovernmental organization that settled disputes through either arbitration or other peaceful means.[6] However, the PCA was not binding on all state parties, and it was abused as parties chose not to comply with it, thereby making it difficult to enforce the law on all states. [7]

New avenues that promoted state accountability and fostered friendly relations, were needed and states began making bilateral agreements where states would agree to support each other politically and trade with one another.[8] These bilateral agreements evolved and expanded to become regional agreements where more than two state parties would trade various goods amongst themselves. For example, the United Kingdom and its colonies established a Commonwealth bloc in 1926, where they traded amongst each other.[9] The formation of these regional and bilateral agreements, did not resolve the problems at hand as they did not create uniformity and were unenforceable.[10]

Due to the increase in regional agreements and the isolation of states that were not a party to these agreements after World War II, states realized that they needed to find a way to boost global trade to assist them with reviving their economies after the war. No one state could readily produce all the goods it needed, and thus trading became a central component towards the development of all states.[11] As a result, the need to regulate trade at a broader scale became crucial to reduce trade barriers.[12]

A plan for an International Trade Organization was set out in the Bretton Woods Agreement in 1944 as trade liberalization, and its regulation was now essential to ensure peace and stability. This need gave birth to General Agreement on Trade and Tariffs (GATT) which only

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5 UNCTAD 'Dispute Settlement 1.3 Permanent Court of Arbitration' 2003 UNCTAD/EDM/Misc.232/Add.26 5; United Nations 'Predecessor: The League of Nations' https://www.un.org/en/about-us/history-of-the-un/predecessor (accessed 2021-05-05); Permanent Court of Arbitration 'History' https://pca-cpa.org/en/about/introduction/history/ (accessed 2021-05-05).

6 https://pca-cpa.org/en/about/introduction/history/ (accessed 2021-05-05).

7 K Amadeo 'The Economic Impact of World War I' 8 November 2020 https://www.thebalance.com/world-war-i-4173886 (accessed 2021-05-06).

8 J Sherlock and J Reuvid *The Handbook of International Trade* 2ed 2008 3.

9 The Commonwealth "Our History" https://thecommonwealth.org/about-us/history (accessed 2021-05-04).

10 PC Mavroidis 'The Regulation of International Trade, Volume 1: GATT' (18 December 2015) 6.

11 Sherlock (n 8 above) 3.

12 C Majaski "General Agreement on Tariffs and Trade" 12 May 2021 https://www.investopedia.com/terms/g/gatt.asp (accessed 2021-05-30).

came into force in 1948.[13] The GATT became the first multilateral free trade agreement that regulated international trade, and introduced principles like the most favoured nation treatment and national treatment.[14] The GATT ran on a provisional basis for 47 years until the introduction of the World Trade Organization (WTO) after the Uruguay Round in 1994.[15] The WTO became the first international organization that primarily focused on the liberalization of trade between states.[16]

However, prior to the establishment of the WTO, GATT formally allowed regional trade agreements (RTAs), which are 'reciprocal preferential trade agreements.'[17] Over 67 RTAs were in force worldwide by the end of the 19th century, and some had been notified under the Enabling Clause or Article XXIV of GATT.[18] Some of these RTAs, which are also referred to as regional economic communities (RECs), were from Africa, as African states also sought to integrate and liberalise trade within their region from as early as 1945.[19]

The notion of regional integration in Africa was initially advanced under the Economic Community of West African States (ECOWAS) in 1945 when the CFA franc came into force, and the francophone states officially had a 'single currency union'.[20] However, it was only in 1975 that a Treaty Establishing ECOWAS was made to promote cooperation and develop the economic wellbeing of its member states.[21] The creation of regional blocs became a way to advance economic development as no state could manufacture all the goods and supply all the services it required independently.[22] RECs in Africa were therefore made to 'facilitate regional

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13 Mavroidis (n 10 above) 1,16 & 18; M Johnston 'A Brief History of International Trade Agreements' (22 August 2019) https://www.investopedia.com/articles/investing/011916/brief-history-international-trade-agreements.asp (accessed 2021-05-06).

14 GATT was also set up to avoid the tariff wars that were creeping up in the 19th century and to assist in the removal of any trade barriers. Amadeo (n 9 above); Sherlock (n 8 above) 11-12.

15 World Trade Organization 'The GATT years: from Havana to Marrakesh' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 2021-05-15).

16 World Trade Organization 'What is the WTO' https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 2021-05-15).

17 https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 2021-05-15).

18 E Patterson 'Rethinking the Enabling Clause' (2005) 6 5 *Journal of World Investment & Trade* 733; A Saurombe 'The Southern African Development Community Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV' (2011) 14 4 *Potchefstroom Electronic Law Journal* 288,290; WTO 'Regional Trade Agreements' http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed 2021-05-15).

19 ECOWAS 'History' https://www.ecowas.int/about-ecowas/history/ (accessed 2021-05-15).

20 https://www.ecowas.int/about-ecowas/history/ (accessed 2021-05-15).

21 Article 2 of the Treaty Establishing the Economic Community of West African States Treaty, 28 May 1975; https://www.ecowas.int/about-ecowas/history/ (accessed 2021-05-15).

22 P Love and R Lattimore *International Trade: Free, Fair and Open?* (OECD Publishing 2009)3.

economic integration'.[23] In addition, African states could not unilaterally succeed in competing in the liberalised world trading system without forming these RECs.[24] This led to the creation of multiple RECs in Africa. The African Union recognizes eight RECs, which include the Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (CEN–SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).[25]

The RECs have made multiple contributions to the development of trade in Africa, including aiding the free movement of persons and goods in some RECs, and they have created harmonized regulatory frameworks that create a conducive trading environment, amongst other things.[26] The African Union(AU) also recently created a continental bloc called the African Continental Free Trade Area(AfCFTA), which came into force in May 2019 to promote intra-African trade.[27] The AfCFTA is an AU flagship projects.[28] Some of the general objectives of the AfCFTA are to create a goods and services liberalised market and deepen economic integration in Africa, amongst other things.[29]

The RECs and the AfCFTA have also adopted some of the provisions of the WTO. Like the multilateral trading system under the WTO that provides a Dispute Settlement Body where states can settle their disputes,[30] the RECs and the AfCFTA also provide institutional dispute settlement bodies that settle disputes between member states that are parties to their respective agreements. However, the multilateral and the regional systems have seldom catered for non-state parties and individuals to access the various adjudicative bodies they provide under their

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23 African Union 'Regional Economic Communities' https://au.int/en/organs/recs (accessed 2021-05-16).

24 BYK Sang 'Friends, Persons, Citizens: Comparative Perspectives on Locus standi and the access of private applicants to sub-regional trade judiciaries in Africa' 2011 13 *Oregon Review of International Law* 356.

25 Article 1(t) of the Agreement Establishing the African Continental Free Trade Area.

26 NEPAD 'Consolidated Report of Africa's regional economic communities (RECs)' 2015 NEPAD, South Africa 4.

27 TRALAC 'Status of AfCFTA Ratification' 13 July 2021 https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (accessed 2021-09-29).

28 African Union 'Flagship Projects of Agenda 2063' https://au.int/en/agenda2063/flagship-projects (accessed 2021-09-29).

29 Article 3(a)&(b) of the Agreement Establishing the African Continental Free Trade Area. TRALAC 'Status of AfCFTA Ratification' 13 July 2021 https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (accessed 2021-09-29).

30 World Trade Organization 'What is the World Trade Organization?' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 2021-05-15).

treaties. In Africa, only a few RECs provide *locus standi* to non-state parties and individuals to appear before their institutional adjudicative bodies to resolve their trade disputes, and this is problematic.

1.2 Problem statement

Individuals and non-state entities, like companies, are considered as the drivers of international trade. Both individuals and non-state entities will be referred to as private parties throughout this study. Multiple scholars have argued that private parties need direct access to regional courts or tribunals more than states do.[31] This argument is based on the notion that disputes arise more frequently between private parties and a state due to the ever-changing rules and regulations that they need to comply with to trade. However, private parties are not accorded *locus standi* in most international and regional treaties and do not have access to the adjudicative bodies established by these treaties. The general trend in international law is that,

> "only states are the parties to international agreements and that only they derive rights from such agreements and enjoy standing before international courts when violations occur."[32]

Looking at this statement through the lens of international trade, one begins by questioning its legitimacy and its weight on protecting the rights of the people these states represent and owe an obligation to. In an ideal system, if there had been violations of any kind against an individual, that individual should be allowed to directly approach an international or regional adjudicative body to seek redress, but this is not predominantly the case. Mostly, only the states that are parties to an agreement or treaty may appear before the adjudicative body set up under a specific treaty to institute an action or enforce any treaty provision that another state has breached.[33] This global trend of state access only, which is firmly adhered to in international law regarding dispute resolution, has found its way into the recently enacted AfCFTA.[34]

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31 J Obonje 'Neutering the SADC Tribunal by blocking individuals' access to the Tribunal' (2013) 2 *International Human Rights Law Review* 315; H Onaria 'Locus standi of individuals and non-state actors before regional economic integration judicial bodies in Africa' (2010) 12 (2) *African Journal of International and Comparative Law* 153.

32 G Erasmus 'The *Polytol* judgement of the COMESA Court of Justice: Implications for rules-based regional integration" 1 July 2015 TRALAC.

33 Erasmus (n 32 above).

34 The AfCFTA seeks to boost intra-African trade and provide mutually advantageous rules that govern trade. Various African states have ratified it and it came into force on the 30th of May 2019. However, due to the Covid-19 pandemic trading under the AFCFTA only began on the 1st of January 2021. Preamble of the AFCFTA; United Nations 'Africa's free trade area opens for business' 7 January 2021

Article 20 of the AfCFTA explicitly deals with dispute settlement and expressly says that the dispute settlement mechanism set up under the AfCFTA is only applicable to state parties.[35] This provision reflects the WTO position, which takes away the *locus standi* of private parties in international trade disputes because they are not states by classification.[36] International law postulates that one way a private party can get its dispute resolved under any international agreement is to ask the state to take up the dispute on its behalf.[37] This process that could take months can also be burdensome on the state as it may become inundated with these requests. In addition, it will also leave some companies or individuals stranded during this waiting period which may destroy their businesses.

It is also presumed that most trading under the AfCFTA will be done by private parties and not by states.[38] The RECs do not have authority to preside over private party matters relating to the interpretation and application of AfCFTA since there is no express provision giving this authority to the RECs within the AfCFTA. Therefore, the AfCFTA needs to ensure that it protects not only states but also private parties because they are the drivers of trade in Africa.[39]

Based on the premise that private parties are not awarded *locus standi* under the AfCFTA to access its Dispute Settlement Body(DSB),[40] it is important to unpack what other adjudicative bodies private parties have access to within Africa, to resolve their disputes timeously. In this regard, this dissertation seeks to critically analyze the dispute settlement regimes provided under the RECs and the challenges and extent to which they provide access to private parties to settle their trade disputes. Not all RECs are open to private parties.[41] Some RECs will only allow private parties from states that belong to their REC to appear before their adjudicative

https://www.un.org/africarenewal/magazine/january-2021/AfCFTA-africa-now-open-business (accessed 2021-05-19).

35 The Agreement Establishing the African Continental Free Trade Area (21 March 2018).

36 GI Zekos 'The Case for Giving to Private Parties access to the WTO Dispute Settlement System' (2007) 8 3 *Journal of World Investment and Trade* 449.

37 C Giorgetti 'Rethinking the Individual in International Law' (2019) 22 4 *Lewis & Clark Law Review* 1088.

38 K Oghobor 'AfCFTA: Implementing Africa's free trade pact the best stimulus for post COVID-19 economies' 15 May 2020 https://www.un.org/africarenewal/magazine/may-2020/coronavirus/implementing-africa's-free-trade-pact-best-stimulus-post-covid-19-economies (accessed 20 May 2021).

39 https://www.un.org/africarenewal/magazine/may-2020/coronavirus/implementing-africa's-free-trade-pact-best-stimulus-post-covid-19-economies (accessed 20 May 2021).

40 Article 20 of the AfCFTA.

41 For example, SADC does not allow private parties to bring any disputes before it. The SADC Tribunal does not entertain claims from private persons anymore and is strictly limited to dealing with inter-state disputes and assisting in the interpretation of the provisions in the SADC Treaty. Obonje (n 31 above) 295.

body.[42] This may pose a problem for those private parties who are resident in states that do not belong to a REC where *locus standi* is awarded to private parties and will therefore leave them with no other alternative but to resort to the local remedies provided in their local laws.

On the one hand, COMESA allows private parties to access its adjudicative body, but it places a condition that local remedies must first be exhausted before approaching it, thereby providing 'conditional access'.[43] On the other hand, the EAC and ECOWAS do not mention any conditions that need to be fulfilled before being awarded *locus standi*, thereby providing direct access.[44] Therefore, this study also seeks to interrogate the value in granting conditional or unconditional access.

In addition, in practice, the African RECs have been mostly adjudicated human rights-based claims and not necessarily trade matters.[45] An investigation of why some of the REC courts have been dealing with human rights claims instead of trade claims will be conducted to assess whether there is a nexus developing in Africa between human rights claims and trade disputes. Now that the United Nations High Commission for Human Rights has been undertaking extensive research on human rights in some of the WTO Agreements,[46] it becomes vital to establish whether there is a connection between human rights and trade disputes and assess what impact, if any, this connection will have on the *locus standi* of private parties.

Most companies in Africa need assurances that once they begin intra-African trading on a larger scale, either under their respective RECs or the AfCFTA, they will have access to the adjudicative bodies provided under these regimes. For private parties to fully take advantage of this enlarged African market, conducive business policy frameworks have been highlighted as the key to effective trade.[47] However, these frameworks will be meaningless if direct access for dispute resolution is not provided for under the RECs and the AfCFTA. Thus, the primary

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42 For example, COMESA. Onaria (n 31 above) 153.

43 D Van Wyk 'An important COMESA Court qualifier for natural and legal persons approaching the Court' 11 July 2019 TRALAC; Onaria (n 31 above) 153.

44 Article 30 of the EAC Treaty allows private parties to use its court. Article 10(d) Supplementary Protocol to the Protocol on ECOWAS.

45 Article 10 (d) of the Supplementary Protocol to the Protocol on the Economic Community of Central African States Community (ECOWAS) Court of Justice 19 January 2005.

46 EU Petersmann 'International trade law, human rights and theories of justice' in S Charnovitz , DP Steger and P Van Der Bossche (eds) *Law in the Service of Human Dignity* (2005) 51-52.

47 P Apiko, S Woolfrey, and B Byiers 'The promise of the African Continental Free Trade Area' December 2020 Discussion Paper No.28712 1.

focus of this research will be on re-examining the *locus standi* of private parties under the RECs and the AfCFTA. An analysis of the EU as a case study will also be conducted to determine whether a holistic model may be created for the AfCFTA, drawing lessons from the EU and the RECs, that seeks to remove *locus standi* barriers when it comes to the resolution of trade disputes.

1.3 Research questions

The main research question this study will seek to answer is: What are the *locus standi* challenges that non-state entities and individuals face when they seek to resolve trade disputes before the RECs and the AfCFTA adjudicative bodies and how can they be addressed?

In answering the main question, the following sub questions will also be addressed-

i. Why were regional trade agreements created?
ii. What role do non-state entities and individuals play in international trade, and what has been the general position regarding awarding them *locus standi* to resolve international trade disputes before international adjudicative bodies?
iii. What are the respective positions followed by the AfCFTA and the RECs in awarding non-state entities and individuals *locus standi* to resolve trade disputes under their dispute settlement bodies?
iv. What can be learnt from the EU's position of awarding *locus standi* to non-state entities and individuals, and can the AfCFTA and the RECs take gradual steps towards awarding private parties unconditional *locus standi*?

1.4 Literature review

Various scholars have pointed out the issue of lack of access and the need for private parties to be awarded *locus standi* in the various REC adjudicative bodies. Dating back to 1995, Kiplagat highlighted a few problems regarding the issue of *locus standi* of private parties under the COMESA.[48] Kiplagat articulated the issue of the conditions placed on private parties to exhaust local remedies first before acquiring *locus standi* is problematic, in that parties are not awarded

[48] P Kiplagat 'Dispute Recognition and Dispute Settlement in Integration Processes: the COMESA experience' (1995) 15 3 *Northwestern Journal of International Law & Business* 437.

direct access.[49] He also argued that the COMESA court was introduced to decide on all matters that deal with the interpretation of COMESA treaty provisions and their application, and that by the treaty stating that private parties had to exhaust local remedies first, the treaty itself was extending the jurisdiction of interpreting and applying the treaty to local courts which he argues was not the intended aim of the treaty.[50] These deductions by Kiplagat are important and are worth examining further for two reasons.

Firstly, at present, private parties do not have direct access to RECs like COMESA while other RECs like the EAC do provide direct access.[51] It has been argued that providing private parties with *locus standi* increases the 'credibility' of a treaty and bolsters compliance by private parties to uphold that specific treaty, as it will award them protection.[52] This shows the advantage of allowing private parties direct access and it is important to unpack why other RECs like COMESA still provide for conditional access today. Although, Kiplagat emphasized the need to amend the provision of *locus standi* to award private parties direct access to the COMESA court, he does not clearly set out whether this *locus standi* should be provided without qualifications.[53]

Secondly, requiring private parties to exhaust local remedies especially in the case of trade disputes will be expensive and time consuming as most local courts already have backlogs that they still need to deal with. Allowing private parties to use the REC courts provides certainty and, if awarded direct access, limits the costs that the party could have incurred from instituting multiple actions through different national courts before getting the desired result.[54] It is difficult to trace how may trade disputes were resolved through exhaustion local remedies.

