

Business & Management Department

**An economic game-changer: An analysis of the African Continental Free Trade Agreement
of 2018.**

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ACADEMIC YEAR 2020 - 2021

DEDICATIONS

To all the young Africans who left home to feed home! Those who continue to be economic nomads! Those who miss terribly the beautiful African sunsets and its people. Miles and miles away from home, the only consolation is reminiscing what home was like. Those who still carry hope for a better Africa! Maybe one day, ‘maybe’ Africa will call its children home! Until then, may you never grow tired of doing what you are doing! You are rays of sunshine! The dawn of the African Continental Free Trade Area is at hand. *“Aluta Continua” “Makwenzeke!”*

ACKNOWLEDGEMENTS

To begin with, I am grateful to Almighty God, for, providence, good health and the wisdom that was necessary to complete this dissertation. *UNkulunkulu muhle!*

I wish to express my gratitude to my supervisor Dr Andrea Miglionico, for his mentorship and patience throughout this work. Thank you for your knowledge and immense contribution.

To my supportive mother Octavia Mloyi and my sister Sithandazile Mloyi who are constantly sources of inspiration to my life. You taught me to excel, work smart, to persevere and prepared me to face challenges with faith and resilience. *“Ngiyabonga okwedlulisileyo”*

Further gratitude goes to my friend Netsai Mugabe, friends from law school for the constant encouragement ever since I left Zimbabwe. *Ngiyalithanda lonke!*

Finally, I extend my gratitude to Ify Ogo, Steve Machage, Sangwani Mkandawire and Ivan Ojakol for sharing your knowledge with me.

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ABSTRACT

This research aims to shed light on trade liberalisation in Africa, specifically the relationship between trade and economic growth. The analysis critically examines how the Africa Free Continental Trade Area Agreement (AfCFTA) would foster investments. The thesis addresses three main areas of the AfCFTA agreement, namely policy, infrastructure and trade facilitation. The study undertakes a critical analysis of the provisions of the AfCFTA to emphasise its importance on fostering economic growth through its robust implementation mechanisms. A double standard is required for trade liberalisation to align with the national interests and regional interests. The research findings show that the AfCFTA marks a positive step towards economic growth in the African region by creating a free trade area, which in parallel involves reducing tariffs and non-tariff barriers.

Abbreviations

AEC	Asia Economic Community
AFCFTA	African Continental Free Trade Agreement
AfDB	Africa Development Bank
AIIDA	Accelerated Industrial Development for Africa
AMU	Arab Maghreb Union
AMV	Africa Mining Vision
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
BIAT	Boost Intra-Africa Trade Action Plan
BIT	Bilateral Investment Treaties
CAADP	Comprehensive African Agricultural Development Programme
CEMAC	Central African and Monetary Union
CEN-SAD	Community of Sahel-Sahara States
CEPT	Common Effective Preferential Tariff Scheme
COMESA	Common Market for East and Southern Africa
CU	Customs Union
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEC	European Economic Commission.
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area

GATT	General Agreement on Tariff and Trade
GSP	General Scheme Preferences.
H.O	Hecksher-Ohlin Theory
IAD	Intergovernmental Authority on Development
ICA	Infrastructure Consortium for Africa
LDC	Least Developed Countries
MFN	Most Favoured Nation Principle
NAFTA	North-American Free Trade Agreement
NTBs	Non-Tariff Barriers
PIDA	Programme for Infrastructural Development in Africa
RECS	Regional Economic Communities
RTAs	Regional Trade Agreements
SACU	Southern African Customs Union
SADC	Southern African Development Committee
SDGs	Sustainable Development Goals
SMEs	Small Medium Enterprises
STISA	Science Technology Innovation Strategy for Africa
TFTA	Tripartite Free Trade Area
UNCTA	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WAEMU	West African Economic Monetary Union
WTO	World Trade Organisation

Chapter One

Introduction

1. Background of the Research

The African Union adopted an initiative to establish the AfCFTA in an attempt to liberalise trade and create a single market for goods and services. This treaty, entered into force on January 2021, serves as a step towards achieving economic growth by reducing tariffs and non-tariff barriers.¹ It is lauded for its provisions to create a Free Trade Area (FTA), which raises attention to sustainable development targeted in 2036. Trade integration in Africa can be truly regarded as a mechanism for social and financial prosperity; hence the significance of the AfCFTA cannot be overstated. The globalisation of economies and increasing attention to trade and services has led to the liberalisation of investment by reducing tariffs, non-tariff barriers, and quotas. It can be noted that the region has eight regional economic communities (RECs), which have achieved little progress in boosting intra – Africa trade. In this context, the objective of the AfCFTA is to create a single market for goods and services to make the region economically independent.

a. Africa and Trade

The African region has experienced an economic decline in which some countries such as Ethiopia, Sierra Leone, and Zimbabwe are renowned for practising protectionism and are ranked as the least competitive business areas.² African governments have often been reluctant to reduce their high tariffs because they shield the domestic markets. For instance, Zimbabwe is one example of countries that have high import tariffs. The country's commitments shape Zimbabwe's tariff regime under multilateral, regional, and bilateral trading arrangements. Zimbabwe is a member of the World Trade Organization (WTO), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and an interim Economic Partnership Agreement with the European Union (EU), as well as bilateral trade agreements with

¹ See Article 4 (a) of the Agreement Establishing The African Continental Free Trade Area.

² Afua Hirsh, 'Trade Wars? Africa has been a victim of them for years, *The Guardian*, 7 March 2018, <https://www.theguardian.com/commentisfree/2018/mar/07/trade-wars-africa-donald-trump>. Accessed 30 March 2021.

Botswana, Mozambique, Namibia, and South Africa.³ Zimbabwe, therefore, operates multiple tariff schedules. In 2012, the country introduced a surtax of 25 per cent on several commodities to protect its local industry against what the government calls extensive imports.⁴ Further, Zimbabwe's agriculture holds the largest share of products with duties in forms other than ad valorem that, if converted to tariff equivalents, would likely push the average nominal protection rate in the sector to an even higher level.⁵ This evidence clearly reflects the need for the AfCFTA to promote the reduction of tariffs in the region thereby liberalising trade. The region has eight regional economic communities (RECs) namely, the Arab Maghreb Union (AMU), the Economic Community of West Africa States (ECOWAS), East African Community (EAC), Intergovernmental Authority on Development (IAD), Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central African States (ECCAS) and Community of Sahel- Sahara States (ECCAS). These regional communities have so far been counterproductive. As a result, there has been little evidence of further deepening of trade liberalisation and facilitation. To this end, the new agreement offers the best ways to address trade liberalisation and improve the integration of the existing regional communities.

The initial step towards liberalising trade was taken by the General Agreement on Tariffs and Trade (GATT) (1948 – 1994). The GATT and the WTO have traditionally been regarded as solely concerned with promoting free trade platform concentrating on the reduction of tariff and non-tariff barriers.⁶ The GATT provides principles aiming at eliminating discriminatory treatment in international trading through the Most Favoured Nation Treatment principle (MFN).⁷ With this principle, countries are obliged to refrain from discriminating against their trading partners. Secondly, the National Treatment Principle⁸ advocates for same treatment for nationals and foreigners in terms of trade. GATT subsequently led to the creation of the WTO in 1995. It is salient to note that it does not concern itself with free trade but mainly with lessening trade barriers

³ Richard Newfarmer and Martha Pierola, *Trade in Zimbabwe: Changing Incentives to Enhance Competitiveness* (World Bank Group 2015) p 60.

⁴ The Zimbabwe Herald 'Non – Trade barriers in Africa on the rise' 28 March 2012, <https://www.herald.co.zw/> accessed on 2 April 2021.

⁵ Ibid p 60.

⁶ James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press 2011) p 93.

⁷ See Article I of the General Agreement on Tariffs and Trade 1994.

⁸ See Article III of the General Agreement on Tariffs and Trade 1994.

and with the promotion of equal treatment. The relationship between Africa and WTO turned sour when the developing economies criticised the WTO for protecting their interests. This was based on allegations that the WTO is biased and harmful with developing economies that generally have less bargaining power. It was also claimed that the WTO failed to clarify the ambiguous rules on concluding trade agreements.⁹ However, the influence of the WTO in supporting the African Union for regional independence has prompted the African countries to have their Free Trading Area (FTA). In this context, the AfCFTA can be considered complementary to the WTO rules on trade and services.

b. African Continental Free Trade Area

The AfCFTA Agreement has been perceived of as a welcome development in the African continent, especially on its set of provisions that aim to promote specialised trade, which will boost productivity and growth. Its Phase 1 negotiations focus on trade in goods and services and on establishing a dispute settlement mechanism. The estimation that has been put forward is that, full elimination of tariffs among African countries creates an overall welfare gain of about US\$ 16.1 billion in the long run.¹⁰ The proposition being made is that tariff reduction should not be treated as losses by African economies but as a positive opportunity to redistribute income from governments to consumers and producers. This might be seen as an opportunity for African communities to redeem themselves by diversifying their exports, increasing manufacturing capacity, and attracting FDI (FDI). The AfCFTA focuses on the following priority areas: policy, infrastructure, finance, information, market integration, increasing productivity and trade facilitation. The agreement can be acclaimed for covering comprehensive issues, for instance legal complementarity and the protection of intellectual property rights. These have not been covered before in the previous eight RECs. The European Union is a prototype of an advanced trade region that was tailored to promote trade liberalisation and boost economies. It is generally accepted that success in trade lies in the implementation phase. Africa has to draw lessons from such an agreement since the AfCFTA is drawing closer to the implementation stage. With a view to obtain

⁹ Karunanidhi Reddy, *Developing Africa: Trade Barriers, liberalisation and inequality in the World Trade Organisation*, (Africa Journal of Business Management 2011), p 5.

¹⁰ Mesut Saygili, Ralf Peters, Christian Knebel, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions*, (UNCTAD 2017) p 12.

high sounding victory through the AfCFTA, need arises to address various inter-linked challenges such as regulatory constraints, infrastructure, and multiple commitments flowing from the different regional economic communities. However, the benefits of the AfCFTA will outweigh the drawbacks.

1.2 Literature Review

1.2.1 Theoretical Literature

The connection between trade liberalisation and economic growth has been debated among scholars, economists, and policymakers. Different scholars such as Chatterjee, Chauvin, Chen and Gupta have made several attempts to define the relationship between trade and economic growth. Consequently, trade liberalisation literature contends that international trade affects economic growth positively. The classical and neoclassical theories show evidence of economic growth. However, mercantilism proposes that there is not any link between trade liberalisation and trade. This section will delve into detail in explaining the theoretical views examining international trade as portrayed by theories and scholars.

a. Mercantilism basis for International Trade

This school of thought is one of the oldest theories, and it dates back to 1630. It was mainly economic in its foundations as gold and silver were used as a measure of wealth. Mercantilists advocated for close government regulation of international trade. Michael et al advanced that it was done for two reasons: to maintain a favourable balance of trade and to promote the processing or manufacturing of raw materials at home.¹¹ Famous philosopher David Hume¹² also assented with the mercantilists when he stated that international trade was likely to preserve a balance of payments equilibrium through the price-specie-flow mechanism. Therefore, governments had to ensure that exports are maximised *vis a vis* imports which are minimised. Consequently, this would help maintain an advantageous balance of trade and push for the domestic processing of raw materials. Adam Smith in *The Wealth of Nations* described the mercantile system as a political

¹¹ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge 2013) p 2.

¹² As quoted by Paul Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (1997) p 541.

economy that diminishes as much as possible the importation of foreign goods for home consumption and increasing as much as possible the production of the domestic industry.¹³

Reliance on the mercantilism school of thought can be misleading because it presented an unfair economic system limiting consumer choice in products. More so, it can be noted that restricting foreign trade has adverse effects such as a balance of payment deficit which is caused by an inadequate supply of money. Smith¹⁴ also criticised the mercantilist theories, citing that “If a foreign country can supply us with a commodity at a lower cost than we can make it, we should buy it from them with a portion of our industry's output.” The meaning of this quotation is to promote free trade, which is beneficial for a country to pursue. Mercantilism advocated for protectionism, which has lost relevance today and is not beneficial in the global trading system. Essentially, a positive-sum game should be promoted through trading instead of the zero-sum game, as advanced by mercantilism. This means that trade must be a win-win as opposed to a win-lose.

b. Trade and Growth in Classical theories

The founding fathers for trade liberalisation, Adam Smith and Ricardo, offered a plausible theory of trade liberalisation. Adam Smith refuted claims that were made by the mercantilists and put forward a contrasting theory labelled as the absolute advantage. He postulated that not only would trade liberalisation lead to mutual benefits, but that will also lead to increased trade and interconnections.¹⁵ The rationale of this theory is that international trade takes place between economies because one country can produce a particular good efficiently compared to the other. In this way, free trade enables companies to specialise. Specialised production culminates in economies of scale, which leads to increased productivity and economic growth.

Nevertheless, the theory of absolute advantage has its limitations. Absolute advantage is not automatic because a country can shift labour to focus on a specific good, which is impossible in some sectors. Furthermore, a survey carried out by Berkum and van Meijil¹⁶ indicates that if a

¹³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (MetaLibri 2007) p 345.

¹⁴ Ibid p 350.

¹⁵ Adam Smith, *The Wealth of Nations* as quoted by Peter M. Haas and John A. Hird, *Trade Liberalisation and Economic Growth: Does Trade Liberalization Contribute to Economic Prosperity?* (Sage Publications 2020) p 3.

¹⁶ Van Berkum S, and Van Meijil H, *A survey of trade theories*. (LEI-DLO 1998), available at <https://edepot.wur.nl/297340>.

country does not have comparative advantage, it will be difficult to show that it has benefited from trade. On that account, the theory is found wanting as it cannot demonstrate anything to that effect. Henceforth, a fundamental question was left unanswered by Smiths' theory of absolute advantage pertaining to what happens to a country that has no absolute advantage? Against this background, David Ricardo opposed this theory in his book, *The Principles of Political Economy*, published in 1817 through comparative advantage. This theory of comparative advantage is the foundation of today's traditional international trade theory. According to it, whenever a producer's opportunity cost is lower than that of another, he or she is said to have an absolute advantage in producing that good. According to Ricardo's theory of comparative advantage,¹⁷ as a result of regionalism, states concentrate on producing items that can be produced more economically. Some benefits accrue to countries in this vein when they focus on producing products with a low marginal cost. Above all, there is a possibility that due to trade liberalisation, there are welfare gains in importing countries that may be manifested as consumer surpluses. Nevertheless, criticisms that can be levelled against this theory relate to how it fails to explain comparative costs.

c. Trade and Growth in Neo-Classical Trade Theories

The shortcomings of Ricardo's theory of comparative advantage led to the reformulation of the comparative advantage theory to the factor hypothesis or the Heckscher – Ohlin (HO) theorem. According to this hypothesis, "trade is influenced by the fact that different countries have varying factor endowments, and that is why it is sometimes referred to as factor-endowment or factor-proportions theory."¹⁸ As a result, countries would specialise on producing and exporting items that are compatible with their factor endowment. In a way, trade will increase to match demand, and trade will increase directly proportional to the demand. For instance, in Africa, the HO theory supports that such countries would export labour-intensive goods such as agricultural produce, while the developed economies would export capital intensive goods. However, this theory cannot be entirely relied on as it assumes static aspects such as factors of production, income and costs. Therefore, it refuses the dynamic economic systems and product differentiation. In this vein, comparative advantage incontestably seems to be a more dynamic concept than the factory hypothesis which is more static.

¹⁷ David Ricardo, *On the Principles of Political economy and Taxation* (Cambridge University Press 1951) p 6.

¹⁸ Lindert H Peter, *Unequal English Wealth since 1970* (JSTOR 1986) p 1129.

1.2.2 Empirical Literature Review

The empirical literature shows the existence of a positive relationship between liberalisation and economic growth. Generally, theories support that trade liberalisation enhances economic growth in countries. Classic theories advocate for specialisation from a resource and an economic standpoint. Chatterjee submits the same sentiments by highlighting that trade liberalisation has been confined to tariff reduction or the most-favored-nation standard, or short-term bilateral preferential agreements.¹⁹ Another submission made by Chauvin et al found that the trade, growth, and welfare benefits for each African country are dependent on the trade liberalisation modalities, with more significant gains from the decrease of non-tariff measures in products and the upgrade of trade facilitation conditions.²⁰ According to Greenway et al cases for positive growth as a result of trade impact tend to dominate those over the negative impact.²¹ Therefore, trade liberalisation does enhance growth, especially if it is accompanied by complementary reforms such as policies and trade facilitation.

Chen and Gupta²² explored the significance of trade openness on economic growth for the SADC region from 1990 to 2003. Throughout the study, the results revealed a considerable positive influence of trade openness on regional economic growth. Tahir and Azid²³ utilised the ratio of industry output to GDP as a measure of trade openness to examine the link between international trade openness and economic growth in fifty developing economies. The scholarly contribution revealed that for developing nations, the correlation between trade openness and economic growth was significantly positive. In essence, the majority of empirical studies corroborate that openness has a favourable impact on economic growth. Trade liberalisation coupled with complementary reforms is fundamental for generating prosperity.

¹⁹ Charles Chatterjee, *From Doha to Cancun: A multilateral trading system* (2004) Amicus Curiae, p 22.

²⁰ Chauvin Nicholas, Ramos Priscilla and Porto Guido, *Trade, Growth, and Welfare Impacts of the CFTA in Africa* (CSAE Conference 2017: Economic Development in Africa, Oxford, United Kingdom) p 31.