Onaria also analyses the issue of exhaustion of local remedies by not only COMESA, but by the EAC, ECOWAS and SADC.[55] He then compares exhaustion of local remedies to direct access and notes the importance of direct access being awarded to private parties in order to

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49 Kiplagat (n 48 above) 465 – 466.
50 Kiplagat (n 48 above) 465.
51 Article 26 of COMESA and Article 30 of the EAC.
52 LR Helfer and AM Slaughter 'Why states create international tribunals' (2005) 93 *California Law Review* 41.
53 Kiplagat (n48 above) 467.
54 G Erasmus 'The COMESA Court of Justice: Regional agreements do protect private parties' (2013) Stellenbosch: TRALAC 1.
55 Onaria (n 31 above) 153.

foster inclusive economic integration.[56] Oppong's view is also in line with Onaria's and he further states that awarding private parties direct access will push states to become more compliant with trade rules knowing that there is a higher chance of them being sued for non-compliance.[57]

Although these scholars have made great contributions towards the issue of *locus standi* of private party disputes, their scholarly writings were published before the enactment of the AfCFTA. The issues these authors had highlighted remain unresolved today and this may be problematic and hinder the chances of greater intra-African trade envisaged under the AfCFTA. A re-examination of the *locus standi* of private parties is important to understand the challenges private parties are still facing, their effects, and to ultimately suggest potential recommendations. The enactment of the AfCFTA made the *locus standi* of private parties shift from being a regional issue to being a continental issue, since the AfCFTA provisions does not award private parties *locus standi* to resolve trade disputes.

Moreover, given that the COMESA court only has jurisdiction to deal with issues of interpretation and application of the COMESA treaty, just like other RECs are also limited to their treaties, it brings one to question how private parties with trade disputes arising from the AfCFTA are going to resolve them, since the RECs do not have jurisdiction to deal with the AfCFTA provisions. Arguments have been made that private parties have access through their states, and this argument will be interrogated throughout this research because what will happen in cases where a private party wants to sue its own state for breaching the AfCFTA? Re-examining the *locus standi* of private parties before African adjudicative bodies is important because states need to be held accountable for breaching treaty obligations. Since states rarely sue one another, private parties should be awarded *locus standi* to resolve trade disputes before the REC courts and the AfCFTA DSB against states, as this has the potential to improve accountability on the part of states and as Onaria said above, it can foster inclusive economic integration in Africa by having private parties directly involved.

[56] Onaria (n 31 above) 168-169; Oppong RF *Legal aspects of economic integration in Africa* (2011) 29.
[57] Oppong *Legal aspects of economic integration in Africa* (n 56 above) 129.

1.5 Significance of research

This research seeks to provide private parties with clarity on whether they can actively pursue their trade cases through the dispute resolution systems of the RECs. It seeks to equip private parties with information regarding which RECs accord them *locus standi*, what conditions they may need to meet in situations where they have conditional access to the RECs, and the challenges that they may face. Considering the increase in intra-African trade expected to flow from the AfCFTA, the issue of *locus standi* of private parties needs to be reassessed taking into consideration the need to make trade efficient and to encourage private party participation in economic integration. Furthermore, this research seeks to encourage the drafters of the AfCFTA and RECs to rework the structure of dispute settlement, like the EU did, to private parties' *locus standi*, even if it is in certain instances. As the drivers of international trade, private parties' access can become a tool to hold states accountable for lack of compliance with their trade obligations under the RECs and the AfCFTA.

1.6 Limitations of research

This research is limited to trade disputes and providing non-state entities and individuals with access to adjudicative bodies under the RECs and the AfCFTA. There are eight recognized RECs in Africa under the AfCFTA. This dissertation cannot thoroughly discuss all of them and will be limited to discussing the EAC, ECOWAS, COMESA and relevant aspects of *locus standi* provisions that used to be in the SADC. This research is limited to these specific RECs because they have provisions on the *locus standi* of private parties within their respective treaties.

1.7 Research methodology

This study will draw on a variety of sources to provide essential information on international trade law and dispute resolution. It will rely on primary and secondary data sources. International, continental, and regional treaties that regulate international trade will be occasionally referenced throughout this research. Legal textbooks, theses, and dissertations of various academics and legal specialists in the subject of international trade and dispute

resolution will be used in this study. Journals, texts, newspaper articles, reports, blogs, and other internet sources will be used as secondary sources. Articles from a wide range of national and international legal publications will be used as resource materials and papers presented at conferences may also be used. Sabinet Legal, LexisNexis, HeinOnline, Westlaw and Jutastat will be used as the main online databases, while the World Wide Web will be used to acquire any other additional information that is pertinent to this research where the Regional Economic Communities' websites are not up to date.

1.8 Chapter Outline

Chapter 1 is a brief historical account of the development of international trade and the reasoning behind the creation of African Regional Economic Communities and the African Continental Free Trade Area.

Chapter 2 outlines the role that non-state entities and individuals play in international trade. It analyses whether private parties can be classified as subjects of international law and assesses why awarding them *locus standi* to resolve trade disputes before international bodies has been such a contentious issue around the world, despite them being the drivers of trade.

Chapter 3 zones into the position in Africa, followed under the AfCFTA and some of the RECs and critically analyses to what extent non-state entities and individuals can resolve trade disputes through the regional dispute settlement bodies. It will delineate the stark differences in legislative provisions and evaluate the notion of direct access against the exhaustion of local remedies requirement which is a condition that limits the *locus standi* of non-state entities and individuals under some RECs. Thereafter, it will also assess the implications of no access on private parties. Furthermore, it will also briefly discuss if there is a relationship between international trade and human rights and the factors affecting the use of the REC courts by private parties, if any.

Chapter 4 analyses the position of the EU of awarding conditional *locus standi* to non-state entities and individuals to access the European Court of Justice. It also assesses what lessons the AfCFTA can learn from the EU in granting *locus standi*.

Chapter 5 Recommendations and conclusion.

CHAPTER 2

Private parties and international trade bodies

2.1 Introduction

Private parties are responsible for the majority of trade that happens around the world and due to the multiplicity of disputes that are likely to arise, these private parties are in need of being awarded legal standing before international courts and tribunals.[58] This need arises from the drastic increase in globalisation which has highlighted that private parties are the primary actors in international trade, as they are directly and indirectly affected by the trade rules and agreements that their states have ratified.[59] In international law, states are regarded as the main parties to international agreements, who acquire rights and duties from those agreements and have *locus standi* to institute proceedings before international courts and tribunals.[60] However, private parties are seldom accorded the same rights as states and are unable to bring matters before international courts or tribunals directly.

This chapter explores what role private parties play in international trade and evaluates the direct and indirect effects of international trade laws on them. Following this, it gives a brief account of private parties as subjects of international law and assesses whether they could be awarded *locus standi* based on being subjects of international law. Thereafter, the chapter will assess why it is important to award *locus standi* to private parties to bring disputes against states before international courts and tribunals. Lastly, an analysis on the treatment of private parties in international law will be conducted to determine to what extent efforts have been made to provide private parties with *locus standi* to resolve trade disputes before international adjudicative bodies.

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58 FO Vicuna *International Dispute Settlement in an Evolving Global Society* (2004)29; International Trade Centre 'The Private Sector: Important Partners in Aid for Trade' issue 4 2009 The Quarterly Magazine of the International Trade Centre; Obonje (n 31 above) 315.

59 S Charnovitz 'Economic and Social Actors in the World Trade Organization' (2001) 7 2 *Journal of International & Comparative Law* 261.

60 Erasmus (n 32 above); Vicuna (n above)29; Charnovitz (n 59 above) 261.

2.2 The role of private parties in international trade

The private sector comprises of multiple sectors, like agriculture, fisheries and aquaculture, mining, manufacturing, amongst other things, that sustain the economy of each state which are run, owned, and managed by private parties. All these sectors form part and parcel of the international trade arena due to the import and export of goods and services driving these sectors. The state facilitates international trading more than it trades, by adhering to international rules or creating and implementing its own rules, that create a conducive environment for trade to take place.

The proper functioning of international trade depends upon each states' government and its ability to interact and engage with the private sector.[61] The state needs to ensure that when it creates rules or signs treaties, it does not create a bad business environment for its traders as this may have a considerable impact on that state's economy. For example, after Vietnam experienced a decline in its fisheries sector between 1976 and 1992, their government developed a strategy that included public and private sector involvement, which then assisted them with acquiring technical and financial support and thereby helped Vietnam increase its fisheries and agricultural exports.[62] The Vietnam example shows how a states' engagement with the private sector in trade can benefit the state as it enables a collaborative business environment that can increase economic growth.[63]

Private parties are the main actors in international trade and an essential component that promote economic integration.[64] Liberal theorists have put forward suggestions that indicate how individuals at times influence state choices and that the actions of these individuals can control the extent to which a particular state 'becomes actively involved in economic integration.[65] In addition, the private sector also plays a role in international trade by being involved in trade facilitation and implementation through providing unique skill sets and

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61 International Trade Centre 'The Private Sector: Important Partners in Aid for Trade' Issue 4 2009 *The Quarterly Magazine of the International Trade Centre*.

62 International Trade Centre 'Case Study: Vietnam's Fisheries Exports to the EC' Issue 4 2009 *The Quarterly Magazine of the International Trade Centre*.

63 International Trade Centre (n 62 above).

64 Oppong (n 56 above) 143; World Trade Organization 'Introduction to the WTO Dispute Settlement System: 1.4 Participants in the dispute settlement system' (undated) https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm (accessed 2021-09-09).

65 Oppong (n 56 above)143.

expertise to assist governments to 'design and implement trade facilitation reform.'[66] According to the Global Alliance for Trade Facilitation, trade facilitation in itself can yield considerable benefits for both the state and the private sector, as it can enhance border administration and communications infrastructure, amongst other things. It is only through the cooperation of both parties that these positive results can be realised.[67] This deduction proves that collaborative efforts between the private sector and the state have the potential to enhance trade in general.[68]

Despite the vital role that private parties play in international trade, there is no direct link between the decision-making process at the WTO and the interests of private parties. The WTO directly regulates states as only states can be members of this international organisation, despite most traders being private parties.[69] Consequentially, private parties are seldom consulted or involved in the rule or decision-making process of these various trade agreements. Rules and regulations play an important role in the functioning of a private parties' business, and any sudden changes or amendments to those rules and regulations can drastically affect the outputs of the businesses of these private parties.

2.3 The effects of international trade rules and regulations on private parties

The WTO is the main international trade organisation that creates rules and regulations that give states rights and obligations within the international trade arena. However, the ultimate recipients who must adhere with these rules are the states and private parties who trade.[70] As a result, a states' action of signing and ratifying an international trade agreement can directly impact the citizens of that state who participate in trading. Private parties are thus bound to these treaties without, in most cases, participating in them. Since the WTO is the main international trade organisation made up of multiple WTO Agreements, this section will solely focus on the effects of those WTO Agreements on private parties.

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66 Global Alliance for Trade Facilitation 'Engaging the Private Sector in Trade Facilitation Reform' (April 2020) Paper LL-01 4.

67 Global Alliance for Trade Facilitation (n 66 above)4.

68 A Hudson 'The role of the private sector in advancing trade facilitation and modernisation' (21-08-2018) *Wolters Kluwer*.

69 G Messenger 'The public-private distinction at the World Trade Organization: Fundamental challenges to determining the meaning of "public body"' (2017) 15 1 *International Journal of Constitutional Law* 61.

70 Ruotolo GM in 'Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, Michelle Q. Zang, (eds.) The Legitimacy of International Trade Courts and Tribunals' in Bungenberg M, Krajewski M, Tams CJ, Terhechte JP and Ziegler AR (eds) *European Yearbook of International Economic Law 2019* (2020) 453.

It is undeniable that the WTO connects with private parties in so many ways despite private parties not being actors that sign and ratify these WTO Agreements. The WTO can affect both the substantive and procedural disciplines of each states' trading system through the rules it creates.[71] An example of how it affects a substantive discipline is when a WTO rule eliminating specific quotas is introduced. This rule can directly affect the 'structure of production and employment in a specific state, which can directly affect the individuals of that state.[72] Another example is if a trade rule is introduced on antidumping today, each trader whose goods fall under the category of the supposed goods being dumped would need to rethink their pricing strategy and accept the consequences that such a rule may have on their business and its existence.

The WTO can also affect individuals through the procedural disciplines that apply to each of its member states.[73] In some instances, certain rights may vest in the state, and it is up to the state to elect to distribute those rights to private parties. In addition, the state may elect to represent a private party through diplomatic powers.[74] This election by the state can be problematic because if the procedural aspects are dealt with at the choice of the state, private parties are left stranded when the state decides not to take up a private parties' matter against another state.

The connection between the WTO and private parties can be direct or indirect.[75] There are WTO Agreements that directly award private parties with rights that enhance these parties' economic and social activities. Under the Agreement Trade-Related Aspects of Intellectual Property (TRIPS), states that are a party to the agreement have an obligation to award nationals from other states who are also a party to the treaty with rights when it comes to copyrights, patents, and trademarks, amongst other things.[76] This provision safeguards the intellectual property of private parties at an international level which directly serves the interests of the creator of that intellectual property as it has a positive effect of protecting their creation.

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71 Charnovitz (n 59 above) 259.
72 Charnovitz (n 59 above) 259.
73 Charnovitz (n 59 above) 259.
74 Giorgetti (n 37 above) 1089.
75 Charnovitz (n 59 above) 260.
76 Article 1(3) of the TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Charnovitz (n 59 above) 260.

Despite having these rights directly conferred onto private parties, those rights are not 'directly enforceable rights' in international courts and tribunals due to private parties' lack of *locus standi*.[77]

WTO Agreements may indirectly place obligations on private parties.[78] Article 13 of the Agreement on Sanitary and Phytosanitary Measures(SPS) is a peremptory provision that mandates member states to take reasonable measures to ensure that non-government entities within their states comply with the provisions under the SPS Agreement.[79] Therefore, this provision places an obligation on private parties through the state to ensure compliance with the SPS Agreement.[80]

The WTO Agreements, among other things, set out various regulations that deal with public activities that may affect private actors and their ability to 'engage freely in the market'.[81] These international trade regulations have the potential to affect private parties positively or negatively. For instance, if a rule were introduced to lower trade barriers for the importation of chicken in South Africa, the chicken industry within South Africa would suffer because of an increase in competition from other parts of the world and the potential price drop that could take place as a result of the new trade rule. The South African chicken breeders will be drastically affected by such a rule which can also lead to potential job losses as they may be unable to keep up with chicken from Brazil where the Brazilian government may be subsidising their chicken breeders, thereby allowing them to export and sell at a cheaper rate. Selling in South Africa for the Brazilian chicken breeders due to the rule to lower trade barriers will positively affect the Brazilian breeders as this will be an opportunity for them to expand their chicken market. As a result, it is clear that in as much as rules can be created to lower trade barriers, on the one hand, a careful balance needs to be reached, on the other hand, where the state balances the interests of local businessmen and private parties involved in trading before ratifying a treaty that could potentially have this effect.

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77 Oppong (n 56 above) 33; Vicuna (n above) 29.
78 Charnovitz (n 59 above) 261.
79 Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1867 U.N.T.S 493 [hereinafter SPS Agreement].
80 A similar indirect obligation is also placed on private parties in the Agreement on Technical Barriers to Trade. Article 3(1) of the Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1868 U.N.T.S 120; Charnovitz (n 59 above) 260.
81 Messenger (n 69 above) 60.

As established above, private parties can acquire rights and obligations from WTO Agreements, but a problem that arises which negatively affects private parties is the lack of a principle in international law to place an obligation on states to allows private parties to enforce treaty provisions in national courts.[82] WTO provisions also indirectly protect private parties by providing rights to trade, due process in administrative proceedings and access to national courts. However, the WTO avoids protecting private party transactions or interests against states, as this does not fall within its purpose.[83] As a result, the domestic courts are left with the discretion to choose whether those treaty provisions can be used to substantiate an argument to enforce a particular provision during a dispute. This discretion is a major obstacle to justice because in cases where the courts do not recognise those treaty provisions, the private parties' case against the state may fail.

Although private parties play an important role in international trade and are affected directly or indirectly by the various international trade laws that their states ratify, private parties do not readily have access to international courts and tribunals to resolve their trade disputes. Part V of TRIPS, for example, does not allow private parties to directly institute actions against another state, despite TRIPS awarding them rights.[84] Instead, it refers explicitly to members(states) as the actors capable of initiating disputes.[85] In order to initiate proceedings, private parties need to have *locus standi,* and the general trend in international law was that only subjects of international law could be awarded this standing. The following section will now discuss private parties' position as subjects in international law and the extent to which international courts and tribunals have awarded private parties *locus standi*.

2.4 Private parties as subjects of international law

Private parties are usually not referred to as subjects of international law, even though no general rule explicitly ousts their capabilities of falling into the category of subjects of international law.[86]

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82 Oppong (n 56 above) 43.
83 Zekos (n 36 above) 449.
84 Articles 63 and 64 read with Article 1(3) of the TRIPS Agreement.
85 Articles 63 and 64 of the TRIPS Agreement.
86 J Crawford *Brownlie's Principles of Public International Law* 9ed (2019) 111; Clapman A 'The Role of the Individual in International Law' (2010) 21 1 *European Journal of International Law* 26.

Historically, international law was created for states as the sole subjects, who co-existed as sovereign states. Individuals were seen as subjects to their state and its domestic laws.[87] At the beginning of the 19th century, states still enjoyed the sole and exclusive role of being international law subjects.[88] According to Martin Dixon, to be a subject of international law, either a body or an entity had to have the ability to acquire and exercise the rights and duties afforded to them under international law. He argued that international legal persons were the only ones who could make and enter into international agreements, be bound to duties and obligations stemming from those international agreements and bring disputes before international adjudicative bodies.[89] A thorough analysis of Dixon's view on what a subject of international law is, shows that private parties could not be capable of being classified as subjects of international law. Private parties were 'objects of regulation', and their protection as individuals stemmed from inter-state obligations and not from them being right holders.[90]

Crawford called Dixon's view conventional, but he criticised it as being circular. He postulated that even though a legal person was an entity that could possess rights and duties and who could institute claims under customary law, the entity in question could still be referred to as a legal person even if they could not institute proceedings.[91] However, despite his argument, Crawford also highlighted the 'primacy of states' as the main subjects in the international law arena.[92]

Although, Dixon and Crawford place states at centre stage, the law has evolved throughout the years. Despite not having an international legal personality, non-state entities also began to enter into international agreements, even though these were limited to concessional agreements or contracts with a particular state.[93] This development meant that, like states, non-state entities were now also parties to international agreements, but the law of treaties did not govern those

87 Giorgetti (n 37 above) 1087.
88 K Parlett *The Individual in the International Legal System: Continuity and Change in International Law* 1 ed (2011) 353; Oppong (n above) 51; Giorgetti (n 37 above) 1088.
89 CM Bailliet 'Subjects of International Law' https://www.uio.no/studier/emner/jus/jus/JUS5540/h14/undervisningsmateriale/subjects-of-international-law.pdf (accessed 20 August 2021)3-4.
90 K Parlett 'The Individual and Structural Change in the International Legal System' (2012) 1 2 *Cambridge Journal of International and Comparative Law* 66.
91 Crawford (n 86 above) 105.
92 Crawford (n 86 above) 105.
93 Crawford (n 86 above) 111-112.

agreements that included non-state entities, and as a result, these entities could not enforce those agreements through international courts and tribunals because they lacked *locus standi*.[94]

Post 1920s, non-state entities could now acquire and exercise rights, powers, and duties provided under international law, meaning states were no longer the only subjects.[95] Initially, the Permanent Court of International Justice (PCIJ) ruled that international agreements did not necessarily create rights and obligations that could be directly conferred onto private parties unless the state parties to that treaty sought to provide those rights.[96] This allowance by the PCIJ did not necessarily make private parties subjects of international law.[97] However, with the development in international law and increasing recognition of private parties as subjects, post-2000, it was accepted by the International Court of Justice(ICJ) that legal personality could also be conferred on to private parties by states through a treaty in international law.[98] This acceptance was confirmation that the acquisition of rights and obligations by private parties in international law makes them subjects of international law.[99] However, private parties' rights and obligations are limited compared to states, which have full rights and obligations in international law.[100] As a result, the term 'subjects' has been heavily criticised as being 'meaningless' and unhelpful' because being a subject does not entitle that subject to the exact same rights and obligations that other subjects have or to have *locus standi* before international adjudicative bodies.[101]

Despite private parties being regarded by various scholars as subjects of international law, this is not a prerequisite that confers on them *locus standi* to resolve disputes before international adjudicative bodies. Throughout the discussions above, the term *locus standi* has been

94 Crawford (n 86 above) 111-112.
95 Parlett (n 88 above) 353; Vicuna (n 58 above) 29.
96 Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion, (1928) PCIJ Series B no 15, ICGJ 282 (PCIJ 1928) 17; Giorgetti (n 37 above) 1093; Parlett (n 88 above) 360.
97 Parlett (n 88 above) 359.
98 La Grand (*Germany v United States of* America),Judgment, ICJ Reports 2001, para 77; Parlett (n 90 above) 27; Crawford (n above) 112.
99 Parlett (n 90 above) 69; Giorgetti (n 37 above) 1092; N Gal-Or 'Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines' Paper prepared for the 1997 European Community Studies Association Conference 3,4.
100 Parlett (n 90 above) 60; Giorgetti (n 37 above) 1089; Parlett (n 88 above) 353,354.
101 Judge Trinidade in a concurring opinion expressed the importance of awarding private parties with rights and that denying individuals to be classified as subjects under international was a rigid position that should be changed. Crawford (n 86 above) 111.

mentioned as something private parties lack at an international law level. The ensuing section will now discuss the term in detail as it relates to private parties.

2.5 The *locus standi* of private parties before international trade adjudicative bodies

Locus standi is the basis upon which a party has the right to bring an action or appear before the courts. It arguably arises from one subject of international law being owed an obligation by another subject, which may be brought before the courts for a breach of an obligation that they owe to the other subject.[102]

2.5.1 International Court of Justice

The ICJ is an international adjudicative body with general jurisdiction to preside over all kinds of disputes, including those relating to trade.[103] States can elect to grant the ICJ compulsory jurisdiction over disputes concerning that state. However, in practice, most states have not empowered it with compulsory jurisdiction because they argue, amongst other things, that they are unwilling to do so and insinuate that the court lacks expertise in some fields of law.[104] Despite it having general jurisdiction, it is rarely utilised as a court to resolve trade disputes.[105] In addition, it does not award *locus standi* to individuals and non-state entities to bring disputes before it.[106] Article 34 of the Statute of the ICJ makes explicit reference to states.[107]

2.5.2 World Trade Organization Dispute Settlement Body

The GATT is the predecessor of the WTO, and it acted as a provisional agreement and organisation that regulated trade between 1948 and 1994.[108] The GATT specifically regulated trade in goods and did not contain a provision that gave private parties *locus standi* to approach any adjudicative body as there was no international trade organisation or a specialised trade

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[102] D Azaria 'The European Union's Contribution to the law on standing and jurisdiction in International Dispute Settlement' in M Cremona, A Thies and RA Wessel (eds) *The European Union and International Dispute Settlement* 56.

[103] EU Petersmann 'Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in *International Economic Law* 301.

[104] Petersmann (n 103 above) 301.

[105] Petersmann (n 103 above) 301.

[106] Petersmann (n 103 above) 301.

[107] (18 April 1946) 33 U.N.T.S 993

[108] World Trade Organization 'The GATT years: from Havana to Marrakesh' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 2021-08-03); World Trade Organization 'WTO and GATT- are they the same?' https://www.iatp.org/sites/default/files/WTO_and_GATT_-_are_they_the_same.htm (accessed 2021-08-03).

body that existed at the time.[109] It was only in 1995 that the WTO was set up as an international organisation to liberalise trade under the Marrakesh Agreement and that a specialised trade adjudicative body was set up as the WTO Dispute Settlement Body (DSB).[110] The GATT subsequently became one of the many agreements housed under the WTO. The WTO DSB is a specialised body that resolves international trade disputes, with a Panel and an Appellant Body. Since its inception, only states can bring claims before it.[111] This means that private parties seeking urgent action against non-compliance by their state of a trade rule cannot approach the WTO DSB because they have no *locus standi* to bring claims before it directly.[112]

In cases where private parties have a dispute, they must request their state to act on their behalf, through diplomatic means, by having it sue another state for the violation or non-compliance with a WTO rule.[113] This approach of having a state act on behalf of private parties who are its nationals is echoed in multiple WTO Agreements like the Implementation of Article VI of the GATT, which deals with antidumping. Article 5 (1) of the Agreement on Implementation of Article VI of the GATT mandates governments to initiate proceedings through a written application on behalf of their domestic industry.[114] This illustrates how private parties cannot directly initiate their own proceedings.

There are also problems associated with having a private party ask a state to act on its behalf. Firstly, there is no certainty that their state will institute a proceeding on their behalf. Secondly, potential conflicts may arise between the state itself and a private party from that particular state, where the party may want to institute proceedings against its own state.[115] It can be reasonably concluded that private parties have no access to the WTO DSB, but there is hope that this may change in the future.[116] The WTO DSB promotes state sovereignty as states can

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[109] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 2021-08-03).

[110] World Trade Organization 'What is the World Trade Organization?' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 2021-08-03); J Kane 'World Trade Organization' (2020) https://www.instituteforgovernment.org.uk/explainers/world-trade-organization-wto (accessed 2021-08-02).

[111] Zekos (n 36 above) 448.

[112] Zekos (n 36 above) 448; Del Vecchio A 'International Courts and Tribunals, Standing' (2010) *Max Planck Encyclopedia of International Law* 6.

[113] Charnovitz (n 59 above) 263; FO Vicuna 'Individual and Non-State Entities before International Courts and Tribunals', Paper presented at the International Symposium "The International Dispute Settlement System" 5 *Max Plank Yearbook of United Nations Law* (2001) Kluwer Law International 63.

[114] Article 5(1) of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1868 U.N.T.S 201.

[115] Giorgetti (n 37 above) 1125.

[116] Del Vecchio (n 112 above) 6.

choose what individual or non-state entity cases it wants to represent those parties in. In addition, it means that private parties are therefore limited to using the local remedies provided for in their state in cases where they want to bring a claim against their state for non-compliance with a WTO provision.

In as much as the WTO stipulates the rules that the various WTO member states need to follow, it does not go a step further in requiring governments to let private parties use their domestic courts to enforce the WTO obligations that have been violated.[117] As a result, there is no guarantee and certainty that private parties have at the domestic level that assures them that their international rights will be enforced since they have no *locus standi* at an international level. Petersmann argues that awarding a guarantee to private parties that treaty provisions under the WTO can be applied and enforced by the domestic court is vital and that this has the potential to strengthen trade.[118] Hilf also supports Petersmann view by stating that if domestic courts guaranteed the 'protection of interests and rights of private parties, and it was obligatory on them to do so, it would enhance the WTO system in its entirety.[119]

Zekos argues that private party rights that are specifically related to the WTO provisions should be dealt with under the WTO dispute settlement regime as opposed to national courts.[120] Making private parties dependent on their states to bring claims on their behalf diminishes another avenue through which states could have been held accountable for not complying with their trade agreements.[121] Scholars like Catbagan propose that private parties should be awarded *locus standi* to resolve disputes under the WTO DSB itself, even if it is limited to arbitration.[122] He argues that this would promote greater equality and revive the credibility of the WTO following its failure in the Doha Round to create an effective global trading system that provides developing states with benefits.[123]

Additionally, Charnovitz argues for private parties to be awarded *locus standi*, even if that standing was introduced and implemented on a gradual basis. He firstly suggested that an

[117] Charnovitz (n 59 above) 266.
[118] Charnovitz (n 59 above) 266.
[119] Charnovitz (n 59 above) 266.
[120] Zekos (n 36 above) 450.
[121] Zekos (n 36 above) 448.
[122] Catbagan A 'Rights of Action for Private Non-state actors in the WTO Dispute Settlement System' (2020) 37 2 *Denver Journal of International Law & Policy* 279, 289.
[123] Catbagan (n 122 above) 279, 280.

Optional Protocol that allows private parties to lodge disputes be introduced and that states could choose to ratify it as a sign of goodwill to show commitment to respecting international rules.[124] A move to ratify such a protocol by a state could also boost private party confidence, enhancing the protection of their rights under international law. Secondly, Charnovitz suggested that either an Agreement on Public Participation in National Trade Policymaking be enacted or advisory groups of various private party stakeholders involved in international trading be set up.[125] Furthermore, he suggested that the WTO website have a section where the public could comment on 'pending decisions, declaration and agreements.'[126] This suggestion has the potential solicit private party participation and allow them to react prior to any new decisions or rules coming into force which could enhance cooperation between the WTO as an organisation, states and private parties.

To date, some of Charnovitz' suggestions have manifested in some ways and not necessarily in the way he envisioned. Charnovitz' last suggestion, has somewhat been incorporated into the WTO through the introduction of the WTO forum and trade policy debates, where non state actors make contributions about trade policy making.[127] This illustrates the evolving nature and the gradual approach that the WTO may be taking towards broader participation in trade related matters with not only states but private parties too.

An increase in judgements by international courts for trade violations would be assured if private individuals could launch complaints over violates and lack of compliance to trade rules by states. Private parties would not be subject to the same political pressures as governments.[128] At present states do not usually institute proceedings against one another due to the preservation of international relations. However, if private parties were awarded the *locus standi* to bring claims, the preservation of international relations will not be a deterrent to justice.[129]

[124] Charnovitz (n 59 above) 273.
[125] Charnovitz (n 59 above) 273.
[126] Charnovitz (n 59 above) 274.
[127] World Trade Organization 'What is the role of non-state actors in trade? https://www.wto.org/english/forums_e/debates_e/debate30_e.htm (accessed 2021-09-01).
[128] GT Schuyler 'Power to the People: Allowing private parties to raise claims before the WTO Dispute Resolution System' (1997) 65 5 *Fordham Law Review* 2277.
[129] Schuyler (n 128 above) 2277, 2294.

Private parties are the drivers of global trade today, and illegal or non-compliance with trade policies has the effect of damaging their potential to trade. As a result, it is crucial that there be strict adherence and implementation of trade policies in order for the benefits of trade to be fully realised.[130] Awarding private parties *locus standi* before international courts could advance the WTO's goal of ensuring 'stability and predictability in international trade law,' as they can play a key role through the initiation of disputes to ensure that states are being compliant with all the trade rules that they have ratified.[131] Moreover, awarding *locus standi* would also enhance private party engagement within the trade system and allow them to contribute more towards improving trade rules in general.[132]

2.6 *Locus standi* before institutions created by Regional Trade Agreements

2.6.1 North American Free Trade Agreement

North American Free Trade Agreement (NAFTA), is a free trade agreement that entered into force in 1994.[133] It can be described as a trilateral treaty or a regional agreement between the United States of America, Mexico, and Canada aimed at eliminating trade barriers.[134] NAFTA facilitates trade between these three states by having rules on tariff and non-tariff trade liberalisation, foreign investment and dispute resolution, amongst other things.[135] With specific reference to dispute resolution, it is important to note that NAFTA does not have a permanent court or tribunal to resolve disputes.[136] Instead, NAFTA uses, amongst others, the International Centre for Settlement of Investment Disputes (ICSID), which is an international tribunal capable of assisting with dispute resolution through arbitration between investors and states.[137] ICSID has no jurisdiction to settle disputes between two states and two private parties, but it provides direct access to arbitration for investor-state disputes.[138]

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130 Schuyler (n 128 above) 2277.
131 Charnovitz (n 59 above) 265, 268; Schuyler (n 128 above) 2277.
132 Schuyler (n 128 above) 2294; Charnovitz (n 59 above) 266.
133 United Nations Conference on Trade and Development 'Dispute Settlement – Regional Approaches NAFTA' 2003 UNCTAD/EDM/Misc.232/Add.24 22; MA Villarreal and IF Fergusson 'The North American Free Trade Agreement' Congressional Research Service Report (24 May 2017) 1.
134 Del Vecchio (n 112 above) 13.
135 Villarreal and Fergusson (n 133 above) 5.
136 G Anderson 'The Institutions of NAFTA' (2008) 3 2 *NOTREAMERICA* 20.
137 UNCTAD (n 5 above) 28; Villarreal and Fergusson (n 133 above) 8; Del Vecchio (n 112 above) 13.
138 Del Vecchio (n 112 above) 13.

In respect to private parties, NAFTA awards individuals who are investors the right to enforce their international rights.[139] Chapter 11 of NAFTA was created to protect private investors, and it was the first free trade agreement that permitted investor-state dispute resolution.[140] When investors resort to Chapter 11, they have to resolve the dispute through consultation or negotiation first.[141] If the dispute is not resolved through consultation, the party instituting the dispute may either bring the matter before the NAFTA Trade Commission or request that an arbitral panel be established to resolve that dispute.[142] Claiming that a state party to NAFTA has breached an obligation will not suffice as a reason that allows an investor to resort to the dispute settlement mechanism under Chapter 11.[143] Investors are limited to only using this dispute settlement mechanism when they have suffered some loss from a breach of a Chapter 11 provision.[144]

Other provisions like Chapter 19 and 20 in NAFTA deal with dispute settlement, but these are limited to the member states and not investors.[145] As a result, it can be reasonably concluded that investors, who in some instances are private parties, are permitted to initiate arbitral proceedings against a host member state that is a party to NAFTA only through Chapter 11. NAFTA is a good example where private parties are awarded *locus standi* through a specific treaty provision to bring a dispute before an international tribunal, like ICSID, for investor-state disputes.[146] However, having this mechanism available to investors ousts the possibilities of other private parties who are traders who may have been affected by a breach of a Chapter 11 provision from taking any direct action. Therefore, NAFTA only protects and affords investors with standing and not private parties in general.

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[139] H Mann and K Von Moltke 'Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11' *Background Paper to the International Institute for Sustainable Development National Policy Workshops Mexico City* (undated) 1,5.

[140] Anderson (n 136 above) 22; Villarreal and Fergusson (n 133 above) 29.

[141] UNCTAD (n 5 above) 25.

[142] Villarreal and Fergusson (n 133 above) 8.

[143] UNCTAD (n 5 above) 25.

[144] UNCTAD (n 5 above) 25.

[145] Chapter 19 of NAFTA deals with disputes relating to unfair trade practices. Chapter 20 is a state to state mechanism used to resolve any disputes stemming from the agreement. Villarreal and Fergusson (n above) 29.