²¹ Rod Falvey, Neil Foster and David Greenway, *Trade Liberalization, Economic Crises and Growth* (World development, Elsevier 2012) p 2.

²² Chen, Pei-Pei & Gupta, Rangan, *An Investigation of Openness and Economic Growth Using Panel Estimation*. (University of Pretoria 2006) 89.

²³ Tahir, M., & Azid, T, *The Relationship between International Trade Openness and Economic Growth in Developing Countries* (Journal of Chinese Economic and Foreign Trade Studies 2015) p 123-139.

1.2.3 Africa Continental Trade Agreement and Economic Growth

The process of liberalisation in Africa through the AfCFTA has attracted positive responses. The widely accepted view amongst the proponents of trade liberalisation is that the AfCFTA will promote positive reforms in policy and facilitate trade and infrastructure development, which will accelerate economic growth. Opponents of liberalisation highlight that several obstacles in Africa may stifle the expected achievement of economic growth. This is primarily a result of the many impediments in the continent, such as multiple RECs, poor infrastructure, and geopolitics. Proponents of David Ricardo's theory of comparative advantage expect economic growth in Africa. The 2020 World Bank Report²⁴ propounds that the episode of the AfCFTA is expected to boost African trade, with ninety per cent of countries seeing the volume of services grow under AfCFTA. A research conducted by the United Nations Conference on Trade and Development²⁵ fortifies this stand. Its findings reveal that the AfCFTA might enhance Africa's economy by harmonising trade liberalisation, encourage economic diversification and expand intra-Africa trade at a continental level. Parshotam²⁶ also submitted that a successfully implemented AfCFTA would reap benefits such as improved transportation, simpler trade rules, custom procedures and the removal of NTBs.

Shinyekwa et al argues that the AfCFTA will augment intra African trade through better harmonisation, proper facilitation of regimes and instruments across RECs.²⁷ According to Luke and MacLeod²⁸ the AfCFTA establishes a solid legal basis for economic integration and re-envisages the first integration process from a continental customs union based on a merger of regional customs to a free trade area. Another school of thought²⁹ applauds the fact that removing tariffs can assist African countries in boosting economic growth, reforming their economies, and achieving SDGS. This is derived from the increased competition, leading to the implementation

²⁴ World Bank, *The African Continental Free Trade Area: Economic and Distributional Effects* (Washington DC, World Bank 2020) p 34.

²⁵ United Nations Conference on Trade and Development, *The Economic Development in Africa Report 2019: Made in Africa – Rules of Origin for Enhanced Intra – African Trade* (Geneva UN 2019) p 13.

²⁶ Asmita Parshotam, *Can the African Continental Free Trade Area Offer A New Beginning For Trade-In Africa?* (South African Institute of International Affairs 2018) p 7.

²⁷ Shinyekwa Isaac, Bulime Enock and Nattabi Aida, *Africa Continental Free Trade Area: The Potential Revenue, Trade and Welfare Effects of the African Community* (Economic Research policy Centre 2020) p 7.

²⁸ David Luke and Jamie MacLeod, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (Routledge London and New York) p 29.

²⁹ Saygili Mesut, Peters Ralf, Knebel Christian, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions* (UNCTAD Research Paper NO. 15) p 5.

of new technologies and a higher rate of innovation. This again is clear evidence that the AfCFTA is a significant opportunity for Africa to achieve economic growth. Critics of the AfCFTA evidence hurdles such as poor official trade statistics, which will hinder policymakers from understanding the magnitude of the impediments to intraregional trade.³⁰ Despite many criticisms levelled against AfCFTA, from the discussion above, it is mainly evident, and therefore of importance to note that the positive impacts greatly outweigh its negative impacts.

1.3 Research Methodology

This research will take a qualitative approach of analysis. The approach in this study shall be descriptive, comparative and analytical. The study will be conducted on extensive desk research, and a set of interviews concerning what legal implementation will be undertaken. Therefore, the research sources will focus on authoritative textbooks, secondary literature, primary sources, international reports, and commentaries. Reference will be made to the European Union and the Association of South East Asian Nations (ASEAN) as model regions that have effectively pursued trade liberalisation. This will evidence if there are any lessons that Africa can draw from the EU and the ASEAN as far as implementation is concerned. The critical analysis of the African Continent regulatory framework will be provided.

1.4 Objectives of the Research

The objective of this research is to explore the sustainability of the AfCFTA. An analysis of the regulatory framework governing the new free trade area shall be done to display the strengths and weaknesses of the AfCFTA. The study shall ensure that the gains and possible losses of having such an agreement are adequately understood. The thesis is structured as follows. Chapter one offers a synopsis of the research, literature review of trade liberalisation and depicts the theoretical background of the AfCFTA. It further discusses the main aim and objectives of this study. Chapter two examines the concept of trade liberalisation and the scope and nature of the Phase I negotiations of the AfCFTA. It is paramount to focus on the mentioned priority areas of policy, infrastructure and trade facilitation. Chapter three focuses on the critical analysis of the regulatory framework in order to highlight the positive and negative consequences of the provisions of the

³⁰ Ibid p 27.

AfCFTA. Chapter four reports and analyses the results obtained from a series of interviews conducted and from evidence collected from a survey. The last chapter makes reference to the EU and ASEAN as regions practising trade openness and thereafter, advance suggestions of possible reforms that can be implemented to achieve the agreement's objectives.

Chapter Two

Trade Liberalisation and the Africa Free Continental Trade Agreement

2.1 Introduction

This chapter examines the relationship between liberalisation and trade law. It will give an overview of the barriers to market access, the principles of trade liberalisation and finally discuss the proliferation of Free Trade Areas. This Chapter also focuses on the main components of the AfCFTA: policy, infrastructure, and trade facilitation. The Agreement provides a positive outlook, especially with its objective to usher economic growth in the African continent.

2.2 The definition of Trade Liberalisation

There is no single accepted definition of trade liberalisation. One school of thought believes that international trade liberalisation is concerned with creating opportunities for all states to gain market access and promoting international trade based on “equality in fact” rather than “equality in law.”³¹ Therefore, trade liberalism promotes market access while ensuring that there is zero discrimination between parties. Economies, therefore, operate at a levelled playing field, with the same set of rules of which States will both have equal chances to succeed. Another definition proposes that in many instances trade liberalisation is confined to tariff reductions or MFN criterion, or by short-term bilateral preferential arrangements.³² This definition introduces a critical element of tariff reductions, which is what trade liberalism concerns.

Historically, the WTO’s latest attempt to achieve international trade liberalisation was the Doha Declaration. Due to its failure, many countries started practising unilateral trade liberalisation amongst themselves, and this is how to date, there is proliferation of regional trade agreements. Therefore, according to this work, trade liberalism is a concept that upholds the call of promoting trade through tariff reduction, which supports by the principle of MFN.

³¹ Chatterjee C, *From Doha to Cancun: a Multilateral Trading System?* (Amicus Curiae 2004) p 23.

³² Ibid p 22.

2.2. Barriers to Market Access

The process to liberalise markets is hindered by the existence of barriers to market access. These barriers impede the general flow of the smooth trade process. These barriers come in terms of tariffs and non – tariff barriers.

2.2.1 Tariffs and Custom Duties

Tariffs are simply taxes on imported goods, and they, as well as other custom duties, must be implemented in accordance to the MFN standard. The rationale for using tariffs has always been to protect domestic industries, but high tariffs hinder trade. Like any additional barrier, its economic effects can prevent all imports, especially if it is a prohibitive tariff. As a result, when trade is affected, it can limit consumer choice and reduce product demand. The imposition of a tariff on goods means the cost is passed to domestic consumers. The removal of tariffs in countries must not be estimated because it enhances economic growth and helps to improve the welfare of States. A good illustration is the Southern African Development Community (SADC), which managed to liberalise tariffs and attained a Free Trade Area status in 2008.³³ As a consequence of the removal of tariffs, the region's welfare has improved, and trade has been made easier.

Custom duties remain an essential barrier in international trade. Customs duty is an indirect financial charge, in the form of tax, imposed on products at the time of their importation.³⁴ Types of custom duties include specific, ad valorem or mixed. Duties are *ad valorem* when they are calculated based on the value of the import itself. Specific duties depend upon the characteristics of the imported goods, such as units, weight or surface area. Compound or Mixed duties bear the attributes of both worlds. Duties are compound when based on both the value and characteristics of imported goods.³⁵ It is salient to note that the WTO does not prohibit custom duties, but there is general acceptance that trade can be an obstacle. In most cases, regional trade agreements include custom duties clauses in schedules of concessions.³⁶ In practice, market access has increasingly become conditional upon the payment of the customs duty. In Africa, customs procedures have been identified before as a significant impediment in the Action Plan for Boosting

³³ James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge 2011) p 217.

³⁴ Ibid. P 31.

³⁵ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge 2013) p 268.

³⁶ See Article II: 1 of the General Agreement on Tariffs and Trade of 1947.

Intra – Africa Trade (BIAT).³⁷ Nevertheless, it is clear evidence of how the effect is the same. Barriers can inhibit trade and block market access.

2.2.2 Non – Tariff Barriers

Addressing NTBs at a national level and regional level is crucial. NTBs are not embedded in regulations but are disguised as rules and laws of a domestic country relating to trade and product standards. NTBs are famous for constraining trade, they are inexhaustible, and in some cases, they can replace tariffs themselves. They take the form of burdensome technical requirements and complicated administrative procedures. NTBs include quantitative restrictions, administrative requirements, technical standards, lack of infrastructure and government involvement. In trade, NTBs seek urgent address because their mismanagement can hinder trade. Their effects are much so significant, and they are listed as one of the endemic challenges faced by African countries.³⁸ For instance, the SADC region reported cumbersome export licensing permits, especially in Zimbabwe.³⁹ Likewise, transit traffic challenges, longer clearance processes, classification and valuation of import procedures, and arbitrary documentation requirements are all common in the COMESA and EAC regions. It can be argued that the persistence of NTBs in Africa is one reason why intra – trade has not been booming. The NTBs have militated against such a dream to have an effective intra – Africa trade system. Despite the existence of eight RECs, there exists a low level of intra – REC trade. All efforts towards intra – trade and integration have been blurry due to the existence of NTBs. The lengthy customs and administrative entry procedures have resulted in increased border delays and, as a result, increased transaction costs.

2.3 The Principle of Reciprocity

Two principles govern tariff negotiations between States: the principle of Reciprocity and mutual advantage and the MFN treatment obligation.⁴⁰ The rationale of these principles is to accord fair treatment that is non – discriminatory and reciprocate obligations and concessions. Michael et al

³⁷ See Action Plan for Boosting Africa Intra - Africa Trade (African Union 2012) p 4.

³⁸ Asmita Parshotam, *Can the African Continental Free Trade Area Offer a New Beginning for Trade in Africa*, (SAIIA 2018) p7.

³⁹ United Nations Conference on Trade and Development, *Trade liberalisation, Investment and Economic Integration in African Regional Economic Communities Towards the African Common Market* (United Nations 2012) p 24.

⁴⁰ See Article I of the General Agreement on Tariffs and Trade of 1947.

submit that when countries pursue trade liberalisation simultaneously, economic advantages are realised.⁴¹ This undoubtedly generates gains on both countries: the importing side and the exporting side. As previously discussed in Chapter 1, the MFN principle is the cornerstone of the multilateral trading system, and the obligation is engraved in numerous GATT/WTO agreements.⁴² The MFN principle attracts economic and political rationales. Economically, through the MFN, more trade liberalisation occurs, which is more advantageous since it applies to all WTO members. Politically, this principle promotes good relations between States, which aids in avoiding bitterness and tensions caused by discriminatory policies.⁴³

The benefit of these two principles is that it fosters international economic cooperation. The MFN principle also aids in reducing transaction costs since States would grant trade concessions towards each other. The risk of defaults is thereby minimised. This principle has been subject to criticism, mainly for the risk of free riding. According to Schwartz and Sykes⁴⁴, the MFN clause enables free-riding on participating nations, resulting in mutually beneficial deals not being struck. To curb this, the principle of reciprocity steps in to complement the MFN principle. Opponents of the MFN state that the principle favours more the developed countries.⁴⁵ This is also part of the reason why the AfCFTA has come into the picture.

2.4 Free Trade Area

Trade liberalism has brought to life the augmentation of bilateral investment treaties (BITS), regional trade agreements (RTAs) and in some cases, it has led to the creation of FTAs. FTAs are international treaties entered into by a cluster of countries uniformly agreeing on the reduction of tariffs and non-tariff barriers between them. The perks also include the facilitation of commercial ties. It drives an economic merger between countries and can have a broad reach depending on the participating countries. According to Ricardo's comparative advantage, an FTA is even more possible when countries have different comparative advantages. Free trade economists think that

⁴¹Ibid p 9.

⁴² See MFN provisions in the WTO Agreements Article IX.1, V.5 and Article I, XIII of the General Agreement on Tariffs and Trade of 1947, Article II of the General Agreement on Trade and Services of 1995 and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995.

⁴³ Carolyn Rhodes, 'Reciprocity in Trade: *The Utility of a Bargaining Strategy*, International Organisation (1989) p 273.

⁴⁴ Schwartz Warren. F and Sykes Alan O, *The Economics of the Most Favoured Nation Clause* (1997) p 59.

⁴⁵ Konstantine Gatsios, *Preferential Tariffs and the "Most Favoured Nation" Principle: A Note* (Journal of International Economics 1990) p 372.

the ideal approach is to accelerate multilateral, unconditional, MFN non-discriminatory trade liberalisation because tariff preferences would vanish if external tariffs were eliminated.⁴⁶ Therefore, FTAs have double effects; economically, they foster trade and channel economic growth while politically, they unite countries and reduce the risk of economic conflicts.

2.5 Pros and Cons of Trade Liberalisation

Trade liberalisation is renowned for promoting free trade through tariff reduction and removing regulatory barriers for trade in services. The economic impact of eliminating barriers is that it lowers consumer costs since the importation costs of products become relatively lower. In addition, trade liberalisation can foster competition between foreign goods and which will stimulate innovation. Another benefit of trade liberalisation is that of fostering economic growth. Although trade liberalisation has significant benefits, it has adverse effects on developing economies. The risk is that developing industries will struggle to establish themselves in such a competitive environment, especially without government protection policies. The lack of protectionism from the government may have the adverse effects of promoting foreign-produced goods at the expense of domestically produced products. Local industries will therefore lose support and the market. Trade liberalisation brings economic growth, and there are benefits when countries focus on producing or offering services where they have comparative advantage.

2.6 The African Free Continental Trade Agreement

It is a mighty instrument that creates an FTA in Africa, decided on 15 June 2015 at the 25th Ordinary Summit of the African Union Heads of State and Government. The launch and signature on March 21, 2018 marked a watershed moment in Africa's economic integration. This instrument pushes for a broader political, economic, and social agenda to bring together 1.3 billion people in the fifty-five African countries to develop the most significant free trading area. It puts new life into the vision of promoting intra continental trade, which was envisioned in the Action Plan for

⁴⁶ Panagariya A, *Preferential Trade Liberalisation. The Traditional Theory and new development.* (Journal of Economic Literature) p 328.

Boosting Intra – Africa Trade (BIAT) of 2011.⁴⁷ It is built on a Tripartite Free Trade Area⁴⁸ (TFTA) between the three Eastern and Southern African RECs (SADC, COMESA and the EAC). Therefore, the AfCFTA takes a bold step towards building on what has been already done; it consolidates previous progress.

The AfCFTA works in collaboration with the pre-existing continental frameworks to bring into fruition of agenda 2063. Agenda 2063 is a concrete plan that will transform Africa into a global powerhouse. The agenda aims to renew Africa as a continent that is united, self-dependent, prosperous and developed. Therefore, the continental frameworks include the Boosting Intra African Trade (BIAT), Comprehensive African Agricultural Development Programme (CAADP), and Accelerated Industrial Development for Africa (AIDA), and The Programme for Infrastructural Development in Africa (PIDA), The Africa Mining Vision (AMV) and the Science Technology Innovation Strategy for Africa (STISA). The Agreement has attracted words such as ‘game changer’ and ‘transformational’ from African citizens. More so, it brings in a unified front of diverse economies that had disconnected.

2.6.1 Scope of the African Free Continental Trade Agreement

Three main essential things stand out about this Agreement. Firstly, the AfCFTA is a legal instrument that spearheads economic development. Through its adoption and ratification, it creates rights and obligations for African governments and persons. Policymakers in the countries and regions that have ratified the Agreement should implement the rules and recommendations at a national and regional level policy level. It implies that institutions, national governments and citizens are legally bound to trade as per the Agreement. Secondly, as mentioned in the above section, the AfCFTA works with the aid of the continental frameworks to achieve the 2063 agenda. Therefore, it builds on the existing continental frameworks and consolidates the progress that has been made by RECS before. Lastly, the implementation of the AfCFTA will be driven by small and medium-sized enterprises (SMEs). In this regard, the AfCFTA is a chance for African businesses to emerge into multinational corporations through intra – Africa trade.

⁴⁷ Action Plan for Boosting Intra – Africa Trade (BIAT) of 2012 (Zero Draft).

⁴⁸ The Tripartite Free Trade Agreement was a consolidation of three regional economic communities: SADC, COMESA and EAC.