[146] Villarreal and Fergusson (n 133 above) 8; Del Vecchio (n 112 above) 13.

2.6.2 European Court of Justice

The EU has the General Court (GC) and the Court of Justice of the European Union (CJ) which are capable of resolving trade disputes, amongst other things. The EU decided to have the Court of Justice of the European Union, as a single body that was made up of the two courts, in order to try to ascertain uniform application of EU law.[147] The GC has jurisdiction to deal with international trade matters, amongst other things and can also make rulings on actions for annulment brought by private parties in the first instance.[148] The CJ can act as the court of appeal in cases where parties are not satisfied with either GC decisions and it can entertain requests for preliminary ruling from national courts.[149] These courts are independent courts that are empowered to resolve disputes and uphold the EU's rule of law.[150] They apply principles of effective judicial protection in their rulings to ensure that people's rights are protected.[151] Article 263 of the Treaty on the Functioning of the European Union(TFEU) gives locus standi to privileged applicants, semi-privileged applicants and non-privileged applicants to bring actions of annulment.[152] Non-privileged applicants, like natural persons and companies are awarded conditional *locus standi*, as they have to meet a few conditions in order to bring a dispute.[153] These conditions and other EU provisions relating to private parties will be dealt with in more detail in Chapter 4.

Two important inferences can be drawn from the above assessment of international adjudicative bodies that can preside over trade disputes. Firstly, that being awarded *locus standi* at an international level has no uniform application. Secondly, it is only through statutes that

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147 R Manko 'Annulment of an EU Act' (November 2019) European Parliamentary Research Service PE 642.282 4 2.

148 The jurisdiction of the General Court is set out in Article 256(1) of the Treaty on the Functioning of the European Union (TFEU) OJ L 326/47-326/390 (26 October 2012); C Sjostrand 'Effective Judicial Protection of Individuals' Masters Thesis, Lund University 2011 18; F Picod 'Action for Annulment: Court of Justice of the European Union' (2019) *Max Planc Encyclopedias of International Law* 1; EU Monitor 'Court of Justice of the European Union' https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vg9obtulslrn (accessed 2021-09-19); Manko (n 147 above) 5.

149 https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vg9obtulslrn (accessed 2021-09-19).

150 E Biernat 'The locus standi of private applicants under Article 230(4) EV and the principle of judicial protection in the European Community' 2003 Jean Monnet Working Paper 12/03 3.

151 Biernat (n 150 above) 21.

152 A Cuyvers 'Judicial Protection under EU Law: Direct Actions' in E Ugirashebuja, JE Ruhangisa, T Ottervanger and A Cuyvers *East African Community Law* (2017) 255, 256; C Adam, MW Bauer, M Hartlapp and E Mathieu in M Egan, N Nugent and WE Paterson(eds) *Taking the EU to Court Annulment Proceedings and Multilevel Judicial Conflict* (2020) 54, 61.

153 European Union Agency for Fundamental Rights and Council for Europe *Handbook on European Law relating to access to justice* (EU Publications: Luxembourg 2016)19.

govern these international courts and not international law that private parties are at times granted *locus standi* to resolve their trade disputes in international courts and tribunals as shown through an analysis of NAFTA and the EU.

2.7 Conclusion

Private parties play a vital role in international trade and being bearers of rights and duties in international law to a large extent warrants them the right to justice through the use of international courts and tribunals. They have also acquired the status of being classified as subjects of international law and as such should be awarded standing like states who are also subjects of international law. Although the issue of states being the members to treaties and not private parties is true, awarding private parties standing has more benefits for trade in ensuring state compliance and broader public participation in trade matters. Thus, it is important that international agreements and international courts permit private parties to have *locus standi* to resolve trade disputes against states.

The position in international law regarding the *locus standi* of private parties has been discussed in detail above. However, it is important to assess whether from a regional perspective, trade agreements and regional courts treat private parties the same way. The ensuing section will look at the position of private parties in Africa under African trade agreements and assess whether private parties are awarded access to bring matters before African dispute settlement bodies.

CHAPTER 3

Locus standi of private parties with trade disputes under the AfCFTA and the RECs

3.1 Introduction

Regional and economic integration has been actively pursued by African states. The creation of African trade agreements like the AfCFTA and RECs are all steps being taken to improve regional and economic integration in Africa. Not only have trade agreements established rules and regulations between their respective member states, but they have also created dispute settlement bodies to resolve any disputes that may arise.

The beauty of the African jurisprudence in this regard is that some of the REC agreements have made provision for private parties and subsequently awarded them *locus standi* before them to deal with issues relating to a breach or violation by a member state of their respective agreements. However, the recently enacted AfCFTA does not follow the same path and specifically limits *locus standi* to only states, just like the international adjudicative bodies in Chapter 2.

This chapter seeks to interrogate how dispute settlement regimes under the AfCFTA and some African RECs deal with private parties and their disputes. It will highlight some of the differences between the RECs themselves in relation to what type of access they offer. Thereafter, it will critically assess what type of cases have been brought before the REC courts and investigate whether there are any factors affecting the use of the REC courts that provide access.

3.2 Various African Trade Dispute Settlement Regimes and their legislative provisions on private parties

3.2.1 The AfCFTA DSB

When the AfCFTA was launched on 21 March 2018, various African state parties adopted and signed the Protocol on Rules and Procedures on the Settlement of Disputes in Kigali, Rwanda.[154]

[154] G Erasmus 'Dispute Settlement in the African Continental Free Trade Area' (11 July 2019) *TRALAC*.

The AfCFTA aims to boost intra-African trade in goods and services by creating a single market of goods and services to deepen economic integration.[155] The wording in the AfCFTA repeatedly refers to state parties only, and it places an obligation on states to progressively take steps towards fulfilling and realising the AfCFTA objectives.[156] Therefore, the AfCFTA can be interpreted as a trade agreement that awards state parties rights and obligations in a continental free trade area.

The AfCFTA DSB mirrors that of the WTO set-up.[157] One of the rights that state parties have is bringing matters before the AfCFTA DSB to resolve their trade disputes when the particular dispute cannot be resolved through consultation.[158] The AfCFTA DSB, which is made up of state parties, should convene a meeting within 15 days after a request to establish a Panel has been made by a particular state party to establish a Dispute Settlement Panel.[159] It is important to note that the Panel's function is mainly to assist the AfCFTA DSB through its findings after conducting an objective assessment of the matter put before it.[160] The Panel then reports back to the AfCFTA DSB, who will decide on the dispute and give a final and binding decision.[161] However, before the AfCFTA DSB makes a decision, state parties are given an opportunity to consider the Panel's reports and notify the AfCFTA DSB of their intention to appeal before it makes a final decision.[162] At this point, the AfCFTA DSB will establish an Appellate Body(AB) who will review the dispute and only after the appeal process is concluded will the AfCFTA DSB decision be finalised.[163] The AfCFTA DSB may elect to accept the AB report unconditionally or decide not to do so through consensus.[164]

A dispute is defined as a disagreement on the interpretation or application of the AfCFTA between state parties.[165] In addition, the drafters made it clear that only state parties could be

[155] Article 3 (a) of the AfCFTA.
[156] Articles 1(v), 3(c),(f) and 4 of the AfCFTA.
[157] Erasmus (n 154 above).
[158] Article 20(1) of AfCFTA; Article 9 (1) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[159] Articles 5(2), 9(1)&(4) read with Article 6(2) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[160] Article 12 (1)&(2) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[161] Article 6 (5) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[162] Article 19 of the Protocol on Rules and Procedures on the Settlement of Disputes.
[163] Article 19(4) read with Article 5 (3)(a) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[164] Article 22 (9) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[165] Article 1(e) of the Protocol on Rules and Procedures on the Settlement of Disputes.

referred to as a 'party to the dispute or proceeding.'[166] This definition and the reference to who may be a party to a dispute excludes private parties from bringing a dispute before the AfCFTA DSB. The scope of application for the AfCFTA DSB is, therefore, exclusively limited to state parties.[167]

Due to the above exclusion of private parties from the AfCFTA, the question that needs to be addressed is where will private parties trading within the AfCFTA go to settle a matter when a dispute arises. Like the WTO, the private parties have to request their state to act on their behalf.[168] However, requesting a state to act on a private parties' behalf is not a legal entitlement.[169] As stated in Chapter 2, multiple issues surround this approach, as a private party has no guarantee that their state will act on its behalf. Without an express provision in the AfCFTA that allows private parties to have *locus standi*, it becomes important to assess whether other dispute settlement bodies in Africa can resolve international trade disputes covered under particular trade agreements and award private parties with *locus standi*. The RECs do not have authority to preside over private party matters relating to the interpretation and application of AfCFTA since there is no express provision giving this authority to the RECs within the AfCFTA.

Since private parties have no *locus standi* under the AfCFTA, it is submitted that the answer to resolving this issue may lie in analysing whether the same provisions that the private party is alleging to have been violated under the AfCFTA are not protected under a specific REC agreement to which that party belongs. The AfCFTA and the existing RECs are meant to complement one another.[170] For example, the AfCFTA has provisions on export taxes and tariffs on manufactured and agricultural goods, which are similarly regulated under almost all the REC agreements.[171] As such a private party may bring a dispute relating to those provisions which are almost identical to the AfCFTA provisions, under the REC Courts, relating to the violation of a REC regulation as opposed to an AfCFTA provision. This will award the private party a higher chance of resolving the dispute because they are awarded *locus standi* under

[166] Article 1(h) of the Protocol on Rules and Procedures on the Settlement of Disputes.
[167] Article 3 of the Protocol on Rules and Procedures on the Settlement of Disputes.
[168] Erasmus (n 154 above).
[169] The state has discretion to choose whether or not to award diplomatic protection to their nationals and represent them against other states for any disputes that a private party wants to resolve. Erasmus (n 54 above)1.
[170] International Bank for Reconstruction and Development 'The African Continental free Trade Area-Economic and Distributional effects' (2020) The World Bank Group 1.
[171] International Bank for Reconstruction and Development (n 170 above) 2.

some REC courts instead of the AfCFTA DSB, where they have no *locus standi*. However, it is important also to note that this suggestion does not provide an absolute answer as some AfCFTA provisions are not provided for or regulated in the REC agreements.[172] In such instances, the private parties will only have the option of either approaching their state to act on their before or to approach their local courts and not regional courts to deal with the dispute. This is mainly because the REC courts are limited to dealing with disputes concerning the interpretation, application, or violation of their own specific REC agreements and not of other RECs, as will be shown below. The following section will look at these REC Courts in detail and assess their legislative provisions relating to awarding private parties with *locus standi*.

3.2.2 The REC courts

a. COMESA Court

The COMESA was initially established as a Preferential Trade Area for Eastern and Southern Africa in 1981 between member states and then in 1994 it was established as COMESA.[173] The Headquarters for COMESA are currently located in Lusaka, Zambia. COMESA set up the COMESA Court of Justice (COMESA court) as its judicial organ, and it started operating in 1998 under the Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty).[174] The COMESA Court was set up as a regional trade court.[175] The COMESA court is permanently seated in Khartoum, Sudan and was created to give effect to Article 7 of the COMESA Treaty.[176] The court is currently split into two, with the Court of First Instance as the lower court and the higher court as the Appellate Division.[177] The lower

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[172] For example, the AfCFTA has provision regulating Competition policy and ECOWAS does not. This means a private party with a competition policy dispute cannot approach the ECOWAS Court for relief of a competition policy matter because it has no jurisdiction or provisions on that aspect within the ECOWAS treaty unless there is a certain provision within the treaty that extends the jurisdiction to include such matters. International Bank for Reconstruction and Development (n 170 above) 2.

[173] COMESA 'COMESA in brief ' (September 2018) https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 2021-09-20)1.

[174] Oppong (n 56 above) 120; https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 2021-09-20)11.

[175] JT Gathii 'The COMESA Court of Justice' in R Howse, H Ruiz-Fabri, G Ulfstein and MQ Zang (eds) *The Legitimacy of International Trade Courts and Tribunals* 2018 314.

[176] COMESA 'COMESA Court moves to digital Justice System' (30 January 2019) https://www.comesa.int/comesa-court-moves-to-digital-justice-system/ (accessed 2021-09-13); W Osemo 'A simple guide to COMESA Court of Justice (7 May 2019) https://www.comesa.int/a-simple-guide-to-the-comesa-court-of-justice/ (accessed 2021-09-13); COMESA 'Profile of the Court' https://comesacourt.org/profile-2/ (accessed 2021-09-20).

[177] https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 2021-09-20)11.

court has presently has seven judges, whilst the higher court has five.[178] The COMESA court can arbitrate and adjudicate matters brought before it.[179]

Article 19 of the COMESA Treaty sets out the jurisdiction of the COMESA court to include the interpretation and application of the COMESA treaty, specifically.[180] The COMESA court is limited to presiding over matters that the COMESA Treaty regulates. The COMESA court also has jurisdiction over matters with arbitral clauses that give it jurisdiction, over matters with special agreements and matters concerning COMESA employees, amongst other things.[181]

Article 26 of the COMESA Treaty provides private parties to access the COMESA court if they are a resident in a member state.[182] In addition to this, the private parties must also exhaust local remedies first before bringing a matter to before the COMESA court.[183]

The COMESA court awards private parties *locus standi* in practice. In *Polytol Paints v the Republic of Mauritius*, a private party brought a case against Mauritius for explicitly imposing a customs duty on products from Egypt only which were 'same or like products' similar to those from other member states.[184] Polytol argued that this customs duty made Mauritius breach its duty under the COMESA treaty which pushed for the elimination of customs duties.[185] Polytol failed when it instituted proceedings in the local Mauritian courts, and then it approached the COMESA court.[186] The COMESA court assessed multiple issues in coming to its decision. Amongst other things, the COMESA court assessed whether there was a breach of the COMESA Treaty, and it found that there had been a breach through the imposition of the customs duty.[187]

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[178] Article 20(1) of the Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty) ; https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 2021-09-20)11.
[179] https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 2021-09-20)11.
[180] COMESA Treaty.
[181] Gathii (n 175 above) 319.
[182] COMESA Treaty; Gathii (n 175 above) 319.
[183] Gathii (n 175 above) 319.
[184] COMESA Court Ref 1 of 2012 (31 August 2013) paras 4 & 6.
[185] *Polytol Paints v the Republic of Mauritius* para 6.
[186] *Polytol Paints v the Republic of Mauritius* para 4.
[187] *Polytol Paints v the Republic of Mauritius* paras 13 & 14.

The COMESA court also looked at whether individuals who belong to COMESA member states are holders of enforceable rights under the COMESA Treaty, and it held that they are holders as long as they establish that they have been prejudiced by an act of a COMESA member state that breaches the COMESA treaty.[188] The COMESA court found in favour of Polytol and ruled that Polytol was entitled to a partial refund of the duties they had paid due to Mauritian tariff duty.[189] The *Polytol* case is a good example of how private parties who are residents in COMESA can bring actions against COMESA member states for breaches of treaty obligations and win. In addition, this case shows the ability of regional courts to be instruments of justice for private parties when it comes to trade disputes.

b. EAC Court

The Treaty for the Establishment of the Eastern African Community (EAC Treaty) was signed by the member states of the EAC in 1999 and came into force in 2000.[190] The EAC set up the EAC court which came into force in 2001 and is currently situated in Arusha, Tanzania.[191] Like COMESA, the EAC also has a Court of First Instance and an Appellate Division, with the former having not more than ten judges appointed and not more than five judges for the latter.[192]

The jurisdiction of the EAC court includes matters relating to the interpretation and application of the EAC Treaty.[193] It also gives the EAC court other original, appellate, human rights and other jurisdiction,' as directed by the EAC Council and implies through its wording that the extended jurisdiction will be regulated in a future Protocol.[194]

Article 30 of the EAC Treaty deals with references by private parties to the EAC court. It expressly states that any private party who resides in one of the EAC 'partner' states may approach the EAC court to institute proceedings against unlawful actions or provisions that infringe the EAC Treaty.[195] This means that the EAC court is not only open to private parties in member states, like COMESA, but it is also open to private parties from states that are

[188] *Polytol Paints v the Republic of Mauritius* para 19.
[189] *Polytol Paints v the Republic of Mauritius* para 26.
[190] EAC 'History of the EAC' https://www.eac.int/eac-history (accessed 2021-09-20).
[191] Oppong (n 56 above) 120.
[192] Oppong (n 56 above) 120.
[193] Article 27(1) of the Treaty for the Establishment of the East African Community, 1999 (EAC Treaty).
[194] Article 27(2) of the EAC Treaty.
[195] Article 30(1) of the EAC Treaty.

partners to the EAC.[196] The private party is limited to bringing the matter within two months of the rule or decision in question being created or since they acquired knowledge of this particular rule or decision that the private party is against.[197]

c. ECOWAS Court

In 1975, the ECOWAS created as a body made up of member states that focused on regional and economic integration of West Africa states.[198] The aim of the ECOWAS Treaty was to promote development and collaboration amongst the member states to enhance the economic activities in all sectors.[199] The ECOWAS treaty was revised in 1993.[200]

Article 9 of the Protocol on the Community Court of Justice (ECOWAS Community Court Protocol) sets out the competence of the court, which sets out what matters the ECOWAS court will have jurisdiction over.[201] It set out how the ECOWAS court will have jurisdiction over matters relating to the interpretation and application of the ECOWAS Treaty.[202] It addition, the court was given authority to deal with disputes between member states.[203] As a result, the ECOWAS Court had no jurisdiction to deal with matters instituted by private parties directly, as it was only competent to deal with state matters and it could only preside over a matter if a member state brought the claim on behalf of a private party.[204]