The AfCFTA First Phase negotiations addresses trade in goods and services. The two are incorporated in Protocol on Trade in Goods and Protocol on Trade in Services and Annexures. These two Protocols are bolstered by the Protocol on Procedure and Settlement of Disputes which addresses conflicts and enforcement mechanisms. Africa's historical trade in services has not been rosy. For instance, the percentage for services in 2013 accounted for 13% of Africa's total exports which is far less compared to exports of raw materials, which accounted for 83%. ⁴⁹This shows that the African region is lagging behind on trade in services. Liberalisation of services begins with the removal of regulatory restrictions. The procedure for liberalisation of services is initiated by submitting schedules of commitment by member states and an agreement to submit to the continental regulatory framework. Eventually, need arises for new domestic laws covering the area of services. Simo put forward that services shall benefit land-locked countries such as Lesotho, Swaziland, and Botswana, small islands such as Seychelles, Mauritius where manufacturing may not be the best option. ⁵⁰ The country of Rwanda has so far been expanding as a perfect example of trade in services. The list for services in the AfCFTA is inexhaustible, but it includes communication, energy, tourism, financial and movement of personal services. Therefore, capturing trade in services will drive competitiveness and prepare the region to compete globally.

The liberalisation of trade in goods through the Protocol on Trade in Goods will introduce policies that promote product diversity and advocate for "buy-in Africa or "Made in Africa" goods. Africa has predominantly traded in primary commodities such as minerals and agricultural products. The danger of reliance on only these commodities is constant price fluctuations on the international market. Consequently, intra-trade within the region would usher in development and promote the consumption of commodities locally produced in Africa. Sixty per cent of countries would experience an increase in the value of their output of agricultural and manufacturing goods. ⁵¹ The introduction of industrialisation policies will lead to an increase in intra-Africa trade. The success of these policies will advance economic growth, thereby lifting the population in Africa from

⁴⁹ United Nations Economic Commission for Africa, *Economic Report on Africa 2015: Industrialising through Trade* (UNECA 2015) p 36.

⁵⁰ Simo Y Regis, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility*, (Journal of Economic Law 2020) p 7.

⁵¹ The Africa Free Continental Trade: *Economic and Distributional Effects* (World Bank Group 2020) p 4.

extreme poverty. The AfCFTA, without doubt, bears favourable trade liberalisation policies and strategies, especially in the following areas:

a. Policy

The AfCFTA has demonstrated that the strategy to enhance Africa's intra-regional trade and stimulate its competitiveness is embedded in introducing a robust policy framework. Trade policy would support the effort towards the liberalisation of goods and services. Among many, its policy strategies include reducing tariffs and NTBs, introducing a common regulatory framework, harmonised rules of origin, improvements in industrial policy, and gender-sensitive trade policy. These policy initiatives are essential to enhance participation and promote "Buy in Africa" and "Made in Africa."

Removal of Tariff and Non- Tariff Barriers

The AfCFTA realises the importance of the elimination of tariff and NTBs to trade. The AfCFTA will eliminate tariffs on 90% of goods and reduce non-tariff barriers.⁵² This is highlighted Article 4 (a)⁵³ where it is enshrined provisions relating to the reduction and elimination of tariffs and non-tariff barriers. Economically, tariff reduction will benefit both intra - trade and external trade especially when Africa begins to trade as a bloc. Tariff reduction significantly begins with the Schedules of Concessions that different member states have to submit. The significance of removing these barriers is that it engineers economic growth and assists in attaining sustainable development goals (SDGs). Previously, the different RECs had made arrangements to reduce barriers to trade among them with little or no avail. For instance, the ECOWAS, which was founded in 1975 in their establishing treaty, had a clause in Article 36 (4)⁵⁴ setting forth an authority that can decide at any time the reduction of import duties. Despite this having been written on paper, member states have been unsuccessful in removing tariff and NTBs to international trade.

Furthermore, the AfCFTA, in its process of tariff reduction, promotes inclusion, especially for countries in Africa that do not belong to any REC or customs union. As a result, tariff negotiations

⁵² Project Syndicate, How Africa should Approach Trade and Industrialisation 23 April 2021 accessed at <https://www.project-syndicate.org/commentary/african-free-trade-area-ignores-limited-capacity-by-nimrod-zalk-1-2021-04> on 23 April 2021.

⁵³ See Article 4 (a) and Article 19 (1) of the Africa Free Continental Trade Agreement of 2018.

⁵⁴ See Economic Community of West African States Treaty of 1993.

will begin between the African Union and other countries that are not currently in a regional preferential agreement or customs union. Tariff reduction also works flexibly to suit the diverse economic GDPs of the different African countries. The benefits of such a policy are that trade costs will be reduced since there will be uniformity in trade rules among the participating countries. It is to be noted that the NTBs will apply through the use of the MFN principle, which means that these policies will not be exclusionary and are more welcoming also to non-participating countries such as Eritrea. Estimations on future intra-African trade is pegged for an increase by 52.3% (\$34.6 billion), compared with a baseline scenario without a CFTA in 2022.⁵⁵ It demonstrates that reducing the NTBS will also pave the way for more trade since the cumbersome administrative processes will be eliminated effectively. It portrays uniformity effectively in terms of trade rules and avoids duplication of policies.

Enforceable Legal Framework

The AfCFTA is renowned for complementing the existing legal framework with its enforceable provisions. The AfCFTA introduces a rule based calculative approach towards the regulation of the terms of the agreement. To avoid legal concern, it recognises the Abuja Treaty⁵⁶ as an annexure to the Agreement. More so, the AfCFTA will fulfil the objectives of the BIAT Action Plan and bring them to fruition, especially on trade facilitation, productive capacity and trade-related infrastructure. This legal framework is supported by the establishment of a Dispute Settlement mechanism in Article 20 of the AfCFTA to oversee the Agreement's implementation. The establishment of the Secretariat mandated to guard the interests of the Agreement is evidence of a robust legal system. In the past, African countries suffered from a lack of policy coherence, which prevented them from benefitting from trade liberalisation.⁵⁷ The dilemma stems from the fact that there is multiple regional memberships, this was problematic because it would lead to cherry-picking on which rules to adhere to concerning tariff reduction. In this regard, the AfCFTA has promoted legal complementarity through respecting the previously existing RECs agreements.

⁵⁵ United Nations Economic Commission for African, Africa Union and African Development Bank *Assessing Regional Integration in Africa VIII: Bringing Continental Free Trade Area About* (United Nations Economic for Africa 2017) p 65.

⁵⁶ See the Treaty Establishing the African Economic Community of 1994.

⁵⁷ Regis Y Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and the WTO Compatibility* (Journal of International Economic Law 2020) p 66.

One can conclude that this is a remarkable achievement; it reduces legal doubt since the existing RECs had several instruments and memberships.

A critical element of the AfCFTA is how it proposes to handle inconsistencies in law between the regional jurisdiction and its terms of Agreement. Evidence of such is found in Article 19 (1) of the Agreement,⁵⁸ which states that in the event of any inconsistency between the Agreement and existing regional agreements, the AfCFTA shall prevail. The import of this provision is that it clears all doubts relating to which Agreement will take precedence in the event of any inconsistencies. This is proof of a binding legal framework to ensure that the rights and obligations are upheld with the highest regard. In light of the existing legal instruments from RECs, this provision is proof of legal coherence and complementarity. This legal coherence reduces the fragmentation and, in the process, establishing a coherent legal system that will be effective.

Rules of Origin

They represent a critical component and a necessary element for implementing the AfCFTA. According to Neumann, rules of origin are the technical criteria used to determine the economic source of a product. The technical term that he proposes is ‘wholly produced’ or ‘wholly obtained.’⁵⁹ A research conducted by the UNCTAD states that “rules of origin are like a passport that allows a product to enter a free trade area and circulate without paying duty.”⁶⁰ The benefit of having a harmonised system of rules of origin that are not restrictive is the fact they bring forth positive impacts on the way in which regional value chains operate. Complex origin rules are prone to becoming a trade constraint, an impediment to trade facilitation, and a burden on customs. Fortunately, their application under the AfCFTA has not been made stringent lest they hinder trade. Flexible use of rules of origin as per this Agreement reflects that they will not be effected to block trade but to promote products made in Africa and respect intellectual property rights.

Industrial Policy

The AfCFTA acknowledges that industrial policies are critical in trade for the promotion of domestically produced goods. The objective is to make the most of what the African continent has

⁵⁸ See Article 19 (1) of the Africa Free Continental Trade Agreement of 2018.

⁵⁹ Eckart Naumann, *The New Rules of Origin in the African Continental Free Trade Area: what has been agreed, what remains outstanding* (Tralac 2021) p 9 and 11.

⁶⁰ United Nations Conference on Trade and Development, *Economic Development in Africa Report 2019: Made in Africa – Rules of Origin for enhanced Intra – Africa* (United Nations) p 9.

and allow goods to be traded in Africa by incentivising industrial processes, especially for small or medium-sized enterprises (SMEs) and in turn, it will create space for African products. The AfCFTA has addressed the outcry for reformed industrialised policies with the introduction of the Protocol on Investments. Reforms in industrial policies will effectively introduce product diversification. Diversification will make the region more competitive globally and make it easier to regulate the rules of origin. Product diversification will also ensure food security, especially in a region that mainly relies on food aid. A change in industrial policies through product diversification curbs the problem of unemployment especially for the youth. This suggests the emancipation of the youth from poverty and effectively deal with migration and brain drain in the African continent.

The mainstay of Africa's development has always been agriculture. Agriculture is an important economic sector for Africa, generating around US\$ 100 billion or 15% of the continental GDP annually.⁶¹ For primary commodities, Africa has primarily traded in commodities such as minerals (coal, gold, copper ores), petroleum oils, crude. The AfCFTA is addressing a gap in industrial policies from a regional level to a national level. The industrial policies are not sufficient at the national level. For instance, Zimbabwe relies on mining; outside mining, it has not attracted foreign investment.⁶² Such one-way policies deter investment and depress domestic investments too. The need arises in countries that lack industrial policies to set up effective industrial strategies. This can only be achieved through the institution's influence, such as the African Union and umbrella legislation such as the AfCFTA. As a result, it confirms that a revamp of the industrial policies will boost the economic viability of industrialisation with commensurate positive effects at national and regional levels.

Gender-Sensitive Trade Policy

The AfCFTA explicitly seeks to address development in terms of the inclusion of women and the youth.⁶³ The youth and women in Africa are an integral part of informal trade. Therefore, the

⁶¹ United Nations Economic Commission for Africa, *AfCFTA to boost intra-African trade in agricultural and food products and enhance continental food security* accessed at <https://www.uneca.org/stories/afcfta-to-boost-intra-african-trade-in-agricultural-and-food-products-and-enhance> on 22 April 2021.

⁶² Newfarmer Richard and Martha Denisse Pierola, *Trade-in Zimbabwe: Changing Incentives to enhance competitiveness*, (World Bank Group 2015) p 16.

⁶³ See Article 27 (2) (d) of the Agreement establishing the African Continental Trade Agreement of 2018.

inclusion of the youth and women ensures the removal of impediments and stimulates international trade participation. Article 3(e) ⁶⁴of the AfCFTA aims to promote and attain socio-economic development, gender equality and structural transformation of the member states. Women are estimated to account for around 70 % of informal cross – border traders in Africa.⁶⁵ The dilemma has always been that the trade policies in Africa are disadvantageous to women. Women have faced challenges such as confiscation of goods during cross border travel. In worst-case scenarios, some have to resort to bribery in order to protect their commodities. A report which was published in 2014 Africa Renewal⁶⁶ noted that women’s participation in informal trade must not undervalued. The information went on to state also that in most cases, women who are informal traders are subjected to harassment, imprisonment and confiscation of goods. To improve this plight of women, the AfCFTA has stressed the importance of the inclusion of women in trade policies. For this reason, tariff reduction and harmonised trade policies would offer security to women traders and also address the gender wage gap.

Integration

The aim to integrate the region is becoming achievable by reducing tariffs and NTBs by the AfCFTA. The Agreement is explicit in pushing for Africa to trade as a bloc in the future. An integrated Africa allows for the free movement of goods, services, capital and eventually persons. This will link the eight RECs, promoting intra – trade and a harmonised fiscal, monetary policies. It can be argued that this is a difficult task to achieve since the region is a haven to eight different RECs which have separate governing treaties and obligations. However, the AfCFTA prioritises unity and a harmonised system to trade. Figure 1 reflects the complexity of the RECS. This is shown by circles which intertwine, indicating the existence of trade agreements blocs within larger RECS. For instance, the SACU which is within the SADC and West African Money Zone within the ECOWAS. To gauge the effectiveness of these associations has been next to impossible.

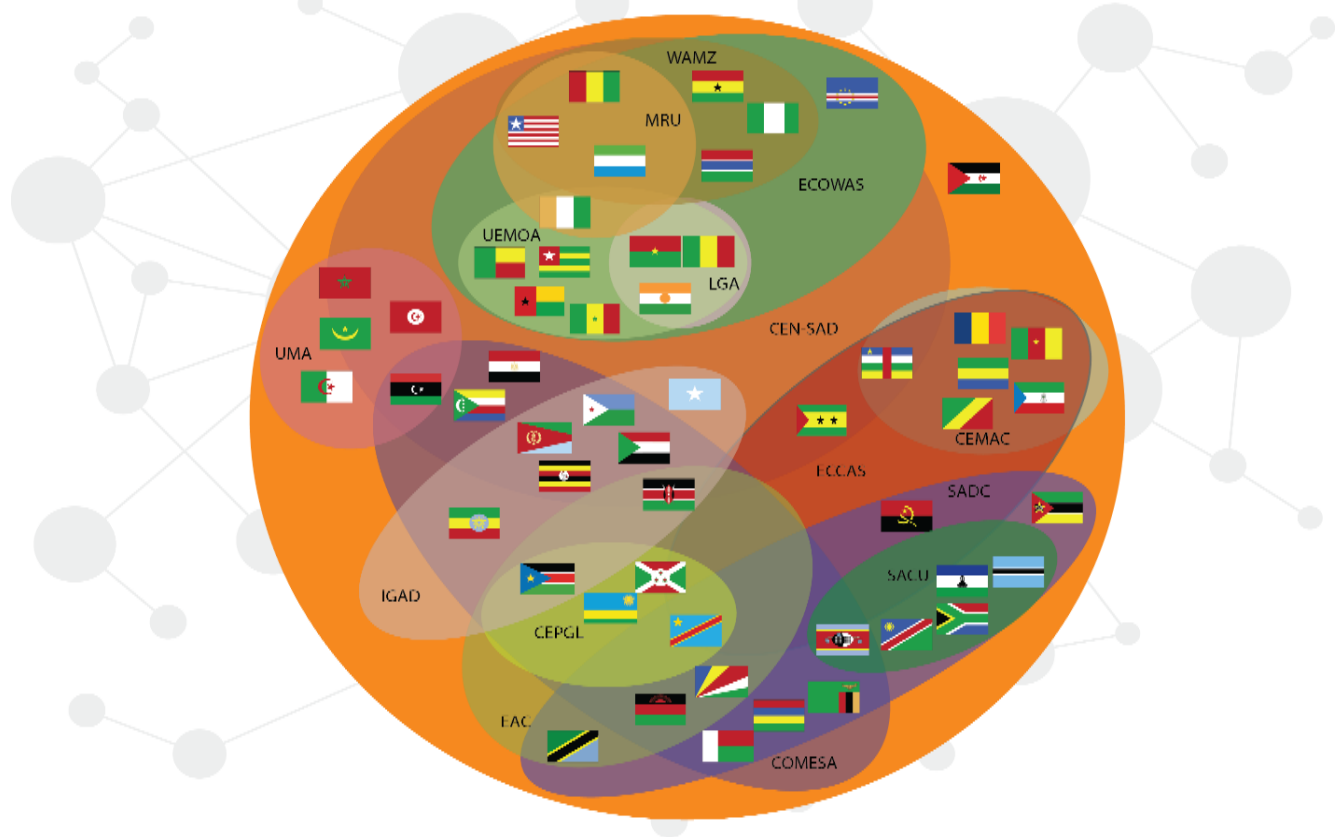
Figure 1: African Trade and Regional Economic Communities

⁶⁴ Article 3 (e) of the Agreement establishing the African Continental Free Trade Agreement of 2018.

⁶⁵ David Luke and Jamie MacLeod, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective*, (Routledge 2019) p 9.

⁶⁶ United Nations Department of Public Information, *Trade in Africa unfinished business* (United Nations, New York) p 8.

African Regional Associations: *A Framework for Trade and Communication*



*This image has been edited for IOA purposes, from an original
courtesy of Wikipedia Commons*

Source: In On Africa, Connecting Africa Website accessed from <https://www.inonafrica.com/2017/07/25/africas-regional-economic-communities-pieces-assembling-africas-economic-security-mosaic/>.

Integration has been a long term objective of the Abuja Treaty and the Action Plan for Boosting Intra – Africa Trade for Africa to integrate to foster economic reliance and development economically.⁶⁷ Moreover, the Africa Development Bank (ADB) has always been a critical player in inter-regional integration efforts. Since its inception in 1963, the African Development Bank's mandate has included regional integration in support of broad-based economic and human

⁶⁷ See Article 3 and 4 of the Treaty Establishing the African Economic Community of 1991 and Action Plan for boosting Intra - African Trade of 2012.

development. The implementation of the AfCFTA fulfils this objective. Regional integration is necessary to reduce reliance on foreign direct investment (FDI), thereby promoting self-reliance.

Integration in Africa is not only underpinned by economic will but also the existence of political will. Integration on a deeper level, would foster cooperation between governments and people. It would inevitably lead to peace and security and economic growth. A borderless Africa is indeed the foundation of a competitive continental market capable of serving as a global hub. Economically, integration will lead to market access both for consumers and producers. Furthermore, the integration will do away with unfair competition policies. It automatically helps eliminate monopolies, thereby enhancing knowledge spill overs between countries. To that end, international trade will also and uniformity in policies will reduce incidences of delays. This attests that integration is indeed the necessary response to the difficulties faced by Africa in the multilateral trading system and the global economy.

b. Trade-Related Infrastructure

Infrastructure forms an integral part of global trade and competitiveness. The significance of proper infrastructure is not underplayed in the AfCFTA. Transport infrastructure and services are vital preconditions for trade, especially for Africa with many landlocked countries. Proper infrastructure is recognised as important to advance intra-Africa trade and help fast-track the Agreement itself. As stated in Article 2 (2) (a),⁶⁸ the Agreement's objective is also to enhance the competitiveness of services through the development of trade-related infrastructure. The same position is found in the AfCFTA preamble that highlights the commitment to enhance cooperation in the area of infrastructure. According to the African Development Bank⁶⁹ the African region would need to spend an additional \$40 billion a year on infrastructure to solve current shortcomings and keep pace with economic growth. Therefore, the most outstanding achievement of the AfCFTA also emanates from the proposal to uphold the existing infrastructure projects.

⁶⁸ Ibid. Note 96 See Article 2 (2) (a).

⁶⁹ United Nations Department of Public Information, *African Renewal* (United Nations 2014) p 6.

In Africa, the situation at hand with most countries is insufficient infrastructure in sectors such as road, railway, air, and cyberspace. They are not adequate to facilitate exchange. Transportation costs have always been high, which has always been classified as an NTB. For example, some countries ranked as the worst roads include Cameroon, Nigeria, Mozambique, Congo and Guinea.⁷⁰ With respect to cyberspace, Africa has lagged. Infrastructure has affected African countries in several ways, chief among them being the cause of lack of diversification, competitiveness and low level of intraregional trade. Another important sector that is inadequate is the energy infrastructure. The issue of energy infrastructure is vital with regards to climate change and promoting digitalisation. For example, it has been considered a problem; Ghana has experienced load shedding power that affects its economic prospects.⁷¹ Implementation of the AfCFTA is a positive step to ensure that the region collaborates in improving trade corridors, improve cyberspace and energy infrastructure. This would enable them to participate in global value chains and lean towards sustainability.

Infrastructure programs

The implementation of the AfCFTA will facilitate the active development of infrastructure especially building on the progress made prior. Several programmes exist which had not yet been properly executed in the continent. Undoubtedly, these will be fulfilled by the implementation of the AfCFTA. One of them is the Programme for Infrastructure Development in Africa (PIDA), developed by the African Union Commission (AUC) and the AfDB. PIDA has since covered a wide range of transport, telecommunication, and energy and transboundary water. In addition, there is the Integrated High-Speed Train network project to connect all Africa's capitals since most of the countries are landlocked. To realise this vision, economic integration is a prerequisite. Interests have been made before, for establishing the Single African Air-Transport Market and this can be achieved through liberalised trade policies. If implemented properly, this will create a single unified air transport market.⁷² Moreover, the Infrastructure Consortium for Africa (ICA) has made efforts to address gaps in regional infrastructure integration.

⁷⁰ Klaus Schwab, *The Global Competitiveness Report of 2017 to 2018* (World Economic Forum 2017) p 146.

⁷¹ Economic Commission for Africa, *Economic Report on Africa* (ECA 2017) p 27.

⁷² David Luke and Jamie MacLeod, *Inclusive Trade in Africa; The African Continental Free Trade Area in Comparative Perspective* (Routledge 2019) p 159.

Information and Technology (ICT)

ICT is a lucrative field for economic development. With the rise of intra-trade, digitalisation is being promoted. There is no need to be physically present to sell services beyond borders. For example, in West and East Africa, there is a digital payment method called M-Pesa, which is an SMS-based money transfer system that allows users to deposit, send, and withdraw money using their mobile.⁷³ The M-Pesa system was launched in 2007 by a company called SAFARICOM which is a leading network operator in Kenya. Scott argued that M-Pesa accelerated financial inclusion in Kenya and banks started to see the mobile platform as a new option to access indigent clients in remote regions without incurring enormous costs of operating rural branches.⁷⁴ It can be highlighted that M-Pesa is convenient, fast, safer, and cheaper than physically going to the bank for transactions, especially for those who stay in remote areas. With the advent of the AfCFTA, trade in services will improve, promoting technology spillovers. African countries are not on the same level concerning the level of ICT. An illustration is that of South Africa, a SADC member, which is the twentieth largest consumer of IT products and services in the world and has a superior ICT Programme.⁷⁵ Therefore, with continental integration, other countries that have inadequate ICT systems will benefit from technology spillovers and ICT programmes.

The implementation of AfCFTA is good news for companies that deal with digital infrastructure. For instance, the SKT Aero shutter, a licensed drone operator headquartered in Ghana, has always intended to use drone imagery capture. The use of drone imagery capture, plant wellbeing investigation, drone spraying and crop observance would improve the agricultural sectors in Africa. This is also in line with the mandate of the United Nations to achieve SDGs, especially regarding climate change. There have been impediments acting against this company, especially in Senegal, where they had to obtain authorisation from the Interior Minister before importing a drone, even if it was only for a short time. The process required waiting for almost a year and entailed additional illicit payments to different intermediary offices.⁷⁶ Therefore, since the

⁷³ William Jack and Tavneet Suri, *The Economics of M-Pesa*, NBER Working Paper Series (National Bureau of Economic Research 2011) p 5.

⁷⁴ Burns Scott, M-Pesa and the 'Market Led' Approach to Financial Inclusion, Economic Affairs 2018 p 412. Available at <https://dx.doi.org/10.1111/ecaf.12321>

⁷⁵ Ibid. p 379.

⁷⁶ United Nations Development Programme, *The Futures Report: Making the AfCFTA Work for Women and Youth* (UNDP 2020) p 44.

agreement recognises and enables companies from all over Africa to enter national markets with minimal or no constraints, this brings various benefits and, in this case, digitalisation.

c. Trade Facilitation

Trade facilitation is critical for enhancing Africa's competitiveness. A sound facilitated trade system minimises regulation and compulsory trade procedures needed to transport goods and services across borders. The effect of this is to lower the cost of transactions. With the implementation of trade liberalisation policies, trade facilitation is expected to improve. This includes harmonising transit procedures, effectively dealing with roadblocks and introducing one-stop borders.

Harmonised Transit Procedures

The AfCFTA addresses trade Facilitation with much detail found in Annexes 3 and 4. Annex 3 deals with Customs Co-operation and Mutual Administrative Assistance, whereas Annex 4 is on Trade Facilitation. The impact of annex 3 is none other than promoting cooperation between state parties in all aspects of customs administration. The critical points in Annexure 4 aims to help simplify import, export and transit processes by simplifying and standardising international trade procedures and logistics. This will ensure the smooth flow, clearance and release of goods within borders. The two annexures are lauded for establishing a subcommittee on Trade Facilitation, Customs Cooperation and Transit. A prerequisite is that member states have to develop/ maintain National Trade Facilitation Committees. This bottom-up approach will yield benefits and lead to domestic coordination and implementation of the provisions. Cameroon, the Democratic Republic of Congo, Egypt, Nigeria and Tanzania are likely to benefit the most from the AfCFTA's implementation with a ten-percent-point reduction in trade costs.⁷⁷ Another benefit is the advantage of flexibility and discretion at which states can implement these measures that consider the respective countries' respective GDPs again.

⁷⁷ World Bank Group, *The African Continental Free Trade Area: Economic and Distributional Effects* (World Bank 2020) p 27.

Reduction of roadblocks and One-Stop Border Post

Police roadblocks are an NTB to trade. They cause severe delays to products that are being transported by road. With the reduction of NTBs to trade, faster procedures will be implemented and ensuring that corruption and bribery are eliminated. The issue of roadblocks had been a problem for countries in the ECOWAS. In the ECOWAS⁷⁸ Agreement it was written in the paper that roadblocks must be reduced by 50%, but there has been stagnant progress. Considering that the AfCFTA aims to eliminate NTBs, reforms are expected to be affected. Regarding the importance of a one-stop border post, Zambia, a member of the SADC, is exemplary because it has managed to initiate a one-stop border post with Malawi.⁷⁹ This is not the first one-stop border post for this country because the same exists in between Zambia and Zimbabwe. Considering that the Agreement bears a political will to reduce barriers, trade facilitation will improve. The cumbersome processes will be eliminated effectively.

2.7 Conclusion

This Chapter explained the operational of trade liberalisation and identified the barriers to market access. These are the tariffs and non – tariff barriers; their impact is that they hinder trade while their removal enhances the proliferation of trade agreements. It further showed the importance of the principle of reciprocity as a principle that complements the MFN principle. When countries engage in mutual trade concessions and extend to each other equal treatment, economic benefits accrue. This Chapter explained what the AfCFTA is and how its implementation will engineer socio-economic development. It highlighted the importance of the two protocols: The Protocol on Trade in Goods and the Protocol on Trade in Services. These Protocols are backed by the Protocol on Rules and Procedure for Settlement of Disputes. An adequately coordinated effort to implement the terms of the agreement will positively impact policy, trade-related infrastructure and trade facilitation. The fact that the AfCFTA also works to fulfil the pre-existing continental frameworks makes it transformational. It seems clear that the reduction of tariffs and non – tariff barriers have resulted in improving policy, infrastructure and trade facilitation.

⁷⁸ See the Economic Community of West Africans Agreement of 1975.

⁷⁹ Nyasa Times, One-Stop Border post to boost trade between Malawi and Zambia accessed on 20 April 2021 at <https://www.nyasatimes.com/one-stop-border-post-to-boost-trade-between-malawi-and-zambia/>.

Chapter Three

The Regulatory Framework

3.1 Introduction

This Chapter critically analyses the regulatory framework and other hurdles that can hinder the implementation of the AfCFTA. The aim is to display the strength and weaknesses of the AfCFTA. The AfCFTA represents yet another experiment towards continental integration which has been previously envisioned. It is crucial to understand how the AfCFTA consolidates this tangible progress that these treaties have made. It shall be evident that the AfCFTA provisions are channelling a progressive development to trade.

3.2 Legislative Framework

The bedrock of the right to enter into agreements to regulate trade is found in the 1947 GATT,⁸⁰ which was amended to the 1994 WTO Agreement. The significance of this statute is that it pushed for states to liberalise trade. It managed to achieve this objective because there was the signing of trade treaties between states and regions after its entry into entering into force. Another statute that forms the legal base for such agreements is the 1994 Marrakesh Agreement⁸¹ establishing the WTO. Its Article 3(2) states that the WTO shall provide the forum for negotiations for its members to negotiate their multilateral relations. The word ‘shall’ is treated as a mandatory provision that places a binding obligation on states. It is on this foundation that regions such as Africa also enter into agreements to regulate trade.

The spark for continental integration in Africa is found in the speech delivered by Kwame Nkrumah, who was a pan-Africanist and President of Ghana. In 1957, he stated that political independence achieved with decolonisation would be ineffective in realising a better life for the peoples of Africa unless it is accompanied by economic freedom.⁸² These words sparked a vision for continental integration, and evidence is found in the prolix of treaties that were signed. The first phase started after the creation of the OAU, where the Lagos Plan for Action 1980⁸³ was

⁸⁰ See General Agreement on Tariffs and Trade of 1947.

⁸¹ See Marrakesh Agreement of 1994 available at https://docs.wto.org/gtd/WTOLegaltexts/Legal_texts_e.pdf. Last accessed 01 May 2021.

⁸² Kwame Nkrumah Speech on African Unity delivered on 24 May 1963 in Addis Ababa available at <https://face2faceafrica.com/article/read-kwame-nkrumahs-iconic-1963-speech-on-african-unity> Last accessed 13 May 2021.

⁸³ The Lagos Plan for Action for the Development of Africa, 1980-2000.

adopted. This Treaty aimed to promote Africa's self-dependency with little or no need for foreign direct investments (FDI) and, in the process maximising Africa's resources. It was after that then succeeded by the 1991 Abuja Treaty,⁸⁴ which introduced a progressive approach to trade liberalisation. It was crafted in mandatory and legalistic language. Article 4 (2) (d)⁸⁵ stated that the community shall, by stages, ensure “the liberation of trade through the removal amongst member states of custom duties...and to establish a free trade area.” This program did not yield any benefits, and instead, it led to the proliferation of more RECS than necessary. The AfCFTA consolidates this progress by including the principles and the objectives of this Treaty in its Preamble.⁸⁶

The next phase was the 2000 Constitutive Act of the African Union⁸⁷ which had an objective “to accelerate the political and socio-economic integration of the continent.” The recent attempt was made in 2012 through the Boost Intra-Africa Trade (BIAT) decision⁸⁸ which re-envisioned continental integration to create a free trade area. The three significant contributions of the BIAT is that it attempted to merge the SADC, COMESA and EAC into a Tripartite Free Trade Area. Secondly, it renewed hope to fix the problem of overlapping memberships. Thirdly, through casting a net over the multiple RECS eventually a custom union will be formed. The final phase of all these efforts became the launch of the negotiations for AfCFTA in 2015. The AfCFTA represents a legal experiment that the BIAT Action Plan envisaged. More so, its provision reflects the principles of all these treaties discussed above.

3.3 The African Continental Free Trade Agreement.

The AfCFTA regulatory structure as per Article 18(1) of the AfCFTA is made up of:

- a) Its framework determining the Agreement’s goals and objectives.
- b) The Protocols (Protocols on Trade in Goods, Services, rules and procedures for the settlement of disputes)

⁸⁴ See Abuja Treaty of 1991 (Treaty establishing the African Economic Community) available at https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf

⁸⁵ See Article 4(2) (d) of the Abuja Treaty of 1991.

⁸⁶ PREAMBLE: **COGNISANT** of the launch of negotiations for the establishment of the Continental Free Trade Area aimed at integrating Africa’s markets in line with the objectives and principles enunciated in the *Abuja Treaty* during the Twenty-Fifth Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Johannesburg, South Africa from 14-15 June 2015.

⁸⁷ Organisation of African Unity (OAU), Constitutive Act of the African Union, July 2000 available at <https://www.refworld.org/docid/4937e0142.html> accessed 08 May 2021.

⁸⁸ Boost Intra- Africa Trade Action Plan of 2012.

c) Annexures, guidelines and instructions of the Protocols.

The AfCFTA mirrors a sound legal standpoint that creates rights and obligations for state parties. An analysis of this framework reflects that the position of AfCFTA is clear and it does not mince words regarding the progressive liberalisation policies. However, there exist minor provisions that warrant reconsideration; there are voids that call for attention. The legal framework contains provisions that fall short of clarity, clear parameters which may create problems on its implementation and enforceability. A lot can be said about the lack of peremptory provisions and the vague language used in the AfCFTA. Nonetheless, one can argue that these gaps are not too detrimental to the AfCFTA text. The three angled legislation is robust, and it is clear that there is a complementary aspect of the principles shared by AfCFTA text, the annexures and the protocols. They all sing with one voice to create a single continental market, promote tariff reduction and foster economic growth.

3.3.1. Criticisms against the AfCFTA

The provisions in these legal texts are not exhaustive enough to liberalise and achieve continental integration. The language of the texts is either vague or open to many statutory interpretations. This poses a problem because legislation must be drafted to reflect the anomaly it seeks to address in clear terms. The AfCFTA in Article 1 (r) defines non-tariff barriers to mean barriers that impede trade through mechanisms other than the imposition of tariffs. This definition is inadequate if it is compared to the one used by Tripartite Free Trade Area Agreement.⁸⁹ Its Article 1⁹⁰ defines non-tariff barriers to mean any laws, regulations, administrative and technical requirements other than tariffs imposed by a partner state whose effect impedes trade. A comparison of these definitions shows a lack of effort in the definition offered by the AfCFTA. The essence of the AfCFTA is also to address the NTBs, which are very problematic in Africa. Therefore, one can argue that if a legal text lacks such crucial definitions, it risks being redundant.

Another illustration is the lack of the definition relating to third parties/ countries. The only definition given is that of member states who are defined as the African Union member states.⁹¹

⁸⁹ The Tripartite Free Trade Agreement was a consolidation of three regional economic communities: SADC, COMESA and EAC. This was pre- AfCTA. It is upon this foundation that the AfCFTA was built.

⁹⁰ Article 1 of the Agreement establishing A Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, The East African Community and the Southern African Development Community of 2015.

⁹¹ Article 1 (q) of the AfCFTA of 2018.

The Tripartite Free Trade Area Agreement takes precedence in Article 1 defining a third country to mean a country that is not a party to this Agreement. One may submit that oversight was done in the drafting of the AfCFTA, making it appear exclusionary by nature. It seems to exclude third parties or other countries that may seek to trade in Africa. This thwarts the obligations that arise thereof from the AfCFTA. One is tempted to state that there is not much difference in the definition of terms by the AfCFTA and the other previous African legislative instruments. This will interfere with the implementation without doubt and has to be reconsidered.

Member Regulated system is problematic.