Despite the provision limiting the ECOWAS court's jurisdiction to member states, an individual did try to bring a matter before the ECOWAS court. This was evidenced by the *Afolabi Olajide v the Federal Republic of Nigeria* case, which was a case involving a Nigeran trader who was suing his state for violating, amongst other things, 'the freedom of persons and goods' which were regulated under the ECOWAS Revised Treaty, by closing the Nigeria-Benin border.[205] However, *Afolabi Olajide* lost on the basis that Article 9 of the ECOWAS

196 Sang (n 24 above) 368.
197 Article 30(2) of the EAC Treaty.
198 ES Nwauche 'Enforcing ECOWAS Law in West African National Courts' (2011) 55 2 *Journal of African Law* 182.
199 Nwauche (n 198 above) 182.
200 ECOWAS 'Treaty' https://www.ecowas.int/ecowas-law/treaties/ (accessed 2021-09-20).
201 Protocol on the ECOWAS Community Court of Justice A/P.1/7/91(the ECOWAS Community Court Protocol).
202 Article 9(1) of the ECOWAS Community Court Protocol.
203 Article 9(2) of the ECOWAS Community Court Protocol.
204 Article 9(3) of the ECOWAS Community Court Protocol.
205 ECW/CCJ/APP/p1/03 [2004]; G Ardito 'Reconceptualising ECOWAS priorities: the judicial protection of human rights as a tool to strengthen effective integration?' (11 December 2019) https://www.sipotra.it/wp-

Court Protocol expressly referred to member states, not individuals.[206] As a result of this judgement, Article 10 of the ECOWAS Supplementary Protocol was subsequently introduced in 2005 which had effect of granting *locus standi* to private parties for acts by member States that violate their rights.[207] The ECOWAS Court Protocol has an express provision that grants jurisdiction to the court to deal with human rights violations.[208]

d. SADC Tribunal

The SADC was initially known as the Southern African Development Co-ordination Conference and was established in 1980 by member states in Southern Africa.[209] In 1992, it was transformed to SADC and it was concerned with 'integration of economic development'.[210] A SADC Tribunal model was later introduced through a Protocol and it was based on the European Community (now European Union) model because the funds used to set up the tribunal were from donors from Europe.[211] In addition, it was envisaged that adopting that model would ensure effective judicial protection in Southern Africa.[212] The SADC member states did not access the pros and cons of such a model and although some member states suggested 'arbitration and mediation', the drafters of the Protocol pushed for a tribunal that was similar to the one in the Court of Justice of the European Union. As a result, when the tribunal was established, it provided access to private parties with the condition that they had to exhaust local remedies.[213] In addition, the Protocol also made provision for a preliminary ruling set up.[214] The SADC Tribunal became the first 'supra-national body' in SADC.[215]

content/uploads/2019/12/Reconceptualising-ECOWAS-priorities-the-judicial-protection-of-human-rights-as-a-tool-to-strengthen-effective-integration.pdf (accessed 2021-09-12) 11; Oppong (n 56 above) 138.

206 ECW/CCJ/APP/p1/03 [2004]; Sang (n 24 above) 365.

207 2005; Article 4 amending Article 10 Supplementary Protocol A/SP.1/01/05 which inserted Article 10 in the Protocol pf the ECOWAS Community Court of Justice; Oppong (n 56 above) 131.

208 Article 10(d) Protocol of the ECOWAS Community Court of Justice; Sang (n 24 above) 366; https://www.sipotra.it/wp-content/uploads/2019/12/Reconceptualising-ECOWAS-priorities-the-judicial-protection-of-human-rights-as-a-tool-to-strengthen-effective-integration.pdf (accessed 2021-09-12) 15.

209 SADC 'History and Treaty' https://www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 2021-09-20).

210 https://www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 2021-09-20).

211 KJ Alter, JT Gathii and LR Helfer 'Backlash against international Courts in West, East and Southern Africa: Causes and Consequences' 2016 27 2 *European Journal of International Law* 307; Obonje (n 31 above) 296.

212 Alter *et al* (n 211 above) 307.

213 Alter *et al* (n 211 above) 15.

214 Article 4 of the Protocol on Tribunal in the SADC (SADC Protocol), 2000; Alter *et al* (n above) 15.

215 Obonje (n 31 above) 296.

Although the SADC Tribunal was initially envisaged in 1993 as one of the institutions that was going to be part of the SADC Treaty, it only came into effect on 18 November 2005 and was situated in Namibia's capital city, Windhoek.[216] The Protocol on Tribunal in the SADC(SADC Protocol) was signed by the SADC Summit which is made up of the SADC Heads of state on 7 August 2000.[217] Soon thereafter, it came into force on 14 August 2001.[218] The SADC Protocol set out the basis of its jurisdiction in Article 14, where it set out how it could deal with all disputes that involved the interpretation and application of the SADC Treaty and Protocols, and any agreements whether entered into amongst states or that were made within the community that subjected themselves to being under the SADC Tribunal jurisdiction.[219]

Article 18 of the SADC Protocol is an important provision that needs to be analysed as it specifically relates to private parties.[220] It expressly states how the SADC Tribunal has 'exclusive jurisdiction' in relation to disputes brought by private parties like natural and legal persons, and also competent institutions or community organisations as long as the dispute falls within the range of disputes that the SADC Tribunal has jurisdiction over.[221] This provision provided private parties with the right to approach the SADC Tribunal for any violations that happened within the community. However, Article 15(2) placed pre-conditions on this right of standing before the SADC Tribunal, by mandating private parties either to exhaust local remedies first or to approach the SADC Tribunal only in situations where there was some hinderance within their domestic law that stopped them from resolving the dispute in question.[222]

The SADC Tribunal was regarded as the 'cornerstone of regional integration', but its competence to promote regional integration came into question after the *Mike Campbell v Republic of Zimbabwe* case.[223] The judgement passed by the SADC Tribunal in favour of the Mike Campbell that stated that Zimbabwe breached Article 6(2) of the SADC Treaty, led to the backlash the court suffered which was forcefully exerted by the Zimbabwean

[216] Obonje (n 31 above) 296; Oppong *Legal aspects of economic integration in Africa* (n above) 120.
[217] 2000; A Afadameh-Adeyemi and E Kalula 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' in A Bosl, A du Pisani, G Erasmus, Hartenberg T and R Sandrey *Monitoring Regional Integration in Southern Africa Yearbook* (TRALAC; Stellenbosch, 2010) 12.
[218] Obonje (n 31 above) 297.
[219] Article 14 (a) (b) and (c) of the SADC Protocol.
[220] SADC Protocol.
[221] Article 18 of the SADC Protocol.
[222] SADC Protocol.
[223] Afadameh-Adeyemi and Kalula (n 217 above) 15.

government.[224] Significantly, SADC used to award *locus standi* to private parties to appear before the SADC Tribunal.[225]

As shown in the above descriptions, the provisions laid out in the various REC treaties vary from restrictive to non-restrictive awarding of *locus standi* to private parties. This means that some RECs have conditions that need to be met first before awarding *locus standi*, whilst others do not impose pre-conditions at all. This matter will be discussed below by compartmentalising the different types of access and setting out their differences with reference to case law.

3.3 Analysis of the type of access awarded to private parties under the African dispute settlement bodies

3.3.1 Conditional access

Conditional access is the ability to access the court after fulfilling some requirements first. As stipulated above, COMESA provides private parties with access to the COMESA court. However, there is a requirement that they must first exhaust all the local remedies available through their national laws before approaching the COMESA court.[226] SADC also used to provide for the exhaustion of local remedies before preventing private parties from accessing the SADC Tribunal.

The exhaustion of local remedies requirement is one of the principles of international law, where parties are obligated to use the legal means available nationally before taking up the matter to a regional or continental court or tribunal.[227] The reasoning behind this requirement is to protect state sovereignty in the sense that the state itself should get the first say regarding the matter and that only after a national decision is passed can a party approach a regional court if they are unsatisfied by the decision.

Although the rule is clear that local remedies must first be exhausted, its application in practice has been different from one court to another. On the one hand, the *Republic of Kenya v Coastal Aquaculture Limited* case shows the strict approach adopted by the COMESA court's, to only

[224] Afadameh-Adeyemi and Kalula (n 217 above) 16.
[225] Article 15 of SADC Protocol.
[226] Onaria (n 31 above) 153.
[227] Onaria (n 31 above) 153.

award *locus standi* to private parties after all the local remedies have been exhausted.[228] In this particular case Coastal Aquaculture, a company, had tried to apply to the COMESA court for an injunction hindering the Kenyan government from acquiring land after withdrawing the action from the Kenyan courts before a decision was made.[229] After an analysis of Article 26 of the COMESA Treaty, the COMESA court held that by withdrawing the matter before finality, Coastal Aquaculture had not exhausted all the local remedies and consequently had no *locus standi* to bring a matter before it.[230] Even though the COMESA court expressed its sympathy towards Coastal Aquaculture, in respect of the eight-year time constraints it had faced in trying to acquire justice, the COMESA court still maintained that the respondent had to exhaust all the local remedies before approaching it.[231]

On the other hand, the SADC Tribunal introduced an interesting facet that indirectly waived the exhaustion of local remedies requirement in the *Mike Campbell v Republic of Zimbabwe* case.[232] The SADC Tribunal held that the requirement did not need to be met in cases that dealt with an 'interlocutory application for interim measures of protection.'[233] The Zimbabwean Constitution had been changed in 2005 and it left the private parties in question with no remedy for claims regarding their agricultural land.[234] This amendment became the basis on which the SADC Tribunal introduced this waiver as it found that the private parties in question had no other way to proceed domestically, and as such could not be requested to exhaust local remedies first if they were no local remedies available.[235]

An analysis of these two approaches shows how the COMESA court strictly applied the exhaustion of local remedies requirement, whilst the SADC Tribunal was flexible based on the unique facts brought before it. This analysis shows the progressive and flexible approach taken by the SADC Tribunal to ensure that private parties had access to justice. Prior to being suspended in 2010, the SADC Tribunal provided conditional *locus standi* to private parties. Eighteen disputes were brought by private parties ranging from commercial disputes to human rights disputes and employment disputes before the SADC Tribunal by the time it was brought

[228] COMESA Court Ref No 3 of 2001, Judgement.
[229] *Republic of Kenya v Costal Aquaculture Limited* para 18.
[230] *Republic of Kenya v Costal Aquaculture Limited* paras 16,17 &20.
[231] *Republic of Kenya v Costal Aquaculture Limited* para 20; Oppong (n 56 above) 130.
[232] Case No 124/06 Judgement 28 November 2008.
[233] Onaria (n 31 above) 154.
[234] Onaria (n 31 above) 155.
[235] Onaria (n 31 above) 155-156.

to a halt.[236] The favourable implication of conditional access is that private parties were getting justice for the disputes they were bringing against their states. Essentially, as shown earlier in the *Polytel* case, states were being held accountable by private parties for violations of treaty provisions. This shows the positive implication of awarding parties' access, even if it is conditionally, and it has the potential of pushing member states to ensure that they meet their treaty obligations or face the humiliation of being dragged to regional courts.

3.3.2 Direct access

Direct access is when private parties are awarded an opportunity to institute a proceeding before a regional court without fulfilling other requirements first to acquire *locus standi*. The EAC and ECOWAS are silent on requirements that must be met for a private party to institute proceedings, and over the years, this has been interpreted to mean that there are no additional requirements that private parties must fulfil to access these regional courts.[237]

Even though ECOWAS awards direct access, there is a condition that the subject matter in question should not have been instituted in another court where it is under review through another international dispute settlement procedure.[238] It has been argued that this condition, on the one hand, ensures that there is no room for forum shopping, but on the other hand, it blocks appeals from being instituted before the ECOWAS court.[239] The latest example of where the ECOWAS court has awarded direct access to a private party is the *Sunday Charles Ugwuaba v State of Senegal* case.[240] Although the case was brought before the ECOWAS court as a human rights case that dealt with a violation of the freedom of 'movement of persons, goods and services', this case denotes components of barriers to trade in its set of facts.[241] The Nigerian applicant who had Gambian residence was involved in cross-border trading and specialized in exporting fish from the Gambia across multiple borders to Nigeria.[242] One of those borders was the Senegalese Badiara border post and the applicant was refused passage for not only himself, but of his 156 boxes of fish in the 3 lorries he had hired, although he had all the relevant documentation required.[243] The applicant ended up spending 63 days at the

[236] Obonje (n 31 above) 297.
[237] Alter *et al* (n 211 above) 6; Onaria (n 31 above) 153.
[238] Sang (n 24 above) 366.
[239] Sang (n 24 above) 367.
[240] ECW/CCJ/JUD/25/19.
[241] *Sunday Charles Ugwuaba v State of Senegal* 2.
[242] *Sunday Charles Ugwuaba v State of Senegal* 3.
[243] *Sunday Charles Ugwuaba v State of Senegal* 3.

border before retreating back to the Gambia and ended up suffering a considerable loss due to border closure.[244]

The ECOWAS court noted that it indeed had jurisdiction over the matter because Articles 9(4) and 10 of the Supplementary Protocol gave it power to hear human rights cases and award compensation for human rights violations, respectively, as long as that particular dispute had not been instituted before another international court.[245] The court went on to rule that Senegal had unjustly violated the applicants right to free movements of persons, goods and services.[246] However, the applicant's claim for compensation was dismissed due to insufficient evidence being presented before the court and the failure to establish a causal link between the closure of the border and the damage the applicant claimed to have incurred.[247] This case highlights that the ECOWAS court awards direct access to private parties. However, it also highlights two other important aspects that will be discussed later below, the monetary implications of instituting actions for international traders and the interconnectedness between human rights and trade.

Another example of a REC that awards direct access to private parties is the EAC court. In *Prof Peter Anyang' Nyong'o v AG of the Republic of Kenya*, the EAC court highlighted that private parties have a 'right of direct access' to bring a dispute against a member state or an organ of the EAC community before it.[248] The EAC court made it clear that private litigants did not need to exhaust local remedies.[249]

The most pressing and important issue that needs to be addressed is what happens in cases where private parties have no access to the REC courts and the implications this may have on their potential to trade.

[244] *Sunday Charles Ugwuaba v State of Senegal* 4.
[245] *Sunday Charles Ugwuaba v State of Senegal* 12.
[246] *Sunday Charles Ugwuaba v State of Senegal* 22.
[247] *Sunday Charles Ugwuaba v State of Senegal* 26.
[248] Ref 1 of 2006 (Judgement) [2007] EACJ 6 (30 March 2007) 21; Onaria (n 31 above) 156; Oppong (n 56 above) 136.
[249] *Prof Peter Anyang' Nyong'o v AG of the Republic of Kenya* 21; Onaria (n 31 above) 156.

3.3.3 No access

At present, the SADC Tribunal completely took away the *locus standi* of private parties to bring disputes to it.[250] The reason the SADC Tribunal took this decision was because it was cornered by Zimbabwe who stifled the SADC Tribunal by refusing to make appointments and who argued that the Protocol was never ratified and was therefore not binding on them, after judgement had been made against Zimbabwe.[251] As a result private parties in SADC have been left in the cold with no regional tribunal to deal with their trade violation disputes, amongst other things. However, the national courts of two SADC member states have disputed the decision to terminate the access private parties had to the SADC Tribunal.

In 2018, the South African President was taken to the Constitutional Court of South Africa over his decision to support the abolishment of access to SADC Tribunal for private parties.[252] In coming to its decision, the SA CC made reference to the fact that the SADC Treaty provisions 'obligated' it to enhance access to justice, amongst other things and not to take it away.[253] The SA CC considered that access to justice was a fundamental right imposed by the South African Constitution and found that the South African President could not make decisions that undermined this right and international obligations.[254] The SA CC held that the President was in breach of the Constitution by agreeing with the decision to remove the *locus standi* of private parties from the SADC Tribunal.[255] The SA CC then directed the President to withdraw his signature as a remedy.[256]

Following the abovementioned decision in 2018, the Tanzanian High Court also made a ruling against the SADC Tribunal stating that the suspension and failure to appoint judges was 'inimical to the Rule of Law'.[257] In the *Tanganyika Law Society v Ministry of Foreign Affairs* case, the High Court held that it will allow private parties who have claims against the

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[250] Obonje (n 31 above) 295.
[251] Obonje (n 31 above) 306,307
[252] *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) (11 December 2018) para 9.
[253] *Law Society of South Africa v President of the Republic of South Africa* para 67.
[254] *Law Society of South Africa v President of the Republic of South Africa* paras 75, 77, 80 & 85.
[255] *Law Society of South Africa v President of the Republic of South Africa* para 101.
[256] *Law Society of South Africa v President of the Republic of South Africa* para 94; TRALAC 'South Africa withdraws its signature from the decision to abolish the SADC Tribunal' (13 September 2019) *TRALAC*.
[257] MS Phooko and M Nyathi 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 1 *De Jure Law journal* 429; G Erasmus 'Another Ruling against the dismantling of the SADC Tribunal' (11 July 2019) tralac.

Tanzanian government to bring disputes that stem from the SADC Treaty before them.[258] This finding by the Tanzanian court became the second push back against SADC for ousting private party access.