The AfCFTA gives authority to the member states, which is reflected in many provisions. Article 5 (a) clarifies that member states of the African Union shall drive the AfCFTA. This is buttressed by using words “*we member States*” in the main AfCFTA text and the Protocols on Trade in Service and Goods. This means that member states shall retain the right and flexibility:

*“...to regulate within their territories...to achieve legitimate policy objectives in areas including public health, safety, environment, public health....”*⁹²

This means that states can exercise discretion on what developments to effect and the time frame. This is problematic because it might slow down agenda 2030 and 2063 on sustainable development, which relies heavily on economic integration. The multiplicity of voices will also pose a challenge to decision-making, which can threaten the efficiency of the trade pact itself. Considering that the different member states are members of different RECs, it can be argued that some members will want to impose their rules on others in avoidance of having to change. Those with RECs that are more influential than the others will benefit even more in such a situation.

Moreover, a member regulated system can have adverse effects on trade with non-members. This lack of representation when a member-state legislature law is adopted may act against them. This stance is bolstered by Donald’s assertion that their interests are thereby neglected when the law is

⁹² The Preamble to the Agreement establishing the African Continental Trade Agreement of 2018 and the Preamble of the Protocol on Trade in Services.

adopted. The cost of the law to the foreigners may well be greater than the benefit to locals.⁹³ In the AfCFTA, it is unclear what rules shall apply to non-members such as those in Africa who have not ratified the Agreement or countries from other regions outside Africa. It could be said that this may also open avenues for protectionist attitude towards non-members, which will defeat the purpose of trade liberalisation. Therefore, a member regulated system is a hazard. The amount of power given to these states is dangerous for trade and must be limited. Limitation of powers will curb the selfish use of power and close leeway for protectionism.

Continental Customs Union

The AfCFTA takes inspiration from Article 6 (c) of the Treaty Establishing the African Economic Community,⁹⁴ on its vision to create a continental customs union. Article 1 (j) of the AfCFTA is a replica of the same provision. The importance of the customs union is on the promotion of economic integration, zero tariffs, no border checks and the adoption of a common external tariff (CET).⁹⁵ It is a matter of principle that a CET does not exist in free trade areas, but AfCFTA references it being adopted. Africa has several customs union, but not all of them are fully operational. For example there is the Southern African Customs Union (SACU), Economic Community of West African States (ECOWAS), East African Community (EAC), West African Economic and Monetary Union (WAEMU), Economic and Monetary Community of Central Africa (CEMAC) and the Common Market for Eastern and Southern Africa (COMESA). The East African Community is only fully operational. To consolidate all these customs unions and be able to capture the various needs without causing a conflict is difficult. It can be said that this vision will be problematic to maintain.

The danger associated with the CET is that it takes away the sovereignty of states since trade deals will be entered into on behalf of the whole customs union. This international law principle is

⁹³ Donald Regan H, *Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing*, Da Capo (Michigan Law Review No. 8 2009) p 3.

⁹⁴ At each such stage, specific activities shall be assigned and implemented concurrently as follows:

(c) Third Stage: At the level of each regional economic community and within a period not exceeding ten (10) years, establishment of a Free Trade Area through the observance of the time-table for the gradual removal of Tariff Barriers and Non-Tariff Barriers to intra-community trade and the establishment of a Customs Union by means of adopting a common external tariff.

⁹⁵ Article XXIV 8 (a) (i) of the GATT defines customs union as the substitution of a single customs territory for two or more territories so that duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade between the constituent territories of the union, or at least with respect to substantially all the trade-in products originating in such territories.

engraved in most African constitutions. This means states will lose the freedom to decide which trade deals to enter into and which ones to avoid. There is also concern that once a country joins a CU, it will be unable to change its trading policy without the permission of the other union members.⁹⁶ Risk for the customs union overlapping with trade liberalisation objectives of the AfCFTA can also be foreseen. A cause of concern also arises, especially from the effect of trade diversion, which the customs union may cause. Trade diversion occurs when tariff agreements cause imports to shift from low cost countries to higher cost countries.⁹⁷ Another drawback with multiple memberships in customs is the high transaction and administrative fees. It means loss of revenue since all states will be subject to the same CET. Therefore, the continental customs union in Africa might be tricky because it limits the powers of the sovereign states and may affect the domestic market, especially in infant industries.

Overlapping memberships

This is a significant problem that has raised many questions with no answers. African states belong to more than one regional economic community (REC) or regional trade agreements (RTA). The AfCFTA itself is built on an existing Tripartite FTA (SADC, COMESA and ECOWAS). These overlapping memberships are what is described as the ‘spaghetti bowl’ a term coined by Jagdish Baghwadi.⁹⁸ The spaghetti bowl phenomenon results when countries and intergovernmental organisations enter into multiple crisscrossing agreements instead of participating in multilateral trade. The economist Bhagwati has argued that multiple regional and bilateral trade agreements are stumbling rather than building blocks for a multilateral trading regime.⁹⁹ Thuo also concurs with this ideology, and he describes the African RTAs as ‘flexible regimes.’ It means African RTAs have to be understood on their terms, rather than as treaty regimes on a path toward becoming much like their European or North American counterparts.¹⁰⁰ This will enable one to

⁹⁶ YongZheng Yang and Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* (IMF Working Paper 2005) p 14.

⁹⁷ Panagariya, *Preferential Trade Liberalisation: The Traditional Theory and New Developments* (Journal of Economic Literature JSTOR, 2000) p 290.

⁹⁸ J Bhagwati, US Trade Policy: ‘*The Infatuation with Free Trade Areas*’ in J Bhagwati and A.O. Kruger (eds), *The Dangerous Drift to Preferential Trade Agreements* (Washington DC: AEI Pres, 1995) p 2.

⁹⁹ Jagdish Bhagwati, David Greenway and Arvind Panagariya, *Trading Preferentially: Theory and Policy* (The Economic Journal 108, 1998) p 1128, 1138 available at <https://doi.org/10.1111/1468-0297.00334>.

¹⁰⁰ James Thuo Gathii, *International Trade and Economic Law: African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) p3.

understand the challenges designed to be addressed by these RTAs and the factors that shaped them.

The objective that the AfCFTA text carries is that of addressing and attempting to resolve the multiplicity of overlapping RECs. A juxtaposition of Article 3 (h) and Article 19 (1) reflects that there is a contradiction that exists. Article 3 (h) plainly state that one of the general aims of the Agreement is to “resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.” However, Article 19 (2)¹⁰¹ states that:

“State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.”

This means that RECs would be allowed to function and continue to exist, particularly if they had achieved higher levels of integration. This speaks that the AfCFTA realises that these RTAs are not mere agreements but are broad in scope. This is fortified by the first part of the same article, which addresses which Agreement should prevail in cases of conflict. The AfCFTA is said to prevail to the extent of the inconsistency;¹⁰² thus recognising that regional agreements will co-exist with the AfCFTA.

The challenge that exists is that most of the regional RECs have achieved these higher levels of integration. In the eight RECS, some of these have already achieved the status of FTAs. For instance, the Economic Community of West African States (ECOWAS)¹⁰³ achieved the FTA status in 2000. The same can be said about the Southern African Development Community (SADC); it obtained its FTA status in January 2008.¹⁰⁴ This is evidence that the complexity of these regimes is so great. It combines even the existence of customs unions which have already

¹⁰¹ Article 19 (2) of the AfCFTA.

¹⁰² Article 19 (1) of the AfCFTA states that: in the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement.

¹⁰³ ECOWAS consists of 15 Western African member states (Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra, Leone and Togo).

¹⁰⁴ SADC currently has fifteen members: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

been discussed above. Furthermore, most African countries are bound by their WTO obligations, and many have unilaterally signed or are negotiating treaties with foreign regions or countries (EU, USA, China, Canada, etc.)¹⁰⁵ Thus, this problem is not being resolved in the AfCFTA and this can pose challenges with regards to its enforcement and implementation.

Some issues also arise concerning regional trade agreements in Section 19 (2) of the AfCFTA, subsequently with regional economic communities and customs union. This is confounding because the AfCFTA does not define what RTAs are for the Agreement. It makes no sense to refer to RTAs without defining what they are or recognising which ones will be recognised by the Agreement. There is no specific protocol or annexure that deals with this relationship between the AfCFTA and the existing REAs.

3.3.2 Benefits of the AfCFTA

Most Favoured Nation Standard

This principle is significant, especially for African economies that have a low percentage of intra-Africa trade. The AfCFTA aims to create a single market for goods, facilitate investments, engineering socio-economic development, enhance competitiveness, and promote industrial development.¹⁰⁶ These objectives are met through a robust three angled legislation underpinned by MFN and national treatment principles. In Article 4 (1) Protocol on Trade in Services, the MFN clause is framed as a general obligation and discipline applicable to any measure affecting trade in services. It even extends to the services of any third party. In comparison, Article 20 of the same Protocol promotes the principle of national treatment in the trading for services.

Notably, the fact that the MFN in the AfCFTA is not automatic shows the difference between the use of this principle in the WTO context and AfCFTA. The MFN principle in the WTO applies to its member states automatically. However, there is a divergence portrayed in Article 4(2) of The Protocols for Goods and Services¹⁰⁷ which says:

¹⁰⁵ Theophile Albert, *The African Continental Free Trade Agreement: Opportunities and Challenges*. (CUTS International, Geneva Switzerland 2019) p 22.

¹⁰⁶ See Article 3(b) (c) (e) (f) (g) of the AfCFTA of 2018.

¹⁰⁷ See Article 4(2) of the Protocol on Trade in Goods and Article 4(2) of the Protocol on Trade In Services of the AfCFTA.

“Nothing in this Protocol prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties..., provided that such...concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis. ”

Two critical things can be deduced from this provision. Firstly, the keywords reciprocal basis suggest that it is not automatic. Therefore a member state cannot hold accountable another member accountable for failure to extend the same. This is opposed to the WTO system as one can hold a member state accountable because this standard operates automatically. Secondly, the AfCFTA can be applauded for its pragmatic approach, it is not closed to the realities. It allows African economies to continue with their preferential trade agreements because intra-African trade has always been low. Hence, it is a given that African economies would never close their markets to better-off regions. One can argue that the MFN standard used in the AfCFTA is crucial for advocating for fair treatment and promoting the practicability of giving freedom to African economies to engage in PTAs.

Continental Rule-Based System to Trade

The AfCFTA text is a rulemaking instrument. This is reflected in its principles, such as best practices and consensus in decision-making.¹⁰⁸ The AfCFTA wording is not minced in creating mandatory rights and obligations that should arise, and this is clear in its constant use of the word ‘shall.’ The AfCFTA is therefore evident in its wording and text. The peremptory word “shall” calls for full adherence to the terms of the AfCFTA and ensure proper implementation. The term “shall” is defined as follows in Black's Law Dictionary: generally imperative or mandatory.¹⁰⁹ The vitality of this word has been displayed in judicial decisions too. In the case of *Kruger & Anor v MacGregor & Anor*¹¹⁰ it was decided that unless there are other circumstances that negate this interpretation, the word “shall” in a statute is to be read as peremptory. These peremptory provisions place obligations among RECs, state parties and international organisations. This rule-

¹⁰⁸ See Article 5 (k) – (l) supra. Note 15.

¹⁰⁹ Henry Campbell, Black's Law Dictionary Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern 4th Edition (West Publishing Co, 1968) p 1541-1542.

¹¹⁰ *Kruger and Another v MacGregor and Another* [1999] ZALC 189 (18 June 1999).

based system is fortified by establishing a Secretariat which will be implementing a rule-based system for trade.

As a result, the AfCFTA mandates that state parties progressively eliminate tariffs and NTBs to trade in goods; progressively liberalise trade in services and develop and maintain an institutional framework for the implementation and administration of the AfCFTA.¹¹¹ Therefore, the impact of peremptory provisions limits the element of discretion on states. They must domesticate this new international law. Most Constitutions in African governments recognise the adoption and domestication of terms from international law treaties. An example is given of the constitutions of Zimbabwe, Rwanda and South Africa.¹¹² The wording will be treated to show the standard or weight that the AfCFTA places on the legal instrument itself and the member states.

Transparency

The principle of transparency is a cornerstone of the multilateral trading system. In international trade, predictability and security are not guaranteed, consequently, players would not feel confident when engaging in cross-border trade.¹¹³ Article 5 (e) of the AfCFTA states transparency and disclosure of information as guiding principles to the Agreement. The highest standard is stretched in Article 16 (1) of the AfCFTA. State parties are obliged to publish any laws, regulations, procedures, administrative rulings and any other commitments related to trade matters of the AfCFTA. The Protocol on Trade in Services reinforces this same standard. Recital 2 of its Preamble recognises African Union Member States' desire to create, among others, a "transparent . . . single service market." Furthermore, Article 5 (1) uses the word promptly and publication through accessible means (e.g. Gazette or newsletter). Therefore due to the unpredictability of state parties involved in trade, transparency cannot be disregarded; it is helpful to promote fair business transactions.

¹¹¹ See Article 4 of the Agreement Establishing the African Continental Free Trade Area of 2018.

¹¹² See Section 34 of the Zimbabwe Constitution (Amendment No. 19) of 2013, See Article 190 of the Constitution of the Republic of Rwanda and Section 231 (4) of the Constitution of the Republic of South Africa, 1996.

¹¹³ Ibid. P 19.

Various annexes to the AfCFTA also maintain the same principle. Annexure 4 Article 4 on Trade Facilitation ¹¹⁴ promotes the publication of procedures, rules, laws, and rules on the classification of goods, promoting trade facilitation. Supplementary to this position is Article 28 of the same Annexure that places an obligation on member states to establish or maintain a National Committee on Trade Facilitation. This is progressive development as this will ensure that business dealings will be treated in good faith. The Annexure on Non-Tariff Barriers likewise encourages transparency in the exchange of information relating to resolved NTBs. The same is found in Article 11 of Annexure on Technical Barriers to Trade uses transparency to be used in dealing with technical trade barriers. The importance of transparency cannot be undervalued; it will promote clarity and predictability. State parties are guaranteed that states will uphold their end of the bargain.

Special and Differential Treatment and Variable Geometry

Special and differential treatment (S&D) is a central feature of the WTO. It is a mechanism used to provide flexibilities and more extended implementation periods for countries within a trade agreement, typically used to help support less developed economies.¹¹⁵ Variable geometry refers to rules, principles, and policies adopted in trade integration treaties that give deficient member states policy flexibility and autonomy.¹¹⁶ In a way, both principles assist developing economies to tackle the opportunities of trade liberalisation. The AfCFTA Agreement does not depart from this character. It provides in its Article 5 (c) (d) that it is governed by the principles of variable geometry as well as flexibility and special and differential treatment (SDT). Scholars have put forward that African economies bear a greater degree of homogeneity than the global space; hence it makes less sense to include such provision in the AfCFTA.¹¹⁷ Arguably, this view bears elements of untruth because African economies have different economic GDPs. Furthermore, the different RECs that exist have been balanced to accommodate countries that are rich and others that are least developed.

¹¹⁴ See Annexure 4 Article 4 of the AfCFTA of 2018.

¹¹⁵ David Luke and Jamie MacLeod, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (Routledge 2019) p 3.

¹¹⁶ Ibid. P 35.

¹¹⁷ Ibid p. 73

The Protocols on Trade in Goods and Services concurs with the AfCFTA text. The Protocol on Trade in Goods recognises the distinct levels of advancement among the state parties. Therefore it provides the need to give flexibilities and differential treatment, and specialised help to state parties with special requirements.¹¹⁸ Article 7 of the Protocol on Trade in Services further advances this approach to S&D by stating that state parties should “grant flexibilities...on a case by case basis, to accommodate special economic situations and development, trade and financial needs of the state parties.” Notable is the incorporation of a “special consideration” in the (progressive) liberalisation of services to advance areas critical to sustainable economic and social growth, development and development. In this way, states are afforded a relaxed time frame to fulfil the obligations of the AfCFTA in ways that match their productive capacities.

The crisis with these principles is that they are not self-executive. This principle can be hard to invoke, especially for the least developed economies. Inevitably, this would result in selective compliance by states, thereby undermining the clauses of the AfCFTA. Moreover, this principle accrues to any economy that can claim it. Countries like South Africa are not barred from pleading for this type of treatment as long as they satisfy the requirements. This is a cause for concern. It can be argued that despite these problems, the S&D principle is still remarkable because it minimises the influence that the most significant economies might have over fragile economies. This differential treatment will guard against a one size fits all policy and avoid using the same standard that some economies cannot achieve.

3.4 The Protocol on Trade in Goods

The Protocol on Trade in Goods (hereinafter referred to as ‘Goods Protocol’) and Annexure 5 on NTBs set rules and modalities for trade in goods. The core objective of this Protocol on Goods is to create a liberalised market for trade in goods.¹¹⁹ Its input among many is on promoting locally produced goods, reducing tariffs, consistent schedule of concessions and harmonised rules of origins. It complements the AfCFTA on its goals to address the tariffs on goods and the redaction of industrialisation policies.

¹¹⁸ Article 6 of the Protocol on Trade in Goods states: “In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall provide flexibilities to other State Parties at different levels of economic development...These flexibilities shall include, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis.”

¹¹⁹ Article 3 of the AfCFTA.

3.4.1 Problems Associated with the Protocol on Trade in Goods

The Goods Protocol lacks essential information and constructive definitions, which may affect the NTBs framework's rigidity. Similarly to the AfCFTA text, a loose interpretation can be attached to it, giving leeway to manipulation. An NTB is defined as to mean barriers that interfere with trade through mechanisms other than the exaction of tariffs. Countries can manipulate such an unclear definition to give leeway to protectionism. From a statutory interpretation point of view, unclear definitions complicate interpretation. They are susceptible to broad interpretation, which may cause problems unless a purposive approach to interpretation is used. It still stands that parties may also find ways to avoid the regulation by stating that the legal instruments did not clearly define what an NTB is. Article 3 (1)¹²⁰ states that member parties may adopt the general categorisation of NTBs from a given list. This list is not exhaustive. It could be stated that the use of the word may bring in an element of discretion which is very dangerous, especially if it is dealing with critical issues such as the reduction of NTBs. This may result in cherry-picking NTBs as the list is limiting. It might also mean that the ones that are not listed are not treated as NTBs for the purposes of the AfCFTA.