There was not a single inter-state case that the SADC Tribunal heard.[259] As a result the new Tribunal's approach has been criticised as 'irrational, illogical, absurd and unsupported' by empirical evidence.[260] The impact of stripping away private party access diminished investor confidence and to an extent slowed down the regional integration process.[261] Investors are usually attracted to regions where the rule of law is observed and their rights are inherently guaranteed and the amendment to remove private parties may have instilled reluctance on the part of investors to invest.[262] In addition, it was argued that the SADC Tribunal had taken away the only remedy that protected private parties from abuse by member states.[263]

On another note, the majority of the legal research and literature done on the effects of the amendment of the SADC Tribunal constantly highlight human rights as being the central rights that have been taken away.[264] However, the other elephant in the room that is rarely addressed is the effect of this amendment has on trade rights. It is without question that the SADC regional integration milestones are based on trade and that it initially began as a free trade area (FTA), hoping to later go up the ladder of integration by becoming a customs union by 2010.[265] This hope was not realised because in 2010, SADC could not transition into a customs union as it was still meeting the targets it had set to liberalise trade in goods and services and enhance economic development amongst other things, under its FTA.[266] Instead, the goal of becoming a custom union was pushed to 2013, as SADC was not yet ready for trade and financial liberalisation and a competitive industrial system, amongst other things.[267] Unfortunately this new 2013 deadline was not met again and in 2015, the member states tried to negotiate a new

[258] Phooko and Nyathi (n 257 above) 429.
[259] Obonje (n 31 above) 315.
[260] Obonje (n 31 above) 315.
[261] Obonje (n 31 above) 315.
[262] Obonje (n 31 above) 315.
[263] Obonje (n 31 above) 318.
[264] Obonje (n 31 above) 318.
[265] SADC 'Integration Milestones' https://www.sadc.int/about-sadc/integration-milestones/ (accessed 2021-09-12),
[266] SADC 'Free Trade Area' https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/ (accessed 2021-09-12).
[267] SADC 'Customs Union' https://www.sadc.int/about-sadc/integration-milestones/customs-union/ (accessed 2021-09-12).

target date.[268] In fact, according to the initial milestone plan, SADC was meant to be a common market by 2015 and a monetary union by 2016, but at present, it is still not a customs union.[269]

Notably, private parties have predominantly been taking human rights matters before the REC courts and seldom trade cases. Multiple scholars have argued that the RECs mainly hear human rights which go beyond the jurisdictions that were awarded under their constitutive treaties.[270] Although this is true, it is submitted that some of the matters that go before the REC courts as human rights cases, have an international trade element and this submission will now be evaluated below.

3.4 The interconnectedness between human rights and international trade cases brought before the REC courts

The African Charter on Human and Peoples' Rights and the ECOWAS Revised Treaty set out the right to free movement of persons, goods, and services.[271] The goods aspect in this description brings in the element of trading goods which involves the aspect of goods being imported and exported. As shown in the *Sunday Charles Ugwuaba* case, the applicant brought the border closure as a human rights case before ECOWAS as opposed to bringing it as a barrier to trade case. One school of thought argues that international trade and human rights are self-standing components of the law that are not intertwined, in contrast, a second school of thought disagrees with this notion and exclaims that there is a connection between human rights and trade.[272]

Multiple authors have exclaimed that the various regional trade courts have mainly settled disputes relating to human rights than trade cases. Gathii is one such scholar who argues that the reason behind the creation of regional courts was to safeguard and promote trade integration

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[268] TRALAC 'SADC to set new Customs Union deadline' (12 August 2015) https://www.tralac.org/news/article/7880-sadc-to-set-new-customs-union-deadline.html (accessed 2021-09-12).

[269] J Mapuva and LM Mapuva 'The SADC regional bloc: What challenges and prospects for regional integration?' 2014 *Law, Democracy and Development* 26; SADC 'Monetary Union' https://www.sadc.int/about-sadc/integration-milestones/monetary-union/ (accessed 2021-09-12).

[270] Sang (n 24 above) 364.

[271] The Preamble and Articles 2 & 12 of the ACHPR CAB/LEG/67/3 rev 5, 21 I.L.M. 58 and Articles 25(2) & 46 of the ECOWAS Treaty; See also the Draft Protocol to the Treaty Establishing the African Economic Community relating to free movement of persons, right of residence and the right of establishment.

[272] AT Lang 'Re-thinking Trade and Human rights' (2007) 15 2 *Tulane Journal of International and Comparative Law* 336, 339.

by ensuring that it was rule based.[273] In 2011, Oppong argued that human rights agendas are likely to distract the REC courts from the economic integration goal that they have in some of their mandates.[274] He went on to state that the REC courts should be weary to not become 'centers for human rights litigation'.[275] At present, Oppong views are the same views that are still being echoed almost ten years later, considering that REC courts like EAC court and the ECOWAS court have been primarily used to resolve human rights cases as opposed to trade cases. This is why it was important to re-examine the *locus standi* requirement to access the REC courts to see whether access is the real problem or whether it is the type of cases brought before the REC courts that are now problematic, amongst other things. Hence, the question that remains to be answered is why RECs are dealing with human rights cases more regularly than they are dealing with trade cases. It is submitted there are two reasons why private parties prefer settling their trade disputes as human rights disputes.

Firstly, the African trajectory of cases heard in regional courts, show that private applicants who institute human rights cases are likely to win those cases and in some instance where more than one party is affected, NGOs assist parties with funding for those cases, which in turn takes away the monetary implication that a private party would have normally had to bear by themselves.[276] Secondly, the REC courts award compensation for human rights violations in cases where the party is able to establish a causal link between the harm they suffered resulting from a breach or violation of a human right. For example, in the *Mike Campbell* case, the SADC Tribunal set out that the applicants were entitled to fair compensation.[277] In addition to these two reasons, there are also other multiple factors affecting the use of the REC courts for trade related disputes and these will now be discussed below. The ensuing section will now investigate whether they are any underlying problems that may be hindering these private parties from using the REC courts.

3.5 The factors affecting the use of the REC adjudicative bodies by private parties

As illustrated earlier in the *Sunday Charles Ugwuaba* case, there are monetary implications of instituting actions for international traders that may potentially dissuade parties from using the

[273] Gathii (n 175 above) 315.
[274] Oppong (n 56 above) 126.
[275] Oppong (n 56 above) 126.
[276] Oppong (n 56 above) 131.
[277] Oppong (n 56 above) 141.

RECs. It is no secret that the use of the courts is an expensive and tedious process that most people give up on. The fact that some RECs award conditional *locus standi* adds on to these expenses as the private party will first have to exhaust all local remedies before reaching a REC court. The lack of direct access to the REC courts in itself makes parties reluctant to institute proceedings.[278] In addition, even in cases where parties have direct access, as shown in the *Sunday Charles Ugwuaba* case, private applicants can also be subjected to paying costs, especially when they lose cases.[279] It is submitted that the expenses that a private party incurs by taking up a matter through the court process and the fear of losing and being subjected to more costs are some of the factors affecting the use of the REC courts.

Some RECs have more private parties instituting disputes than others because of the way the specific REC courts interpret treaty provisions. On the one hand, some courts practice a less restrictive approach when it comes to interpreting treaty law. This tends to be the EAC and ECOWAS approach and as a result, private parties are attracted to these courts. On the other hand, other courts take a very restrictive approach in interpreting their treaty provisions. Gathii argues that one of the reasons why traders specifically do not make use of the COMESA Court is because it uses a restrictive approach when interpreting the COMESA Treaty.[280] This is evidenced by the multiple employment cases COMESA has mostly heard, and the lack of trade cases brought before it.[281]

Another factor affecting the use of the REC courts is the failure to enforce REC judgements in the domestic courts of the member states. State sovereignty and lack of political will are the main drivers that result in the lack of enforceability. At present some RECs do provide for some form of enforcement of REC judgements in national courts. There is no uniform approach regarding what type of judgements can be enforced. On the one hand, EAC and COMESA only make provision for enforcement of judgements that impose a 'pecuniary obligation' which is basically a monetary judgement.[282] On the other hand, ECOWAS and SADC make provision for the enforcement of monetary and non-monetary judgements.[283] Despite these provisions

[278] Obonje (n 31 above) 315; Onaria (n 31 above) 153.
[279] *Sunday Charles Ugwuaba v State of Senegal* 26.
[280] Gathii (n 175 above) 316.
[281] Gathii (n 175 above) 316.
[282] An example of a monetary judgement made by COMESA is the *Muleya v Common Market for Eastern and Southern Africa* [2001] COMESACJ 20 22 October 2001. The provisions setting out the pecuniary obligation are Article 44 of the EAC Treaty and Article 40 of the COMESA Treaty.
[283] The ECOWAS court which provides for enforcement of all judgements is one of the busiest RECs and this can be attributed the wording in the ECOWAS Treaty which binds all member states to the ECOWAS court

for enforcement, some national courts exercise discretion in choosing to comply or not to comply.

The *Mike Campbell* case is one example where the Zimbabwean High Court rejected to enforce the SADC Tribunal judgement.[284] This later led to the *Mike Campbell* approaching the South African courts who then enforced it and made Zimbabwe pay some damages.[285] The question that needs to be addressed becomes what use will the rulings of RECs, like the SADC Tribunal be, if they cannot be enforced. According to Oppong, SADC member states have provisions in their law that allow for the enforcement of judgements that stem from foreign national courts, but they do not have provisions to enforce judgements from international courts or more specifically, the SADC Tribunal.[286] It is submitted that mechanisms need to be put in place by the main treaties that establish these RECs, to ensure that there is enforcement of all REC judgements in national courts. In Chapter 2, it was pointed out that this is one of the problems with WTO DSB rulings, in that national courts have discretion to enforce them or not. Enforcement of judgements is therefore one of the key problems that is deterring private parties from using the REC courts.

Another factor affecting the use of the REC courts is fear of reprisal by the member state towards the private party. This issue is rarely discussed but it is reality that the member state may devise ways to restrict that particular private parties' trade activities. There are no mechanisms in place set up by the RECs that monitors a member states behavior towards the private party who instituted action against them. A state's reputation is always at stake when it losses a case and it may retaliate through making other laws, like Zimbabwe did in the *Mike Campbell* case where it unilaterally declared all SADC Tribunal judgments to be none binding. The possibility of states retaliating is something that should be reasonable foreseen from the moment that a private party institutes action and the REC should have an oversight mechanism that ensures that the private parties' position even after winning the case does not deteriorate due to new domestic laws that circumvent the RECs trade laws.

decisions and to the mandatory enforcement. Article 24(2) of the Supplementary Protocol on the ECOWAS Court A/SP.1/01/05; Article 32 of the Protocol on Tribunal in the SADC. Nwauche (n 198 above)194; Oppong (n 56 above) 247.

284 Oppong in Bosl *et al* (n 217 above)115.

285 Oppong in Bosl *et al* (n 217 above) 22,23.

286 Oppong in Bosl *et al* (n 217 above)116.

3.6 Conclusion

The African disputes settlement bodies provided for under regional agreements either provide direct access like the EAC and ECOWAS or provide conditional access like COMESA. Meanwhile other bodies like the AfCFTA and SADC do not make provision for private parties to access either the AfCFTA DSB or the SADC Tribunal, respectively. Direct access seems to be an attractive attribute that makes private parties bring matters before the REC courts as shown in the EAC and ECOWAS, which have the highest numbers of private party disputes brought before them.

The impact of awarding access whether it is direct or conditional, is positive in that private parties are at least afforded an opportunity to acquire justice for a breach of a treaty law. The implication of not awarding access affect the regional or continental integration process and have the effect of slowing down trade that the region has attempted to achieve. This Chapter has shown that there is no uniform approach followed by African adjudicative bodies regarding *locus standi* of private parties. However, it has highlighted that private parties are in fact in need of *locus standi* and that they do use the REC courts not only for human rights claims but to ensure that states are complying with their treaty obligations.

The AfCFTA as a continental agreement remains oblivious to the benefits posed by awarding access to private parties to its DSB. As such, it becomes important to compare it to another continental agreement to assess if there are any lessons to be learnt.

CHAPTER 4

Private parties and the EU Courts

4.1 Introduction

The AfCFTA is a continental agreement and there can be a few lessons it may learn from the approach taken by other continental bodies like the EU. In the international trade arena, the EU has brought action against others and has had actions brought against it for international trade law violations as evidenced by the multiple cases involving the EU that have been brought before the WTO DSB. However, at WTO level, private parties are unable to bring actions against the EU, but at regional level, they are afforded *locus standi* to bring matters before the EU regional courts in certain instances.

This chapter briefly analyses the regional courts under the EU system that resolve trade disputes. It will critically analyse the various grounds that need to be met to institute an action for annulment and the conditions for a private party to acquire *locus standi* before the European Union Court of Justice. Following this it will set out some lessons that the AfCFTA, can learn regarding awarding *locus standi* to private parties.

4.2 The EU Courts

4.2.1 The General Court

The General Court(GC), previously known as the Court of First Instance (COFI) was created in 1989 and was a court of first instance.[287] It did not have the authority to resolve appeals against annulment judgements.[288] At first, the GC could deal with competition policy annulment actions that were instituted by private parties, but after 1993 it became competent to deal with any annulment actions requested by private parties.[289] After 2004, its powers were extended to hear actions instituted by member states in matters of trade protection and state aid, amongst other things.[290] In 2009, after the Lisbon Treaty came into force, the court was

[287] Article 2 (2) (n) and Article 9 F of the Treaty of Lisbon 2007/C 306/01 ; EUR-Lex 'General Court' https://eur-lex.europa.eu/summary/glossary/general_court.html (accessed 2021-09-21).
[288] Egan in Adam *et al* (n 152 above) 54.
[289] Egan in Adam *et al* (n 152 above) 54; https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (accessed 2021-09-21).
[290] Egan in Adam *et al* (n 152 above) 54; European Union 'Court of Justice of the European Union'

renamed from COFI to the General Court (GC).[291] If parties want to appeal an annulment order, they have to make use of the Court of Justice, as their final court.[292]

4.2.2 The Court of Justice

The Court of Justice(CJ) was created in 1952, as the main EU Court.[293] After 1989, the CJ was no longer the only EU court that could preside over annulment actions.[294] However, it still dealt with annulment cases, brought by the privileged, semi-privileged and non-privileged applicants. The CJ became a court that entertained requests for preliminary rulings that stem from the national courts, and it can deal with some annulment actions and appeals.[295]

The EU decided to have the Court of Justice of the European Union (CJEU), as a single body that was made up of the two courts, in order to try to ascertain uniform application of EU law.[296] Consequently, national courts did not have jurisdiction to deal with matters relating to EU institutions and their compliance with the EU Treaty, amongst other things, but they through a preliminary reference procedure, the national courts could ask the CJEU questions regarding the validity of a particular framework.[297] The EU Courts also give higher standing to EU law and international agreements were considered secondly.[298] The reasoning behind such an approach was that it was through an act by Council that led to the adoption of a particular agreement and therefore, the act by Council is what could be judicially reviewed under the CJEU and not the international agreement.[299]

Having these two courts dealing with actions for annulment assures private parties that they have an opportunity to appeal decisions made by the court of first instance. However, the ability of private parties to bring international trade disputes before the CJEU is limited to very specific circumstances and these will now be discussed in detail below.

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[291] Article 2 (2) (n) and Article 9 F of the Treaty of Lisbon 2007/C 306/01 ; EUR-Lex 'General Court' https://eur-lex.europa.eu/summary/glossary/general_court.html (accessed 2021-09-21).
[292] Manko (n 147 above) 5.
[293] EUR-Lex 'Court of Justice of the European Union' https://eur-lex.europa.eu/summary/glossary/eu_court_justice.html (accessed 2021-09-21).
[294] Egan in Adam *et al* (n 152 above) 54.
[295] https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vg9obtulslrn (accessed 2021-09-19).
[296] Manko (n 147 above)2.
[297] Manko (n 147 above)2.
[298] Manko (n 147 above)2.
[299] Manko (n 147 above)2.

4.3 The CJEU and their treatment of private parties

Private parties may institute an action before the CJEU directly or indirectly.[300] Private parties acquire rights from the EU Charter and other treaties and they are permitted to institute direct action against an EU institution, through Article 263 of TFEU.[301] Individuals in particular also have the another alternative to indirectly challenge an action that falls within EU law or an EU measure that would ordinarily not been able to pass Article 263 of the TFEU's strict rules. This alternative is an indirect action through Article 267 of TFEU which sets out a preliminary rule procedure, where a national court of a member state requests the CJEU to give a ruling to enable it to make a judgement.[302] The ensuing section will now look at direct actions, followed by an explanation on how the indirect actions work.

4.3.1 Direct action

There are multiple direct action options available under the EU regime. The options are an action for annulment, a damages action, an action for inaction and a plea for illegality.[303] However, this dissertation will only deal with an action for annulment as it has preconditions that need to be satisfied before a private party is awarded *locus standi*, to go against the EU regulatory bodies and institutions for acts that contravene trade practices.

Private parties have *locus standi* before the EU courts provided that they are bringing a direct action for the annulment of an EU act.[304] Article 230(4) of the Treaty of the European Community made provision for private parties to directly institute an action for annulment of European Community acts that affect them or are illegal.[305] This provision was later amended by the Treaty of Lisbon in Article 263(4) of the TFEU which will be discussed later below.