There threat posed by the use of the word 'may' as opposed to 'shall' reflects a provision that is not obligatory. It means the provisions are non-binding but depend on concessions that member states towards each other will make. This may cause problems in the implementation of the Goods Protocol and the AfCFTA as a whole. Discretion seems to be left with states, which is dangerous, especially in critical areas such as export duties.¹²¹ "State parties may control export tariffs or charges having equivalent effect on commodities originating from their borders," according to the agreement. The discretionary element takes space in other provisions, too, relating to the schedules for tariffs, exchange of tariff books, the certificates of origin, and other phytosanitary measures. This will result in a delay in the execution of the provisions of the Protocol. The evidence presented

¹²⁰ See Annexure 5 Article 3 (1), which states that State Parties may, for guiding purposes, adopt, among other things, the generalisation of potential NTBs as indicated below:

- (a) government participation in trade and restrictive practices tolerated by Governments;
- (b) customs and administrative entry procedures;
- (c) technical Barriers to Trade;
- (f) charges on imports

¹²¹ See Article 10 (1) of the Agreement establishing the AfCFTA of 2018.

shows that the NTBs framework has a loophole that must be attended to lest it becomes detrimental to the enforcement of the AfCFTA.

Duty on Regional Economic Communities

The consolidation of RECs to the framework of the AfCFTA is complicated, even more, when the text refers to specific duties that are placed on RECs. Article 10(2) states that RECs shall attempt to resolve identified NTBs to facilitate trade. This is confusing because the RECS are not state the parties, so no obligation arises from the said legal instrument that bounds them to adhere. This merits consideration since RECS are not parties to the AFCFTA. The dilemma that exists with such generalised clauses is that they may hinder the full effectuation of the terms of the whole Agreement. Suppose the AfCFTA intended to create such an obligation on RECs. In that case, it should have expressly made the RECS state parties; in that way, obligations would arise and have the RECs involved in the negotiation in that capacity and states.

Another problematic provision that places a duty on RECS relates to the resolution of NTB concerns. Article 12(3) of the Annex on NTBs precisely states that:

“State parties are encouraged to resolve NTBs raised at an intra-REC level using resolution mechanisms in place in each REC.”

This is yet another illustration that there seems to be a loophole in the law. The same obligation is being created in Appendix 2 (1), which gives a procedure for elimination and cooperation to eliminate non-tariff barriers. According to it, state parties shall exhaust existing NTB elimination channels from lower levels such as REC level before escalating such a complaint or trade concern to the AfCFTA level. This can seem to expedite the process of resolving such challenges. Nevertheless, again, RECS are not state parties; it is not expressly clear what an intra-REC is according to the Protocol on Goods and the Annexure. This leaves an open question on whether NTBs schemes will be REC specific while others will be AfCFTA specific. This is not clear. If this is so, then the purpose of the AfCFTA as umbrella legislation that introduces homogeneity is defeated.

3.4.2 Benefits of the Protocol on Trade in Goods

Creation of liberalised markets for goods.

The Goods Protocol makes remarkable steps in liberalising the market for goods. The Preamble clearly stipulates the desire to eliminate trade barriers, increasing trade and investment progressively from the onset. Various clauses have been included to that effect. The member states are committed to expanding intra- Africa trade and implementation of trade facilitation instruments across Africa. Article 2 (1) (2)¹²² of the AfCFTA is one provision that bears the proper vision and objectives that the Members have and agreed to promote trade in goods. This provision is fortified by Article 7 (1), which compels state parties to limit import duties progressively. This progressive development is further reinforced by providing schedules of tariff concession found in Article 8 of the Goods Protocol. These are schedules of specific commitments that member state will grant to each other as an undertaking to provide market access. One is tempted to say that this is efficient since member states are given the power to decide what is suitable for them instead of concessions imposed on them.

3.5 The Protocol on Trade in Services

The Protocol on Trade in Services (hereinafter referred to as ‘Services Protocol’) aims to foster the creation of an open, rule based, inclusive and integrated single services market.¹²³ The Services Protocol focuses on five key areas: business, transport, communication, financial and tourism services. The Protocol takes the GATS’ definition of services and trade in services which is based on four supply modes. Article 1(p) of the AfCFTA Services Trade Protocol covers the four modes of service provision, similar to the GATS, it does not define a service but rather how it might be exchanged.¹²⁴ As a result, the Services Protocol’s reach is as broad as the GATS.

¹²² Article 2(1) (2) (a) (b) (c) states that: The specific objective of this Protocol is to boost intra-African trade in goods through:

- (a) progressive elimination of tariffs;
- (b) progressive elimination of non-tariff barriers;
- (c) enhanced efficiency of customs procedures, trade facilitation and transit;

¹²³ See Second Recital of the Preamble of the AfCFTA Treaty's Protocol on Trade in Services available in AfCFTA.

¹²⁴ Article 1 (p) of the Trade in Services Protocol states that “Trade in services” means the supply of service:

- i. from the territory of one State Party into the territory of any other State Party;
- ii. in the territory of one State Party to the service consumer of any other State Party;
- iii. by a service supplier of one State Party, through commercial presence in the territory of any other State Party;

3.5.1 Challenge associated with the Protocol on Trade in Services

Lack of domestic regulatory frameworks

The liberalisation of service sectors is a reasonably novel phenomenon in Africa. Only the East African Community is advanced in terms of free movements services in Africa.¹²⁵ Due to their value, services are heavily reliant on regulation to ensure a competitive but secure business environment, lacking in most African economies. It is baffling how the liberalisation of services will operate in a weak domestic regulatory framework. Since African economies have primarily traded in goods, one can argue that they do not have laws that can protect and regulate trade in services. Seeing that the AfCFTA is member-driven, this introduces a delay in the enforcement of the provisions. It will further delay the progress of the AfCFTA, which is headed towards having a continental trading block. Consequently, it will prove challenging to have this process accelerated, especially with the lack of political will. This suggests the existence of a legal gap that needs to be addressed at a national level.

3.5.2 Benefits of the Protocol on Trade in Services

Harmonised system for services.

Given the profound potential to pursue continental market integration, the Services Protocol introduces a harmonised system of regulating services. According to Kamba, harmonisation of law is a mechanism intended to achieve an approximation or co-ordination of multiple legal provisions or systems by eliminating substantial discrepancies and creating minimum requirements or standards.¹²⁶ This standard is met in the Services Protocol, in the Preamble by stating that, “...build on achievements in services liberalisation and regulatory harmonisation at the Regional Economic Community (REC) and continental levels.”¹²⁷ Article 10 (1) buttresses this position by harmonising standards, which will pave the way to mutual recognition of the importance of an

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- iv. by a service supplier of one State Party, through the presence of natural persons of a State Party in any other State Party territory.

¹²⁵ East African Common Market Protocol at Article 14 (1) p 18.

¹²⁶ Kamba W, *Comparative Law: A Theoretical Framework*. (International and Comparative Law Quarterly 1974) p 501.

¹²⁷ See the third Recital of the Preamble of the Protocol on Trade in Services of the AfCFTA of 2018.

economy. A harmonised system is constructive for efficiency in trade, regulatory efficiency and, most importantly, reduces the costs of having to comply with double standards of a domestic and a foreign country. This harmonised system has already curtailed the freedom of discretion on how foreign service suppliers will be treated. They can no longer mistreat them and justify their actions by invoking national policies.

The principle of Mutual Recognition

This is a fundamental principle that originates from the European Union internal market law. According to Regis, mutual recognition entails recognising by one country how another or other countries regulate the production and marketing of products, in a manner equivalent to its system of regulation, without the need for any other procedures.¹²⁸ In other words, member states must recognise and allow goods that have been legally produced in another country to their territories. This principle was set in the famous European Court of Justice Case of *Cassis de Dijon*¹²⁹ by stating that: “unless the importing member state can successfully demonstrate that the laws of the exporting country are not functionally equivalent to its own laws, the presumption is that a lawfully marketed good in the exporting country should be admitted in the importing country without restriction.” This was a case of inquiry on whether Germany was allowed to restrict the importation of French liquor because it did not correspond to the percentage allowed by German law.

Mutual recognition in trade in services illustrates the basic notion that if a service can be delivered legitimately in one jurisdiction, it should be able to circulate in any other participating countries without having to comply with the laws of other jurisdictions.¹³⁰ The Services Protocol of the AfCFTA adopted this principle in Article 10 (1). The provision encourages member states to recognise the education or experience obtained, in another member state, as well as prerequisites satisfied, and license or certifications granted. Mutual recognition can be achieved through harmonisation or by entering into agreements by member states to that effect. The East African Community (EAC) has used this principle among its members to complement the commitment to

¹²⁸ Regis Y Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility* (Oxford 2020) p 75.

¹²⁹ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, European Court Reports 1979- 00649 (20 February 1979) (*‘Cassis de Dijon’*).

¹³⁰ Gkoutzinis, Apostolos, ‘International Trade in Banking Services and the Role of the WTO: *Discussing the Legal Framework and Policy Objectives of the General Agreement on Trade in Services and the Current State of Play in the Doha Round of Trade Negotiations*, 39(4) *International Lawyer* 877 (2005), p 888.

liberalise the services. It is the only REC so far that is the champion for trade in services. The standard set by the service Protocol is high; it prevents discrimination between states and proposes for state parties to be given adequate time to prove if the principle is not granted automatically.¹³¹ Consequently, the principle aids in the smooth flow of trade curbs discrimination and promotes equal treatment.

Right to Administrative Justice

Noting the importance of individuals, especially that of informal traders and service providers in Africa, the Protocol enshrines administrative justice. This is found in Article 9 (2)¹³² where member states are obliged to maintain or institute administrative tribunals. In most African countries, the right to administrative justice is embedded in the constitutions. In Zimbabwe, for example, Section 68(1) of the constitution stipulates that everyone has a right to administrative conduct that is legitimate, swift, efficient, reasonable, proportionate, impartial, and substantively and procedurally fair.¹³³ Gerhard argues that domestic regulation is a critical aspect of trade in services.¹³⁴ This is effective for the AfCFTA trading system to take a bottom-up approach to implement rights and obligations in trade.

3.6 Protocol on Rules and Procedures on Settlement of Disputes

The Protocol on rules and procedures on settlement of disputes (hereinafter referred to as Settlement of Disputes Protocol) addresses the conflict's administrative aspect. This Dispute Settlement Mechanism is established in Article 20 (1) of the AfCFTA.¹³⁵ It also strives to make the dispute resolution process transparent, accountable, fair, predictable, and consistent with the terms of the Agreement.¹³⁶ Its significance is for enforcing the provisions of the AfCFTA. The provisions of this Protocol procedural fairness and upholding impartiality.

¹³¹ Ibid, Article 10 (2) (3).

¹³² Ibid, Article 9 (2).

¹³³ Section 68 (1) of the Constitution of Zimbabwe (Amendment No. 20) of 2013.

¹³⁴ Gerhard Erasmus, *Trade in Services under the AfCFTA and Domestic Regulation*. (TRALAC 2019)

¹³⁵ Article 20 (1) of the AfCFTA states that a dispute settlement mechanism is hereby established and shall apply to the settlement of disputes arising between State parties.

¹³⁶ Article 2 of the Protocol on Rules and Procedures on Settlement of Disputes of the AfCFTA of 2018.

3.6.1 Problems Associated with the Protocol on Rules and Procedures on Settlement of Disputes.

Locus Standi

The word *locus standi* refers to a person's legal ability to bring a lawsuit, and it is sometimes used interchangeably with terms like standing or title to sue.¹³⁷ In academic circles, *locus standi* means the right to bring an action, be heard in court, or address a court on a matter before it. The Settlement of Disputes Protocol is problematic on the legibility of those who can approach it for recourse. It appears only state parties can invoke this provision, and they are treated to have a *locus standi*. The definitions of 'complaining party' and 'dispute are flawed.' Article 1 (b) of the Settlement of Disputes Protocol defines a complaining party as a state party that has initiated a dispute settlement procedure after the Agreement. While in Article 1 (e), a dispute is narrowed down to mean a disagreement between state parties. These definitions are flawed, which means that the DSM only entertains interstate disputes leaving little or no space for private individuals.

This position is strengthened by Section 3 of the same Protocol that specifically mentioned that it would apply to conflicts between states concerning rights and obligations in terms of scope. A question may be asked: what happens when the conflict is between a state party and a non-member state? Can the aggrieved none member bring forward a complaint? It does not seem to be the position that this Protocol stands by. This needs to be clarified. Third parties are only mentioned in Article 13 (1), where it says their interests will be taken into consideration throughout the panel process. This is short of clarity since the definition section and scope excluded the third parties in the first place.

Mode of Dispute Resolution.

Dispute resolution in the AfCFTA follows the order of a tribunal system. The challenge of such a system rests on the enforceability of decisions, especially on states who may be resistant to comply with the decision made. This would make it difficult to achieve the full implementation of the AfCFTA. Reference is made to a conciliation and mediation procedure in Article 8. Article 4 (5) also reiterates the same position on the use of mediation, conciliation, good offices. This means that states have to start from the lower levels of conflict resolution until it reaches the Dispute Settlement Board. This might be difficult especially dealing with African economies that usually

¹³⁷ Thio Sue Mien, *Locus Standi and Judicial Review* (Singapore University Press 1971) p 2.

have a story of enmity. This might also affect the uniformity of decisions, especially considering that different states belong to different RECs.

Provisions of the Dispute Settlement Mechanisms.

The Special and Differential treatment principle was duplicated in the Protocols on Goods and Services, but it is not clear whether it applies to Disputes Protocol. No reference is made to it, which may suggest that it was omitted. This was meant to be specified in clear terms to leave no assumptions. This is particularly important because dispute settlement mechanisms can be costly to use. Is dispute settlement affordable for all economies? Since African economies have differences in GDP and productive capacities? For instance, there is a lot to be learned from a study conducted to inquire on why African states were not utilising the WTO DSM. The research found that, African countries required the WTO to give assistance in the form of a pool of experts and lawyers in the preparation and conduct of cases. It entailed the payment of fees and expenses.¹³⁸ A scrutiny of the provisions relating to DSM reflects that there is no reference to this and how the costs shall be made. One can argue that this is crucial; such a background check is necessary for the fruition of the AfCFTA. There is much weight that attaches to why African economies did not use the WTO DSM, and ignoring them can be a grave mistake on AfCFTA.

Risk of Redundancy of the Dispute Settlement Mechanism

African countries are well known not to want to take each other to court or enforce harsh penalties against each other.¹³⁹ There is a common unwritten principle of brotherhood mainly rooted in political reasons and the desire to uphold their reputations. The relationship of the International Criminal Court and African states is an example of the approach taken by African states towards court systems against one of them. This is because African states have always favoured one set of fundamental norms: sovereignty, peace, and pan African solidarity.¹⁴⁰ From such pan African solidarity, it flows the attitude of not wanting to sue or testify against each other to preserve their reputations. With the advent of the AfCFTA, one can reasonably foresee the same happening. For

¹³⁸ Amin Alavi, *African Countries and the WTO's Dispute Settlement Mechanism* (Development Policy Review 2007) P 8.

¹³⁹ Parshotam Asmita, *Can the African Continental Free Trade Area Offer A New Beginning for Trade in Africa?* (SAIIA 2018) p 21.

¹⁴⁰ Lucrecia Garcia Iommi, *International Relations: Whose justice? The ICC 'Africa Problem'* (SAGE 2020) P 106.

over 15 years or more, African economies have integrated using the different RECs, so it is imaginable having countries that used to belong in the same RECs or Customs Unions taking each other to dispute settlement bodies. It is problematic and will inevitably lead to states solving problems using backdoor policies that skip the dispute settlement mechanism suggested by the AfCFTA.

3.6.2 Benefits of the Protocol on Rules and Procedures on Settlement of Disputes

Rule of Law

Similar to the WTO Dispute Settlement Mechanism¹⁴¹, the AfCFTA designed its DSM to promote the rule of law between trading states. The Settlement of Disputes Protocol is valuable for the security and predictability of the regional trading system.¹⁴² The rule of law is constructive to influence economic development. Such a system has a double effect of upholding transparency and the principle of good faith. To ensure progressive development, Article 7 of the Settlement of Disputes Protocol permits municipal laws in consultation. The significance of the section is that municipal laws will apply firstly when a state or country request consultation. Furthermore, it means that a dispute can arise from an impairment or nullification of the rights and obligations captured in trade instruments and not just the AfCFTA. Thus, rights and obligations will be preserved by upholding the rule of law, allowing for the positive implementation of the AfCFTA.

Procedural Clarity

The AfCFTA DSM represents an effective procedural system that is prompt and efficient. This is evidenced by its provisions which address urgent cases such as those of perishable goods. There are clear rules on filing a dispute, deadline for such processes, prescriptions, functions of the different personnel included in the DSM system. Moreover, the panel structure of the AfCFTA covers functions and composition, which promotes certainty. This is cemented in Annex 4 Article 1 (2) on the Code of Conduct for Arbitrators and Panelists. This provision calls for impartiality, independence and confidentiality on matters relating to dispute settlement.

¹⁴¹ The dispute settlement mechanism of the General Agreement on Tariffs and Trade was based on Articles XXII and XXIII of GATT 1947.

¹⁴² Article 4 of the Protocols and Rules and Procedure for Settlement of Disputes of the AfCFTA 2018.

3.7 Other Issues

3.7.1. Population Increase

The AfCFTA will cover a market for 1.3 billion people and a gross domestic product (GDP) of 2.5 trillion across 55 members of the African Union.¹⁴³ However, according to a study undertaken by the UN Population Division, the global population is predicted to grow by 2.2 billion people between 2017 and 2050, reaching 9.8 billion people in 2050.¹⁴⁴ Africa is predicted to account for half of global population increase. Since the continent is working on vision 2030 and 2063 on SDGs, it means that the population would have increased to exceed the benefits from trade policies. One is tempted to argue that this may inevitably cause problems for implementing the AfCFTA since it is working on emancipating from poverty its current population.

3.7.2 Poor Monitoring VAT problems

Value Added Tax is widely adopted in Sub-Saharan Africa, and it has been a centrepiece for tax reform in developing economies. One of the most dominant claims made by proponents of the VAT, particularly in emerging economies, has been that it will boost efforts to raise much-needed tax income, not just directly but also indirectly through better tax administration and compliance.¹⁴⁵ A policy brief by African Tax Outlook¹⁴⁶ stated that the performance of tax administrations in collecting VAT is influenced mainly by two components: the policy gap and the compliance gap. The policy gap relates to VAT rates, tax expenditures, changes in the VAT threshold and exemptions. The compliance gap gauges the extent to which taxpayers comply with all their legislative and administrative obligations. Nigeria is an example of such a country with inadequate VAT systems. A February 2021 IMF country Report recommended a revenue measure such as the increase of the VAT rate to at least 2022 and 15 per cent by 2025.¹⁴⁷ The report said the country is at a critical juncture, and the government needs to fast on reforms that

¹⁴³ United Nations, Department of Economic and Social Affairs, *Population Division (2017) and IMF GDP estimate for Africa 2019* (IMF, 2018) p 8.

¹⁴⁴ United Nations, *World Population Prospects Data Booklet*, (United Nations, 2017) p 5.

¹⁴⁵ Keen Michael and Lockwood Ben, *The value added tax: Its Causes Consequences*, (Journal of Development Economics 2009) p 1.

¹⁴⁶ African Tax Outlook, *Impact of Value-Added Tax in revenue stability in some African countries- Policy and compliance gaps using the C- efficiency* (African Tax Outlook 2020) p 2.

¹⁴⁷ International Monetary Fund Country Report No.21/33, Nigeria February 2021 (International Monetary Fund Washington, DC) p 17.

will help overcome the aftermath of the economic fallout due to the oil price crash and the Covid-19 pandemic.

3.8 Conclusion

A critical analysis of the legal framework showed critical debates. The treaties (Lagos Plan of Action, Abuja Treaty, Constitutive Act of the African Union and the BIAT) that were entered into previously by African economies form the foundation of the vision for continental integration. The AfCFTA introduces a binding and enforceable framework that consolidates progress made by these previous treaties. The Protocol on Trade in Goods addresses the tariff on goods which will aid in creating a liberalised market for goods. The Protocol on Trade in Services advocates for a harmonised system for services, through the use of the principle of mutual recognition. The Annexures cited supplement on the crucial issues raised in the Protocols and will help African economies fully liberalise their markets. These efforts are fortified by the Protocol on Rules and Procedures on Settlement of Disputes that will guarantee security and predictability of the regional trading system. Such a robust legal mechanism will, without doubt, ensure that the provisions of the AfCFTA are enforced. This would enable the enacted legislation to effectively serve the purposes for which it was created for.

The gaps in the framework, are the definition of terms, vague language, and incomplete provisions, they warrant reconsideration. The AfCTA is a member regulated system and this leaves too much room for discretion and cherry picking on which provisions to adhere to. The overlapping memberships by the African economies has not been clearly addressed in the AfCFTA. Despite the challenges that arise from the AfCFTA legal framework, it is noted that many principles can be drawn from it. It introduces a rule-based system, upholds special and differential treatment, and prioritises transparency that will be enforced by the dispute settlement mechanism.

Chapter Four

A critical Survey

4.1 Introduction

This Chapter presents results from interviews held with six participants, including four AfCFTA trade policy experts and two economists. The data will be analysed to show that the AfCFTA is a tool for economic development, and it brings positive benefits in trade policy, trade-related infrastructure and trade facilitation. The other part of this Chapter reports and analyses the results obtained from a survey conducted with thirty individuals. The analysis that can be drawn from all this information is that the AfCFTA is a positive achievement for the African Continent.

Part I: Outcome of the Interviews

4.2 Background

Interviews were conducted with six participants selected from four regions with one of the famous diverse regional economic communities in Africa (SADC, EAC, ECCAS and ECOWAS). The scope of the questions investigated the perceptions held by participants towards the AfCFTA, as a tool of economic growth. In addition, an inquiry was made focusing on the three trade areas: trade policy, trade-related infrastructure and trade facilitation. Another major inquiry was on the interaction of the Protocols on Trade in Goods and Services with goods and services from outside the African region. A consultation was done on whether the AfCFTA creates more winners than losers or vice versa, given the diversities of the member states. The last question focused on the influence of existing multiple RECs as lessons on what is to be done or avoided in order to implement the AfCFTA fully.

In this set of interviews, it emerged that the AfCFTA is a positive achievement for the African continent. In order to fully understand the benefits it brings, one should look at it under the following perspectives: economic, legal and social. The economic aspect concerns the AfCFTA as a tool to foster economic growth and promote intra-trade. Therefore, the AfCFTA text is explicit in its vision to ensure that economic benefits flow from it. The benefit that accrues legally is establishing a robust legal framework that is binding and enforceable, which will, in turn, promote legal coherence. The AfCFTA introduces a continental rule-based system compatible with the WTO rules and consolidates the previously signed African treaties on trade. Lastly, the social

benefit of the AfCFTA is the continental unity and free movement of persons, which had long been envisioned over 50 years ago. The evidence below shows that the experts agree that the AfCFTA is a positive step by African economies. In contrast, two economists on some questions explain the complexities in trade, especially in Africa. Overall, in the AfCFTA system, there will be losses, and there will be gains; the latter weighs more hence compelling economies to engage in trade as opposed to abstaining from it.

4.2.1 The views of experts (East Africa, West Africa, Central Africa and Southern Africa)

i) AfCFTA as a step towards achieving continental integration and economic growth

Ify Ogo¹⁴⁸ confirmed that the AfCFTA is a step towards achieving continental integration. The basis of her argument is that the AfCFTA is an explicit text itself that speaks to previous assertions¹⁴⁹ of creating one African market. Therefore, it fulfils the Organisation of African Unity in 1963, the Lagos Plan of Action 1980, and the Abuja Treaty - African Economic Community in 1991. The practical example that she gave was the 2021 negotiations currently going on in Ghana by the AfCFTA Secretariat to finalise the tariffs on goods and finalise the schedule of specific commitments. This includes removing 90% of tariff lines to zero, and that will happen in the space of 5 years for countries that are not least developed countries (LDCs) and ten years for those that are LDCs. Therefore, the AfCFTA is taking a bold step towards boosting intra-Africa trade. The views of a policymaker fortify this position¹⁵⁰ who sees the AfCFTA as what has always been envisioned by policymakers of different countries in Africa. He referenced the AfCFTA, on that it creates a liberalised market in Article 2, which is the essence of the AfCFTA after all. The AfCFTA is, therefore, an enabling legislation that depends mainly on implementation. Therefore, the AfCFTA continually uses the word ‘progressive’ to show that this step is not automatic but is a step by step process.

Ivan Ojakol¹⁵¹ coincided with the two responses above by stating that, numerous studies indicate that the AfCFTA is a positive step including those from the World Bank. He further asserted that the AfCFTA will create a large trade pact, one of the largest in the world with Africa’s population

¹⁴⁸ Dr. Ify Ogo is a Trade Specialist and legal economist on the AfCFTA from West Africa.

¹⁴⁹ Previous assertions mean the treaties that were signed before by African economies to unite the African continent.

¹⁵⁰ Policymaker from Central Africa.

¹⁵¹ Ugandan Lawyer and AfCFTA Expert.

of approximately 1.3 billion and a combined gross domestic product (GDP) of approximately USD 3.4 trillion. Consequently, the trade pact has the potential to lift millions of Africans out of poverty. Most importantly, the AfCFTA is expected to increase intra-African trade by over 52% which is currently oscillates between 15-17% in comparison to the European Union where it is over 65%. Steve Machage¹⁵² concurred with the ideas put forward by these three experts above and stated that the AfCFTA embodies the European Union model in enforcing the free movement of goods and people. Europeans already have a customs union, monetary union, and common market, which the AfCFTA essentially tries to follow in terms of integration. According to him, there shall be investments made by individual African countries in other African countries in the long run. He said the latest is the case of SAFARICOM,¹⁵³ which recently entered the Ethiopian market to invest. In his words, Ethiopia has always been very reserved to allowing external companies to come and invest in their countries. This is evidence that continental integration has begun.

The views of the four are juxtaposed with information obtained from an economists from Zimbabwe and Malawi. The economist from Zimbabwe concurred with AfCFTA boosting intra-Africa trade. However, he maintained the position that the economic reality of trade in Africa is different. Trade is not only concerned with goods, but trade is about exporting capital, which most African economies do not have, and the AfCFTA seems to push for trade only in goods. Hence, financing of trade is more important than the movement of goods. Since less developed countries never understand this principle, they misallocate the little capital doing everything, resulting in loss of competitive trade space. What is moving essentially is capital; therefore, the idea of economic growth being automatic must be negated. Sangwani Mkandawire,¹⁵⁴ reiterated the same position and stated that the AfCFTA is a boost in the right direction regarding progress in regional integration within the continent. However, liberalisation alone is not enough to boost intra-Africa trade as there is a need for enhanced efforts to eradicate non-tariff barriers, enhanced efforts in export diversification and value addition. These two ideas have an adverse impact on the AfCFTA as a tool towards achieving economic growth and continental integration. Nevertheless, the majority of the responses on this question leans in favor of the AfCFTA.

¹⁵² Trade Expert from Kenya.

¹⁵³ Safaricom is a leading telecommunications company in Kenya.

¹⁵⁴ Junior Economist and Trade Policy expert and Economist from Malawi.

ii) *AfCFTA and the three trade areas (trade policy, trade-related infrastructure and trade facilitation)*

A common position was obtained regarding the three trade areas; all the experts agreed that AfCFTA would improve the infrastructure, trade policy, and facilitation. The contribution made by the policymaker focused on that the AfCFTA is very significant, especially the provisions on Trade Facilitation. Questions are raised like: are traders furnished with complete information before trading? Do countries have on stop border post? Do economies have reporting mechanisms? According to him, the AfCFTA will incentivise all these problems and create a trading bloc such as the European Union, but at a progressive step. There is a will to solve all these problems by the AfCFTA, and it means policymakers had these impediments in mind to be remedied. Steve Machage concurred with this stand by stating that some RECs have made little progress in infrastructure (ECOWAS), while some, like the EAC, have made progress. Therefore, in areas where there is little progress, this will change with the advent of the AfCFTA. He referenced to a paper by the International Trade Center on Opportunities for Youth Employment and Entrepreneurship¹⁵⁵ to support that trade policy is improving, especially with the inclusion of the youth in trade. According to him, this is crucial, the AfCFTA creates employment opportunities for young academics. He stated that now with the AfCFTA, it means there is now a bigger market, reduction of NTBs and the introduction of free movement of persons. There is also value addition since African countries have been focusing on exporting minerals. The AfCFTA will allow small enterprises to add value instead. One can state that this is remarkable progress because Africa will be able to negotiate with key markets such as the EU and USA in the long term run.

The economist from Zimbabwe added that there is potential by the AfCFTA in improving infrastructure and trade facilitation. He gave an example of the Zambia-Zimbabwe one-stop border post and said there would be more of these in the African region with the implementation of the AfCFTA. Ify Ogo believed these are critical areas because these areas have been recorded before in research as impediments. Their existence as impediments cannot be denied because they bear an element of truth and are primarily rooted in facts. She, however, posed questions: does

¹⁵⁵ International Trade Centre, Opportunities for Youth Employment and Entrepreneurship (ITC Geneva Switzerland May 2021).

Africa have to stop because it does not have everything? Moreover, must efforts towards integration be suspended? The responses to these questions were that the AfCFTA would incentivise and resolve some of these challenges. Ivan Ojakol further pointed out that with respect of infrastructure, trade facilitation et al, there are a number of initiatives at both Continental and multilateral WTO level. Examples of such are the Pan African Infrastructure Development for Africa (PIDA) and the WTO Trade Facilitation Agreement. All of these can only work if there is political will. Therefore, the critical element is that the AfCFTA will introduce reforms in trade policy, trade-related infrastructure and trade facilitation.

iii) Comments on the Protocols on Trade in Goods and Services of the AfCFTA

The participants sympathised with the Protocol on Trade in Goods as a way to promote locally produced goods through the use of the comparative advantage. The policymaker emphasised that the Protocol on Trade in Goods is essential for promoting ‘Made in Africa’ and ‘Buy Africa.’ In his words, he stated that this is important to restore African pride. Ify Ogo held the same view by stating that the Protocol on Trade in Goods takes a calculative approach to prepare investments for goods to be made in Africa. It promotes products made in Africa, which will reduce the importation of some goods. Nevertheless, the AfCFTA does not pronounce the limitation of importing goods from other parts of the world since Africa cannot make everything independently. She gave supplementary information concerning the European Union beginning to approach discussions on trade through the African Union. Another example given is that the United States of America in 2019 also expressed interest in approaching trade in Africa as a block. There are trading agreements that existed, such as the Economic Partnership Agreements (EPAS), such as Ghana and Ivory Coast. There will be some work to co-enlist them into one significant treaty. Overall, there is a strong will from the AU and African traditional trading partners that the continent must begin trading as a block.

Ivan Ojakol submitted that, the AfCFTA is not meant to be protectionist. It is largely meant to simply promote intra-African which currently stands at despicable levels. Meaning that it is there to help Africa trade with itself more as it does with the rest of the world too. Article 4 (2) of the Trade in Goods for example does not limit state parties from entering into preferential trade arrangements with non-state parties like China. So, the AfCFTA will not necessarily limit the importation of Chinese/ western products but perhaps if Africans implement the ideals of the

AfCFTA and intra-African trade is increased, then perhaps eventually Chinese/ western products will come to an end in Africa.

The Zimbabwean economist had a dissenting view from the ones mentioned above. According to him, the AfCFTA will limit the importation of products from outside the region. The AfCFTA will reduce the importation of Chinese products in preference for African manufactured products. Sangwani Mkandawire was indifferent. His contrasting view was that ideally, the AfCFTA should result in a trade diversion effect, however, this may be possible only if member states also leverage on the available opportunities and ensure that the costs of trading within the AfCFTA are lower than trading with non-members. In practice, it may be necessary to ensure that member states are equipped to tackle dumping to ensure a strengthened position towards non-member states. It still stands that trade in services should ideally result in job creation and economic growth in the region.

iv) Does the AfCFTA create more winners than losers or vice versa?

Ify Ogo expressed confidence while saying that the AfCFTA creates more winners than losers despite the regional differences in Africa that are political, economically and culturally vested. Her exact words were; the concept of win or lose is not static; countries will gain more than they will lose. She invited me to read a study conducted by the Economic Commission for Africa¹⁵⁶ that found that the least developed countries stand to benefit more from the AfCFTA. Her conclusion of this study is that industrialisation policies will make it possible for LDCs to benefit more. This indeed has a positive bearing because the study has been conducted on facts and presents the data that tempts one to concede to this idea. The policymaker held that a balance would be achieved in the same way the different RECs achieved it. He stated that the membership in different RECs reflects the concept of winning even though countries are diverse.

The same view was maintained by Ivan Ojakol who stated that there is more to gain for Africa from the AfCFTA than there is lose. If anything with the promotion of more intra-African trade than it currently stands, Africa will be more united than ever. The Anglo-phone-Franco-phone-Luso-phone divide will be reduced with the free movement of persons, right of residence and right of establishment. Therefore, the membership reflects a balance between the weak and strong

¹⁵⁶ African Union and United Nations Economic Commission for Africa, *African Continental Free Trade Area Questions and Answers* (AU & UNECA 2020).

economies. In this way, there will be more winners than losers. He said that in the 2021 current ongoing trade conferences, each country is bringing forth its priorities in the AfCFTA and what they are competitive on and acting towards it. Given this, countries will win in their way and according to their comparative advantage.