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300 S Peers and M Costa 'Judicial review of EU acts after the Treaty of Lisbon' 2012 *City Research Online* 1.
301 P Craig 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 5 *Fordham International Law Journal* 1121.
302 EUR-Lex 'Preliminary ruling proceedings- recommendations to national courts' (31 October 2017) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14552 (accessed 2021-09-22).
303 An action for failure to Act is regulated under Article 265 TFEU, an action for damages is regulated under Article 268 and a plead of illegality is regulated under Article 277; Picod (n 148 above) 1; Cuyvers (n 152 above) 254.
304 A Rosas 'The Preliminary Rulings Procedure' in D Patterson and A Sodersten *A Companion to European Union Law and International Law* (2015) 179; Manko (n 147 above) 4; Adam (n 152 above) 51.
305 Biernat (n 150 above) 5.

When it comes to annulment, the direct action should be instituted within two months of the publication or notification of the act or rule, that is the subject of the dispute.[306] Private privates pursuing the direct action route can only bring matters before the courts that fall within the Article 263(2) of the TFEU grounds of an annulment. These grounds for annulment are misuse of power, non-compliance with an essential requirement, violation of a treaty or violation of a rule that relates to the application of a treaty, and lack of competence.[307] After falling into one of the four grounds above, the contested act should infringe the private parties' interests in one way or another.[308] In addition, to their matter falling into one of the grounds, their ability to have *locus standi* before a court is dependent on them meeting the preconditions of admissibility.[309]

4.3.1.1 Admissibility of private party actions for annulment

Article 230 (4) of the Treaty of the European Community made provision for private parties to directly institute an action for annulment of European Community acts that affect them or are illegal.[310] However, after the Treaty of Lisbon came into force in 2009, Article 230(4) was replaced by Article 263(4) of the TFEU. This new amendment read as follows,

> "any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."[311]

The ensuing subsections will now critically analyse these various preconditions to determine whether *locus standi* of private parties is easily awarded in the EU. Not only are there imposed conditions that must be meet, but the strict interpretation of these conditions by the courts have made it difficult for private parties to acquire *locus standi* to resolve disputes.[312]

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306 Manko (n 147 above) 5; Cuyvers (n 152 above) 258; Sjostrand (n 148above) 18.
307 Cuyvers (n 152 above) 255; Egan in Adam *et al* (n 152 above) 54; EUR-Lex 'The action of annulment' (undated) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0038 (accessed 2021-09-19).
308 Biernat (n 150above) 5; Manko (n 147 above) 4; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0038 (accessed 2021-09-19).
309 Manko (n 147 above) 4.
310 Biernat (n 150 above) 5.
311 Treaty on the Functioning of the European Union Official Journal C326, 26 December 2012
312 Biernat (n 150 above) 4.

a. An act addressed to that person

Private parties can request an annulment against an act or measure that is 'specifically addressed to them.'[313]

b. Direct concern

In order to acquire *locus standi*, the private parties need to show either that the act was addressed to them or indicate that they have both a direct and individual concern.[314] This section solely focuses on the first leg which is that of the direct concern.

If the private party is directly affected by an act that leaves no discretion to the addressees who introduced it and are meant to implement the measure, then that measure will be of a direct concern.[315] In other words, if the private parties' legal situation is directly affected by a particular act then they are regarded as someone with a direct concern in that matter.[316] Firstly, there is need for a direct causal link between a specific EU measure and the harm or damage that the applicant suffers.[317] Secondly, there should be an assessment to determine whether the member state had discretion over the matter in question and if they did, whether or not plans were made on how to approach that particular matter.[318]

Even though there is limited case law available that deals with a direct concern, it is expected to grow due to changes made in Article 263 of the removal of the individual concern requirement through the Lisbon Treaty.[319] After proving a direct concern the applicant must also prove that they have an individual concern, which where a lot of complications and complaints arise regarding awarding *locus standi*.

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313 Cuyvers (n 152 above) 256; Picod (n 148 above) 6.

314 European Union Agency for Fundamental Rights and Council for Europe *Handbook on European Law relating to access to justice* (EU Publications: Luxembourg 2016)19; M Kucko 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon' (2017) 2 *LSE Law Review* 104.

315 Biernat (n 150 above) 7.

316 Cuyvers (n 152above) 256.

317 Kucko (n 314 above) 104; Sjostrand (n 148 above) 19.

318 L Gormley 'Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?' 2013 36 *Fordham International Law Journal* 1173; Case 41-44 *International Fruit Company v Commission* [1971] ECR 411; Biernat (n 150 above) 7.

319 Kucko (n 314 above) 104.

c. Individual concern

This notion has received criticism as various scholars have argued that the courts interpret it in a narrow and restrictive manner.[320] The CJ first interpreted the notion of 'individual concern' in the *Plaumann* case in 1963.[321] *Plaumann* approached the court for an annulment order against the European Commission for its decision not to authorise the Federal Republic of Germany to partly suspend customs duties on imported fresh mandarins and clementines from other countries. The CJ assessed whether the company was individually concerned with the decision that the Commission had taken and it was at this point that the *Plaumann* test was created.[322] There was no explanation on what 'individual concern' meant or the scope of the limitation given by the TFEU, and it was left to the court to decide.[323] Some scholars have argued that the natural meaning of the words that are used in this provision lend themselves to allowing the broadest interpretation.[324] However, the court took a different approach.

The court decided to focus on the individual concern aspect and found that it was only parties who could show that certain peculiar attributes differentiated their position from that of any other individual or entity.[325] The court reasoned that even though *Plaumann* has been affected by virtue of being an importer of clementines which was a commercial activity that other people could also practise, he could not be distinguished in relation to the contested decision from other people.[326] The court found that *Plaumann* was not individually concerned.[327] This case illustrates how the court will not give *locus standi* , to an 'open group' where other people can practise the same commercial activity despite, the ability to clearly identify who the affected individuals may be.[328] The EU act has to affect a specific party.

[320] CC Kombos 'The Recent Case Law on locus standi of private applicants under Art 237 (4) EC: A missed opportunity or a Velvet Revolution?' 2005 9 17 *European Integration Online Papers* 2; Biernat (n 150 above) 7; Sjostrand (n 148 above) 19.
[321] Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95.
[322] Biernat (n 150 above) 7; UNECE 'Appendix 1 Detailed Analysis of the courts' jurisprudence'(2008) https://unece.org/DAM/env/pp/compliance/C2008-32/communication/Appendixes.doc.pdf (accessed 2021-09-19).1.
[323] UNECE (n 322 above) 1.
[324] UNECE (n 322 above) 1.
[325] Cuyvers (n 152 above) 256; UNECE (n 322 above) 1.
[326] Cuyvers (n 152 above) 256, 257.
[327] Biernat (n 150 above) 7.
[328] Cuyvers (n 152 above) 256.

Arguments against the court have been made by scholars like Biernat, who argues that the test the court setup is 'very restrictive and difficult to meet'. The court wanted applicants seeking an annulment to be part of a closed category which was at the date of the contestation of the matter, 'fixed and ascertainable'.[329] For example in the *Toepfer v Commission* case, a decision was taken by the Commission that led to the rejection of the importer's application for an import licence on that specific day.[330] The court in this instance accepted that the importer was individually concerned because the decision taken by the Commission affected only importers who had applied for import licenses on that particular day.[331] However, in a multiplicity of cases it has been difficult for private parties to form part of a closed category.

In the *Calpak* case, the pear producers wanted an annulment of a regulation that changed the calculation of production aid from 3 years to 1 year and argued that they were a close and definable group.[332] However, the court dismissed the action even though it could easily pinpoint the identity the people affected by the contested regulation.[333] As a result, the CJEU has consistently interpreted individual concern to mean that the party instituting the action has to show that they were exclusively concerned by the disputed act for them to bring the application for annulment.[334]

Scholars have argued against this approach taken by the CJEU by arguing that exclusive concern does not mean the same as individual concern.[335] In the *Stichting Greenpeace Council* case,[336] an NGO that was acting in the interests of the public was denied *locus standi* on the basis that they were not individually concerned.[337] Scholars have criticised this case by arguing that an environmental NGO ought to have been a party who would have been individually concerned by an act that posed an impact on the environment and that it was highly likely that other NGOs could have also been individually concerned about the same act.[338] However, the CJEU did not see it that way and as a result, this case illustrated a classic example of denial of

[329] Biernat (n 150 above) 7.
[330] *Toepfer v Commission* Case 106-107/63 [1965] ECR 405.
[331] Biernat (n 150 above) 7-8.
[332] *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* Case 789-790/79 [1980] ECR 1949; Biernat (n 150 above) 9.
[333] Biernat (n 150 above) 9.
[334] Biernat (n 150 above) 9; Cuyvers (n above) 257.
[335] UNECE (n 322 above) 5-6.
[336] *Stichting Greenpeace Council and Others v Commission*, T-585/93, 9 August 1995
[337] UNECE (n 322 above) 5-6.
[338] UNECE (n 322 above) 7.

justice that was prevalent in the EU system through not meeting the individual concern requirement.[339]

The CJEU continued to point out that in cases where the applicants may have been subjected to suffering harm from the disputed act, they would have no *locus standi* if they failed to differentiate the harm that they suffered from the harm that other people could have also suffered.[340] Adopting such a strict reasoning, meant that private parties were unable to seek justice against unlawful decisions made by the EU, especially in cases where the damage caused by that decision affected other people, other than those bringing the action.[341] The more people were harmed by that particular decision, the more that specific issue could not be brought for judicial review by private parties.[342] In the *Danielsson* case, the applicants were individuals who stayed within the area where nuclear tests were being conducted, but the court held that the individuals had no *locus standi*, because they could not separate their individual concern from others.[343]

The CJEU therefore requires individuals to explicitly distinguish their concern from other persons who could have been affected the same way through the same decision that the EU had taken and this is why this test is regarded as a prohibitive restrictive test.[344] Gormley has pointed out that the interpretation of the court blemishes the court and affects the availability of a way through which private parties may have acquired effective judicial remedies.[345]

In 2002, an attempt to reword the individual concern was done in the *Jégo-Quéré* case and it was a momentous case where the GC took a different path from that followed in previous case law.[346] In this case, a regulation was enacted that explicitly prohibited the use of nets with a mesh size of less than 100 or 120mm and the applicant in this case used a net that was 80mm

[339] When the *Stichting Greenpeace Council* case, was appealed, the CJEU made it clear that the NGO did not have *locus standi* due to not bringing the matter before their national court; UNECE (n 322 above) 7,9.
[340] *Marie-Thérèse Danielsson, Pierre Largenteau, Edwin Haoa v Commission of the European Communities*, T-219/95 R, 22 December 1995 para 68; UNECE (n 322 above) 12.
[341] UNECE (n 322 above) 13.
[342] UNECE (n 322 above) 13.
[343] UNECE (n 322 above) 12.
[344] UNECE (n 322 above) 6.
[345] Gormley (n 318 above) 1170.
[346] *Jégo-Quéré et Cie SA v Commission*, T-177/01, 3 May 2002; Kombos (n 320 above) 5; Gormley (n 318 above) 1175; C Werkmeister, S Potters and Traut J 'Regulatory Acts within Article 263(4) TFEU- A Dissonant Extension of Locus Standi for Private Applicants (2011) 13 *Cambridge Yearbook of European Legal Studies* 312.

in mesh size to fish. Due to this regulation, the applicant approached the GC arguing that they did not have any other remedy at national level and were seeking an annulment because that the EU regulation had a negative effect on applicant's fishing activities.[347]

The GC indicated the importance of ensuring judicial protection for individuals and they held that were the act in question directly affects, in both a definite and immediate sense, the individual instituting the matter, then that individual is individually concerned.[348] The applicant had to show that the act that they are contesting adversely affected them in a legal manner.[349] Contrary to previous case law, the GC went on state that whether other people are also affected by the act in question is irrelevant in considering whether the party is individually concerned.[350] As a result, *Jégo-Quéré* was held to have an individual concern.[351]

The *Unión de Pequeños Agricultores* (UPA) case, was brought before the CJEU and it dealt with the individual concern condition.[352] In this case, a few small Spanish Agricultural businesses were represented by a trade association against the European Commission and brought an action for annulment of a regulation that changed the olive oil market.[353] The applicants argued that the regulation had abolished schemes and aid that these agricultural producers used to have and led to the some members being unable to continue their economic activities.[354] The CJEU stated that the applicants did not meet the *Plaumann* test and concluded that they were not individually concerned as the applicants could not be differentiated from other traders in the EU.[355] This case also illustrated the gravity of unfairness posed by this notion of individual concern and showed how private parties were being denied justice to resolve disputes through annulment.[356]

When the case *UPA* case was brought on appeal in 2002, after the ruling of the GC in the *Jégo-Quéré* case, the CJEU emphasized how an action for annulment of a regulation could only be

[347] *Jégo-Quéré et Cie SA v Commission* para 21.
[348] *Jégo-Quéré et Cie SA v Commission* para 51.
[349] UNECE (n 322 above) 22.
[350] *Jégo-Quéré et Cie SA v Commission* para 51.
[351] *Jégo-Quéré et Cie SA v Commission* paras 52, 53; Peers and Costa (n 300 above) 3; UNECE (n 322 above) 22.
[352] *Unión de Pequeños Agricultores v Commission* T-173/98, 23 November 1999 para 47.
[353] UNECE (n 322 above) 14.
[354] UNECE (n 322 above) 14.
[355] *Unión de Pequeños Agricultores v Commission* para 50; Gormley (n 318 above) 1174; Werkmeister *et al* (n 346 above) 312.
[356] UNECE (n 322 above) 15.

brought by a party who fulfilled the *Plaumann* test.[357] Advocate General Jacob in an opinion about the *UPA* case and stressed the need for the courts to have a 'flexible approach' when it came to how they interpreted an individual concern.[358] Other scholars argued that, the principle of effective justice is directly affected by the restrictive interpretation by the CJEU and it amounted to denial of justice.[359] On appeal, in the *UPA* case, the CJEU did not approve the interpretation of the *Jégo-Quéré* case by the GC and argued that it was the treaty wording that had to be changed and not their interpretation of what individual concern meant.[360]

Through an analysis of the court's decisions, it seems that three categories of private parties that are usually awarded *locus standi* under Article 263(4). Firstly, those that belong to a well-defined group whose interests were meant to be taken into account prior to the adoption of a specific act.[361] Secondly, private parties who are entitled to participate in the decision making process because of a right that they have in the adoption of the act that is now the subject of the action.[362] Thirdly, private parties that belong to a distinguishable group of persons due to special circumstances or through particular specific rights.[363] In cases where a matter is brought before the CJEU specifically, as shown through various case law, that does not fit into the abovementioned category, the private party in question will most likely be denied *locus standi*, under Article 263(4) of the TFEU. The CJEU continues to apply the *Plaumann* test which remains a restrictive test that hinders the acquisition of *locus standi* for private parties in general. In 2009, the Treaty of Lisbon came into effect, and relaxed the individual concern requirement in relation to regulatory acts only.

d. Regulatory act

After Lisbon Treaty came into force, Article 263(4) was amended to allow actions against 'regulatory acts which do not entail implementing measures' for private parties who wanted to

[357] *Unión de Pequeños Agricultores v Commission* C-50/00P, 25 July 2002 para 37.
[358] R Mastroianni and A Pezza 'Striking the right balance: Limits on the Right to bring an action under Article 263(4) of the Treaty on the Functioning of the European Union' 2015 30 3 *American University International Law Review* 747.
[359] Biernat (n 150 above) 4.
[360] Gormley (n 318 above) 1175; Werkmeister *et al* (n 346 above) 313; Peers and Costa (n 300 above) 3; Mastroianni and Pezza (n 358 above) 749.
[361] Sjostrand (n 148 above) 20.
[362] Sjostrand (n 148 above) 20.
[363] Werkmeister *et al* (n 346 above) 312; Sjostrand (n 148 above) 20.

challenge acts that were not addressed to them.[364] Through this amendment, only a direct concern is required to acquire *locus standi*, and not the difficult individual concern requirement.[365] However, it is important to emphasise that the individual concern condition was not deleted from the TFEU, it was just amended to not be used when it came to regulatory acts that do not have implementing measures.[366] Although the amendment was a positive step forward and seen as a relaxation of *locus standi* restrictions on private parties, the question that needed to be answered was what a regulatory act is, since there was no definition readily available.[367]

It has been argued on the one hand that regulatory acts are binding acts that do not entail a legislative act.[368] Gormley argues that such an interpretation is ignorant of the possibility that a 'non-legislative act is regulatory in nature.'[369] Another argument that has been put forward indicates that only in situations where the binding act is of general application, then it cannot be regarded as a legislative act.[370] However this argument has been countered by the possibility that nothing stops a decision addressed to a private party from being regarded as a regulatory act in itself.[371] Although these arguments try explain what a regulatory act is not, they do not explain what it is.

Kornezov suggests that whether an act is regulatory is dependent on a few factors. Firstly, it is important to assess on what procedure the act was adopted, because if it was adopted through a legislative procedure, it cannot be regarded as regulatory.[372] Secondly, acts of general application "only" are regulatory in nature.[373] This means that those acts that constitute legislative acts and those regulatory acts that have implementing measures will be subjected to the individual concern test.[374] As a result only those regulatory acts that are a direct concern that do not entail implementation measures will be the acts that do not have to comply with the

[364] R Schutze and Tridimas T *Oxford Principles of European Union Law* (2018) 891; Werkmeister *et al* (n 346 above) 313; A Albors-Llorens 'Sealing the fate of private parties in annulment proceedings? The General Court and the new standing test in Article 263(4) TFEU' (2012) 71 1 *The Cambridge Law Journal* 52.
[365] Werkmeister *et al* (n 346 above) 313.
[366] A Kornezov 'Locus Standi of private parties in actions for annulment: Has the gap been closed?' (2014) 73 1 *The Cambridge Law Journal* 25.
[367] Kornezov (n 366 above); Albors-Llorens (n 364 above) 53.
[368] Gormley (n 318 above) 1177.
[369] Gormley (n 318 above) 1178.
[370] Kornezov (n 366 above) 26.
[371] Gormley (n 318 above) 1178.
[372] Kornezov (n 366 above) 26.
[373] Kornezov (n 366 above) 26.
[374] Kornezov (n 366 above) 26,27; Cuyvers (n 152 above) 258.

strict individual concern requirement.[375] In cases where the private party has no access to a legal remedy provided for under EU law for challenging a particular regulatory act, the CJEU could award *locus standi* to that party as direct legal remedy.[376]

Prior to the introduction of the Lisbon Treaty, private parties could institute actions in matters where they were not the addresses if they had proven a direct and individual concern. However, the Lisbon Treaty allowed for the removal of the individual concern requirement in instances where a challenge was made against a regulatory act that did not entail implementing measures.[377] This allowed private parties to institute direct actions to acquire justice.

The various preconditions laid out above relating to direct actions show the restrictiveness of the EU regarding awarding *locus standi* to private parties. It is important to also discuss ways in which private parties can institute indirect action as a way to acquire justice within the EU system.

4.3.2 Indirect Action

Private parties may elect to use may elect to use the Article 267 of the TFEU.[378] They would approach their national courts in order to challenge a specific act or measure introduced within the EU.[379] As a result, the private party will not be making a direct request to the CJEU.[380] In this instance the private party would have to take their matter relating to the interpretation or validity of an EU law to their national court that is a member state of the EU.[381] That national court will then request the CJEU to give a preliminary ruling on the matter provided that the national courts requires a decision in order to hand down judgement, or if no other national law provides an alternative judicial remedy to deal with that particular dispute.[382] The CJ is the arm

[375] Cuyvers (n 152 above) 257.
[376] Case C-456/13 *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, 28 April 2015 para 29.
[377] Kucko (n 314 above)102.
[378] This provision used to be Article 234 in the Treaty of the European Community. Werkmeister *et al* (n 346 above) 313; Kornezov (n 364 above) 27.
[379] Werkmeister *et al* (n 346 above) 322.
[380] Rosas (n 304 above) 180.
[381] Picod (n 148 above) 1; Rosas (n 304 above) 180.
[382] Specific reference is made to national courts only and not international courts. Rosas (n above) 183; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14552 (accessed 2021-09-22).

of the CJEU that is able to deal with preliminary rulings.[383] Hence, the preliminary proceeding is referred to as an indirect action.

According to Craig, making use of Article 267 of the TFEU assists private parties to 'attack an EU measure' that they would not have been able to directly challenge through not meeting the restrictive individual concern requirements under Article 263(4) of the TFEU.[384] As a result, it has been postulated that national court involvement through the preliminary ruling procedure has aided legal integration through the CJEU and indirectly enhanced private party access to justice.[385]

Craig also argues that although a multiplicity of claimants have had no choice but to opt for the Article 267 of the TFEU route, it is difficult to regard it as a remedy for private parties to challenge EU measures.[386] This difficulty stems from the lack of control, because it is the national courts' prerogative not the private claimants whether to request that preliminary ruling and ensure the case proceeds.[387] Nevertheless, indirect action is still an available option.

It has been argued that individual rights are protected through the preliminary hearing procedures. Unlike Article 263(4) of the TFEU, Article 267 is not a mechanism that is seeking to promote uniform interpretation and application of EU law.[388] Instead, Article 267 is a provision that seeks to simply provide private parties with an avenue to contest EU acts.[389] In addition, Rhimes argues that the option for indirect actions in itself gives effect to providing sufficient judicial protection to private parties within the EU system.[390]

The EU offers private parties an opportunity to bring direct actions, provided that certain conditions are met and indirect action through national courts. The *locus standi* provided under the EU has both good and bad attributes associated with how the courts deal with private party matters. These attributes will now be considered below to make arguments for and against the

[383] Rosas (n 304 above) 180.
[384] Craig (n 301 above) 1121.
[385] K Leijon 'National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands' (2021) 44 3 *West Europe Politics* 510.
[386] Craig (n 301 above) 1125.
[387] Craig (n 301 above) 1125.
[388] M Rhimes 'The EU Courts stand their ground: Why are the standing rules for direct actions still do restrictive?' (2016) 9 1 *European Journal of Legal Studies* 160.
[389] Rhimes (n 388 above) 160.
[390] Rhimes (n 388 above) 161.

allowance of *locus standi* for private parties in the AfCFTA, whilst highlighting lessons that it may also learn.

4 4 Lessons for the AfCFTA

The TFEU is said to provide a 'complete regime of legal protection' for private parties but, this has been severely criticized.[391] Yes, the EU provides private parties access to the CJEU but that access is provided under very strict requirements. The individual concern condition is viewed as a 'bottleneck' provision that is extremely restrictive.[392] Kornezov argues that the individual concern interpretation was an 'unsurmountable obstacle' that stands between private parties and their access to justice.[393] The lessons African dispute settlement bodies like the AfCFTA DSB can learn from the EU is the use of introducing conditions that need to be met to acquire *locus standi*. The African dispute settlement bodies should be weary not make very restrictive conditions that make it almost impossible for private parties to bring matters before them. They must be mindful not to create a locked system by copying conditions like the 'individual concern' condition from the EU. Instead, they should adopt a flexible approach of creating reasonable preconditions to assist private parties in acquiring justice. This flexible approach could also involve the dispute settlement bodies assessing the gravity of the particular measure being disputed and the potential impact it may have on the private party and in some cases the community at large, if that issue is not addressed.[394]

Another aspect that AfCFTA can learn from the EU and other RECs is the introduction of timeframes in which to bring disputes. The EU places a two-month timeframe after the publication or an act, within which private parties may bring disputes before it.[395] Adopting such a measure will ensure that disputes regarding trade measures or violation of rules are dealt with timeously. This will also place an obligation on the private party to act quickly as opposed to waiting for several years before finally bringing the matter before the respective body. ECOWAS for example also places a limit of three years in which private parties can bring human rights actions before it.[396] Meanwhile the EAC is very strict and follows a similar

[391] A Meuwese 'Standing rights and regulatory dynamics in the EU' in P Popelier, A Mazmanyan & W Vandenbruwaene (eds) *The Role of Constitutional Courts in multilevel governance* (2013) 301.
[392] Cuyvers (n 152 above) 256.
[393] Kornezov (n 364 above) 25.
[394] Albors-Llorens (n 364 above) 55.
[395] Manko (n 147 above) 5.
[396] Media Defence 'Litigating at the ECOWAS Community Court of Justice' https://www.mediadefence.org/ereader/publications/advanced-modules-on-digital-rights-and-freedom-of-

approach to the EU of introducing a two month limit in which to institute a claim for private parties.[397] It is important to note, that arguments have been brought forward stipulating that the time limit specifications of two months hinder access to justice.[398] As a result the AfCFTA should introduce what they consider as a reasonable time that should at least be more than two months, in order to allow parties to gather enough evidence and funds to bring the proceedings before the AfCFTA DSB. In addition, it must set out exceptions to when the time limit may be waived or extended. The EU for example awards private parties' grace periods in cases where unforeseeable circumstances have taken place or in instances of *force majeure*.[399]

Unlike the rest of the world, Africa has a large informal sector that trades, and African states should start adopting ways to start formalizing informal trading in Africa. The writer submits that access to the dispute settlement regime is one way of doing this, as informal traders will now have an incentive to formalize their trading knowing that their rights will be protected and enforced by African dispute settlement bodies. With specific reference to the AfCFTA, failure of this trade agreement is not an option and thus, the drafters must be willing to create innovative systems that cater for the real traders on the ground who are private parties, and not leave it up to states to decide whether they want to represent a particular private party or not, as is the case at present. Such a stance would strangle the hopes of inclusive integration and stifle the aim of boosting intra African trade as private parties will be reluctant to venture into bigger schemes and supply chains due to the uncertainty of their rights being protected. Therefore, it is submitted that the AfCFTA has to, at the very least allow for gradual *locus standi* of private parties to resolve their trade disputes.

4 5 Conclusion

It is clear the EU does not provide a perfect framework from which AfCFTA may follow in the future; however, it does provide a foundation that the AfCFTA may build on. The EU empowers private parties with *locus standi* to bring matters before the CJEU for misuse of power and non-compliance, amongst other things. However, it also has preconditions that

expression-online/module-6-litigating-digital-rights-cases-in-africa/litigating-at-the-ecowas-community-court-of-justice/ (accessed 2021-09-25).

397 Article 30 (2) of the Treaty Establishing the East Africa Community.

398 T Mebratu-Tsegaye 'Case Watch: Time Limits Thwart Justice in East Africa' 20 May 2015 *Open Society Justice Initiative.*

399 Article 45 of the Statute of the Court of Justice of the European Union.

need to be satisfied to determine the admissibility of claims brought by private parties. It is these preconditions that have been the subject of criticism especially the 'individual concern' condition that the courts interpret very strictly. This explains why in adopting such a framework, the AfCFTA must be careful not to adopt the problematic features that hinder private parties to acquire *locus standi* before their DSB.

When private parties are awarded *locus standi*, circumventing that access through very stringent requirements defeats the purpose of assuring private parties that their rights and duties will be protected at a regional level. It inherently, takes away their ability to acquire justice. The CJEU as shown above in some cases was instrumental in granting annulments for EU acts that were not in line with EU laws. The fact that private parties brought these matters to the attention of the CJEU directly shows the role that private parties can play in ensuring that rules and regulations set out within the law are complied with by states. Hence, the AfCFTA may learn from the EU and possibly in the near future, award private parties with *locus standi*. This may ensure greater compliance on the part of states with their trade obligations and also allow private parties to play an active role in enhancing economic and regional integration in Africa.

CHAPTER 5

The potential future of awarding *locus standi* to private parties with trade disputes in African dispute settlement bodies

5.1 Conclusion

Regional trade agreements were created to promote the liberalization of trade and enhance economic development for the states that were parties to those particular agreements. The interdependence of states has led to the proliferation of these RTAs as no state can independently supply itself with all the goods and services it requires to meet the needs of its people.

Only states can become members of RTAs but in practice, international trading is predominantly done by private parties and not by states. Private parties are subjected to being bound by trade agreements that their member states ratify and are rarely involved in the decision-making processes of what those trade rules will be. Although some states do engage with private parties to ensure that the trade agreements, they are entering into create conducive environment for the enhancement of trade, the rights of private parties are not guaranteed to be protected. Despite them being able to acquire rights and duties from trade agreements, private parties are rarely awarded *locus standi* to resolve their trade disputes before the international adjudicative bodies that in most cases make and enforce those trade rules.

An interrogation of the role of private parties in international trade has shown that private parties are the drivers of trade and that they are also holders of rights and duties. Private parties drive trade through their ability to manufacture and run multiple sectors that promote economic development in each state. They are the main importers and exporters of goods and services and this why state engagement with the private parties is important as a way to bolster the states' economic growth and improve its trade facilitation services.

Historically, the argument postulated for not awarding private parties *locus standi* was that they were not 'subjects of international law' and as such, could not appear before international adjudicative bodies. However, this argument has lost traction over the years because private parties became subjects of international law through their ability to enter into international

agreements which subjected them to become right holders in international law. The literature review conducted in Chapter 1 showed the importance of providing private parties with trade disputes *locus standi* and highlighted the impact that it could have on regional and economic integration in general.

Despite the development in international law of private parties gradually being accepted as subjects of international law, the irony is that they are still rarely awarded legal standing, Instead, legal jurisprudence shows that although not expressly stated in international law as a rule, private parties can acquire *locus standi* before a dispute settlement body if a particular treaty gives them the right to do so.

International trade dispute bodies like the ICJ and the WTO DSB refuse to grant private parties with standing. The WTO makes it clear that its agreements explicitly mention states only as parties who can bring disputes before its DSB and that private parties have to request their states to act on their behalf. The unwillingness of the WTO DSB which is the overarching trade dispute settlement body in the world, to allow private parties to access it, has created a significant barrier for private parties in having their disputes settled.

Although the WTO has tried to accommodate private parties through the establishment of the World Trade Forum and allowing public participation in trade policy debates, this has left the pertinent issue of providing *locus standi* to private parties unresolved. There is still a lot more that needs to be done internationally in terms of assisting private parties to acquire justice in their trade disputes, to strengthen trade and accountability on the parts of states, and to enhance cooperation between the WTO as an organization with private parties.

In Africa, the dispute settlement bodies are inconsistent in providing private parties with *locus standi*. Some African dispute settlement bodies provide direct access, others provide conditional access, and some do not provide access at all. The AfCFTA like the WTO does not provide *locus standi* to private parties to appear before the AfCFTA DSB. Three out of the eight RECs in Africa provide *locus standi* to private parties. COMESA provides access that is conditional upon private parties being residents in a COMESA member state and exhausting local remedies first. There are problems surrounding the fulfilment of the local remedies' requirement which private parties face, like exorbitant legal costs. These challenges emphasise

the need for direct access, like that provided for in the EAC and ECOWAS, as it has been shown that conditional access could still be a barrier to access to justice for private parties.

The implication of awarding access, whether direct or conditional outweighs not providing access at all. The importance of awarding access is simply to provide private parties with an avenue to acquire justice for any trade disputes they may have against states. The RECs and AfCFTA, have failed to appreciate the impact that not awarding direct *locus standi* has had on the ability of private parties to settle their disputes and on trade in the region. In cases where access is provided, more still needs to be done to attract private parties to make use of the REC courts.

The EU provides a framework that allows private parties to have *locus standi* before the CJEU. However, this framework is riddled with multiple obstacles that hinder rather than facilitate access to private parties. There are certain attributes that the AfCFTA may pick up from the EU's treatment of private parties which may assist it in creating its own framework for *locus standi* for private parties. The goal at the end of the day is for the AfCFTA and the RECs, to allow private parties to have direct *locus standi* before their adjudicative bodies. This will facilitate effective and efficient compliance by states with their trade agreements knowing that there is a higher chance that they may be held accountable for non-compliance by private parties. Thus, allowing private parties to have *locus standi* may ultimately increase trade on the continent and ensure that there is greater compliance.

5.2 Recommendations

Based on the above findings, the following recommendations and suggestions are submitted based on whether the AfCFTA DSB and the REC courts adopt a swift approach or a gradual approach.

If a swift approach is taken, which is more accommodating to private parties, the AfCFTA should be revised to allow the *locus standi* of private parties subject to certain conditions. The first condition is the direct concern condition. This would ensure that the AfCFTA DSB will not be subjected to hearing frivolous or vexatious cases from private parties who are not directly affected by a particular matter. The second condition is that the private party must show that there has been a contravention of an AfCFTA provision if appearing before the

AfCFTA DSB or a REC provision if appearing before a REC Court. This condition will ensure that either the AfCFTA DSB or the REC courts deal with matters that their treaties regulate. The third condition the private party must show is that there has been a contravention or failure to act on the part of a member state that has led it suffering some economic loss. This condition will ensure that the private party shows that they have suffered a loss and could assist the international dispute settlement body in easily determining how much damages the state in breach ought to pay as compensation. If the above requirements are met, then the private party should be awarded *locus standi*, unless there was a direct conflict between the REC/AfCFTA law and a Constitutional provision of that particular state. All these conditions are taken directly from the EU provisions and specifically exclude the contentious 'individual concern' condition.

The AfCFTA and the RECs must also ensure that there is enforcement which has been one of the main challenges hindering parties from approaching their dispute settlement bodies. The AfCFTA DSB and the REC courts need to ensure that the state remedies its breach or violation. One way of ensuring compliance is allowing states to have reasonable time to comply. Determining what is reasonable can be left to the dispute settlement body which will consider the gravity of the contravention on a case by case basis. Both the AfCFTA DSB and the REC courts need to introduce mechanisms for following up on state compliance after a decision has been given.

If the gradual approach is taken, which is more accommodating to states, African dispute settlement bodies will start by not having power to force the state in breach to pay damages to the aggrieved party. The dispute settlement bodies will have a duty to ensure that the state remedy the contravention of a trade rule or regulation within a specified period (as the court deems fit but not more than 4 months). If for example, the state does not comply like Zimbabwe did with SADC, then all the other states that are a member of that REC should stop trading with state until it has complied. The reason why this forceful suggestion is made is because all states are dependent on one another, and the consequences of being ousted by fellow members and the inability to trade with them is not something a state will be willing to lose, which will indirectly force it to comply. However, in order for this to work, other RECs must also comply and support the decision made by a fellow REC court and bar its member states from trading with that particular state until they have complied with a REC court judgement. This may also develop unity, regional integration, and foster relations between the RECs themselves, which

will inevitably strengthen the courts' ability to enforce its judgement without opposition or defiance from other RECs.

There are more benefits to regional and economic integration in Africa if private parties are awarded *locus standi* before all the RECs and the AfCFTA DSB. At the end of the day the Africa that is envisaged by the AU's Agenda 2063 will only be realized through working together as states and people and providing legal standing to private parties will increase accountability and assure compliance by states with their respective obligations in the various African trade agreements.

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