The economist from Zimbabwe's position varies. He stated that there might be many losses for landlocked economies and least developed countries (LDCs). In his view, powerful hegemonies in the African continent such as South Africa, Nigeria, and Egypt benefit more. He put it bluntly by saying, if trade is about exporting capital, it is clear who wins this game. South Africa supports AfCFTA because: (i) it creates a barrier to Chinese products (ii) its deep capital markets is unparalleled. Regional hegemonies such as South Africa will dominate the trade because of its capital and ability to attract offshore capital that the rest of Africa cannot. In addition, he made comments on how the risk/ return profile of Africa reveals the likely winners of the AfCFTA. Countries that provide a healthy return with less risk will be the winners of the AfCFTA. For example, Botswana is positioning itself as a trade/ financial hub beyond diamonds. However, he pointed out that there is a slight possibility of more gains through the promotion of comparative advantages. This he said in reference to the improvement of Zimbabwe in its comparative advantage of the production of maize.¹⁵⁷ Despite this submission, the AfCFTA will create more gains than losses since countries will all focus on their comparative advantages and implement the provisions of the AfCFTA at a progressive pace.

v) *Will the success and failures of the multiple serves as lessons to the AfCFTA?*

This inquiry elucidated positive responses which genuinely reflected the inclination of the participants to their regions of origin. Ify Ogo held the view that previous failures and successes of the RECs will influence the path of the AfCFTA in terms of what steps to take and those to avoid. She stated that there are tools that are at the disposal of the AfCFTA, one of them is the Africa Regional Index Report (ARII 2019) by the Economic Commission for Africa (ECA)¹⁵⁸ and the Africa Union. The report provides an overview of the successes and failures in Africa

¹⁵⁷ African Agri Magazine, Bumper Harvest to save Zimbabwe US200M on March 29, 2021, accessed from <https://afriagrimagazine.com/2021/03/29/bumper-harvest-to-save-zimbabwe-us200m/>. Last accessed on 12 May 2021.

¹⁵⁸ African Union, United Nations Commission for Africa, *Africa Regional Index ARII* (AU & UNECA 2019)

concerning trade. The report looks at every country in the continent regarding trade infrastructure, policies, alignment and openness and draws lessons to be learned. It also focuses on the multiple RECs and compares them. Lessons will be drawn from this report on the successful wins of the RECs, which may serve as a lesson and on how failures can be avoided. For instance, a lot has been said about the COMESA simplified trade regime and the ECOWAS approach on regulation and liberalisation of services. The utilisation of such reports will make it possible to learn from what has worked and what has not worked.

Steve Machage believed that the AfCFTA would learn a lot from the progress made by the RECS. He added that historically, the individual RECs (COMESA, SADC and EAC) played a significant role in the formation of the AfCFTA in the first place. These RECs are the ones that convened and discussed the formation of the AfCFTA. After that, the AfCFTA took some of this progress made by RECs to a continental level. The EAC, SADC and the SACU already have a customs union. The West Africa region establishes a common currency while the EAC struggles with this aspect. ECOWAS is far ahead in regional integration, while the EAC has achieved deeper integration that extends to the ordinary person. The SADC is also copying the best practices of the EAC. One can argue that this position by Steve Machage bears an element of truth because Article 5 (i)¹⁵⁹ of the AfCFTA states best practices in RECs as one of its guiding principles. Ivan Ojakol reinforced the same position, according to him the AfCFTA foundational agreement in fact provides in its preamble that the REC's are building blocks towards the AfCFTA. The evidence of such is again reiterated in Article 8 (2) of the Protocol on Trade in Goods states that where state parties under their respective REC's have established higher levels of integration through the elimination of customs duties and tariffs, the state parties are allowed to maintain and even improve upon that level of liberalisation. Hence, the AfCFTA will copy the best practices in RECs without a doubt.

The economist from Zimbabwe strengthened the same position and expressed that it is clear that the RECS will ideally be a compass used by the AfCFTA. Since the AfCFTA is being built on an existing Tripartite Agreement (SADC, COMESA and ECOWAS), the possibility of influence is more significant. However, he cautioned on the importance of a guard against states with powerful RECs influencing everything at the expense of the other RECs that do not perform too well. It is

¹⁵⁹ See Article 5 (i) of the Agreement Establishing the Africa Continental Free Trade Agreement of 2018.

possible to learn from what has worked and that which has not worked. The policymaker concurred with the four (Ify Ogo, Steve Machage, Ivan Ojakol and the economist) and suggested that a lot will be learned from the efforts by the different RECS. His position was that the AfCFTA would benefit more from how the East African Community has improved on Trade in Services and how it is best regionally. However, for Sangwani Mkandawire, even though the wins and failures of previous RECs may serve as a lesson, new challenges may also emerge with particular uniqueness to the free trade area. The rationale behind such remark is that the complexities of challenges such as rules of origin or political will may be complex.

4.2.5 Summary of the Data

From the above considerations, it is evident that the AfCFTA, if successfully implemented, can be recorded as the most successful multilateral trade agreement in the history of the WTO. The AfCFTA is a developmental tool that addresses multi-faceted issues such as social, economic and legal development. It advocates for progressive development, and that is crucial since Africa is a developing region; it is vital because it offers enough time to adjust to its economies. It cannot be doubted that the AfCFTA will foster progressive elimination of tariffs, continental integration that is beneficial for trading enterprises, businesses and consumers. The existing hurdles will be incentivised, such as lengthy custom procedures, poor VAT monitoring systems infrastructure. Therefore, the AfCFTA will change a lot in trade policy, trade-related infrastructure and trade facilitation. The Protocols on Trade in Goods and Services will transform the continent to be competitive globally. In this regard, the AfCFTA, if viewed in light of other regional trading blocs such as the European Union and the ASEAN, it can tempt one to say that it will be a success. The AfCFTA reinforces what has been done by the regional economic communities (ECOWAS, SADC, EAC, AMU, CEN-SAD, ECAAS, IGAD, and COMESA). It recognises the progress that has been achieved to varying degrees across these building blocks. Accordingly, the AfCFTA consolidates the previous tangible progress by initiating a continental rule-based system and contributing to creating a Pan- African space in trade.

Part II: Outcome of the Survey

4.6 Background

A survey was conducted with 30 individuals with questions directed to determine the participants' thoughts about the AfCFTA Agreement. The individuals were selected from various disciplines, different African nationalities to amply capture the diverging views. There were seven multiple-choice questions and seven open questions. This survey indicated that there are economic, legal and social benefits of being part of the AfCFTA. The participants view the AfCFTA as a positive step towards continental integration, which, if properly implemented, will yield results.

4.6.1 Results

Figure 2 is a visualisation of the statistics of one of the main multiple-choice questions. 95, 7% believe that reducing tariffs is essential for trade, with a lower percentage thinking otherwise. This means the AfCFTA has found support from its citizens since it aims to eliminate tariffs on goods by 90% progressively. A positive percentage of 76.7 % agrees that the AfCFTA will benefit from the failures and successes of the existing RECS, which will be used as building blocks. This suggests that the AfCFTA will be successful because taking influence from the different RECs would mean adopting significant policies such as eliminating tariffs, forming customs unions, and the free movement of people. It can be observed 23.3% is indifferent, which can be attributed to the hurdles mentioned at the end of the survey on the little progress achieved due to the multiple overlapping memberships. These multiple memberships have complicated the African trading arena.

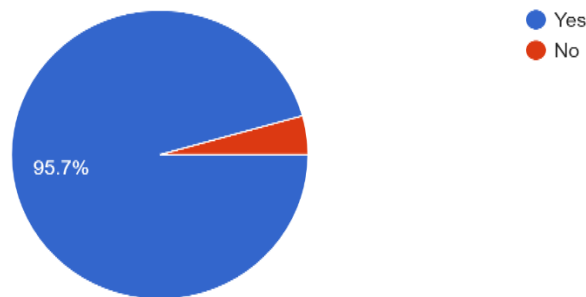
There is a positive percentage of 73.3 % where participants believe that the AfCFTA will improve trade facilitation, policy and trade-related infrastructure. This can be influenced by the fact that the participants are from different RECs; hence some RECs have been successful, for example, the EAC and SADC. While 26.7% are neutral, this is due to the little progress made by other RECs to achieve this, and this problem is mainly dominant in ECOWAS. Due to the previous efforts that have failed to achieve continental integration, trading as a block was met with a percentage in-between, with 50 % thinking it is possible. In comparison, 40 % thinks maybe this can happen, with 10% disagreeing. The previous continental integration efforts gave birth to overlapping

memberships that Baghwati described as a ‘spaghetti bowl.’¹⁶⁰ These multiple memberships have done little towards making Africa a trading block. This may be the cause of the different percentage with regards to the percentages.

Figure 2 Statistical Results of the Survey

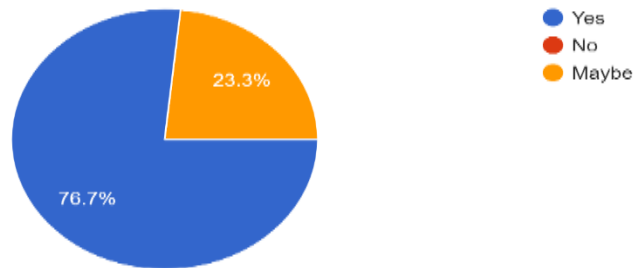
Is reducing tariffs and non-tariff barriers to trade important for trade?

23 responses



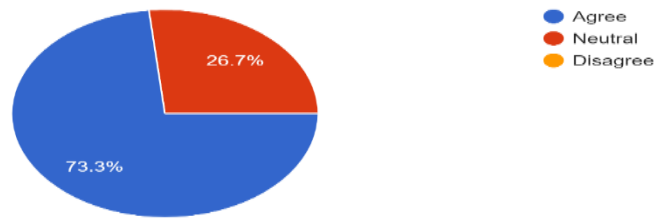
Do you think the AfCFTA will benefit from taking lessons from the Regional economic communities such as ECOWAS, SADC, EAC, AMU, CEN-SAD, ECAAS, IGAD, and COMESA?

30 responses

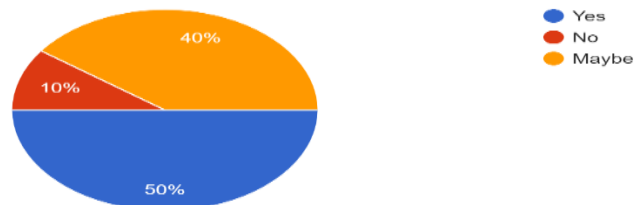


¹⁶⁰ J Bhagwati, US Trade Policy: *The Infatuation with Free Trade Areas* in J Bhagwati and A.O. Kruger (eds), *The Dangerous Drift to Preferential Trade Agreements* (Washington DC: AEI Pres, 1995) p 2

Do you agree that through the implementation of the AfCFTA, there will be reforms in Trade-related infrastructure, trade facilitation and policy?
30 responses



One of the aims of the AfCFTA is to create one African market which will make Africa approach trade with other regions as a block. Do you think this vision is achievable?
30 responses



Source: Google Forms Survey available at <https://forms.gle/LsJUzQ2W5q8dvyFr8>

The question relating to whether the participants foresee favourable policies introduced by the AfCFTA was met with various positive responses. Participants formed a consensus that economically, the AfCFTA will promote reducing tariffs, accelerate trade, and create a single market, leading to foreign direct investment (FDI) and employment opportunities. Those dwelling on the social perspective viewed the AfCFTA to introduce the free movement of persons and continental integration. From a legal perspective, applying similar rules will simplify trade laws across the continent, opening the way for interchange between jurisdictions. A reference was made on how The Protocol on Trade in Goods restores African pride through promoting locally produced goods. A unique term was attached to it: 'decolonising the mind.' The Protocol on Trade in Services was said to introduce dynamism vital in this increasingly digitalised world. The summary of the benefits speaks to the ease of doing business in Africa and will give an outlook of a United Africa.

Participants believed that challenges in the implementation exist and chief among them is the political instability in Africa. There is armed conflict and turmoil in Africa that include the famous *Boko Haram* in Nigeria. Therefore, the successful implementation of the AfCFTA is said to depend on political willingness. Additionally, the varying economic GDPs of African economies might affect the implementation of the AfCFTA. An example was how South Africa has a strategic partnership with powerful blocks such as the EU and BRICS to lessen a commitment to AfCFTA. With regards to taxation implications, the AfCFTA has few taxation implications which warrants re-imagining. There is a potential race to the bottom in international tax policy which disregards neutralities. Further, even if nothing in tax policy changes, some countries like South Africa pursue a “Gateway to Africa” policy that already incentivises investment in SA rather than other countries. The risks are heightened by the growth of e-commerce which might result in the fluid movement of goods from one country of residence.

Against this backdrop, the participants made general comments outside the premise of the structured questions. From the various comments made, participants fortified their stand. Several participants stated that the AfCFTA is a good initiative that needs to be revisited to aid in its full implementation. Another response sees the AfCFTA as a way to bring people together and promote ‘oneness,’ while another viewed it as a way to do away with hate crimes such as xenophobia, genocide. One participant remarked that any trial to bring Africa together and promote its product is essential. Some comments were prescriptive, encouraging the solidarity of the African states towards their duties in the AfCFTA, pushing to educate the public by policymakers on the AfCFTA and looking at AfCFTA with a gendered lens, especially in mining. Another participant’s view was that more should be done on harmonising the legislation and grievance mechanisms similar to the EU structure.

4.6.2 Summary of the Survey Data

African economies will benefit immensely from the AfCFTA through integration and lose if they decide to pursue isolationist policies. The AfCFTA is an excellent initiative to improve the general standard of living for Africans and create employment, especially for the youth. Looking at other regional blocks that already have free trade agreements, one is tempted to say that it will also work for Africa. The participants saw the AfCFTA creating more winners, making it easy to achieve sustainable development by 2036. However, regional hegemonies in Africa might be a problem as

some might seek to exert more influence. Participants suggested the need to educate the public on the AfCFTA. Policymakers have to acclimatise the general public on what the AfCFTA entails. More should be done on harmonising the legislation and grievance mechanisms similar to the EU structure. Looking at other regional blocs that already have free trade agreements, one is tempted to say that it will also work for Africa.

4.7 Conclusion

The AfCFTA can be viewed as a levelling ground for African economies. It encompasses broader perspectives with its trade policies that are inclusive of integrating ordinary persons. The AfCFTA is a tool for fostering socio-economic development in Africa, resulting in continental integration. In harmony, the interviewed participants agreed that the AfCFTA consolidates all the tangible progress made before by the various treaties entered into by African economies. The AfCFTA is significant for ushering in progressive development that allows economies to effect change at a pace that is flexible for them. The principle of special and differential treatment is one such example that will assist African economies to focus on their comparative advantage. Significantly, the AfCFTA is an enabling instrument that requires effort from economies to act upon it. The survey outcome indicates that African citizens have a strong will for the AfCFTA to be implemented, which is underlined by reasons coming from an economic, political, and legal perspective. The AfCFTA was an overdue step, and its effectiveness will make it easy to realise its policies relating to infrastructure, trade policy and trade facilitation.

Chapter Five

The Practice in Selected Regions and Recommendations

5.1 Introduction

This Chapter concludes the research by referring to the European Union and the Association of South-East Asian Nations as two regions that have successfully liberalised trade. The reference is made in light of the fact that the EU is a model that the AfCFTA seeks to replicate. However, since the African region has a large population of developing economies, a submission is made that the ASEAN model currently seems the perfect fit. The strategies implemented by those regions serve for experience, especially to African economies, in this initiative of liberalising trade. At the end of the Chapter, recommendations and the conclusion of the study is made.

5.2 The European Union

The European Union (EU) region is a formidable trade power globally with twenty-seven member states. It was established by the Treaty of Maastricht Treaty on the European Union.¹⁶¹ The EU created an economic monetary union, common currency and propelled trade cooperation between state members. The treaty was built on the existing European Economic Community (EEC), which the Treaty of Rome of 1957 created.¹⁶² Credit is given to the Rome treaty for catalysing the integration process for the six original members (Italy, Belgium, France, Holland, Italy, Luxembourg and West Germany). In this treaty, a customs union was formed based on four freedoms: free movement of persons, goods, service, and capital.¹⁶³

It is against this bedrock that the EU is famous for its multilateral trading system that has become a model to most regions that wish to embark on trade liberalisation. To date, the EU is a region that uses one single market, the same currency, flag and practices unrestricted movement through the Schengen Agreement.¹⁶⁴ It is important to note that it has a centralised system that has never employed a model FTA to encourage global trade, rather depending on flexible principles to promote multilateral trade. Therefore, it is clear that the EU's trade power traces from the strength of its internal market and the efficiency of its institutions in negotiating lucrative commercial

¹⁶¹ Treaty of Maastricht on European Union of 1992.

¹⁶² Treaty Establishing the European Economic Community, 25 March 1957 (Treaty of Rome).

¹⁶³ Originally Article 3 of the Treaty establishing the European Community (TEC), currently Article 26 of the Treaty on the Functioning of the European Union (TFEU).

¹⁶⁴ The Convention implementing the Schengen Agreement of 14 June 1985.

deals.¹⁶⁵ Its success as a trading power stems from a strong internal structure, which is bolstered by institutions that enforce regulations and foster a stable and secure common market. EU trade legislation establishes the basis for trade policy and is adopted through the standard legislative procedure. Since the Lisbon Treaty, the European Parliament has played an essential role in the standard commercial policy.¹⁶⁶ The EU has so far employed a range of legislative tools and negotiates bilateral, multilateral and FTAs. After the WTO Uruguay Round, the EU has aimed to spread and open free trade based on mandates from member states.

The progress achieved by the EU internally through trade cooperation is the creation of a single market for its economies. Trade-in goods in the region are mainly free. This single market was created through the elimination of tariffs on goods. As a result, it has been estimated that EU GDP increased by an estimated 1.7 % between 1990 and 2015, due to the single market.¹⁶⁷ Furthermore, the region has achieved a harmonised system that uses the same currency (euro). For good measure, the economic union that was formed enhanced the power of the EU to trade as a block with other regions. The liberalisation of the movement of capital as incorporated in the Schengen Agreement and Amsterdam Treaty of 1999 helped liberalise the free movement of persons. In 2018, the European Commission recorded an economic benefit of export-related jobs estimated at 36 million.¹⁶⁸

Externally, the EU as a region has entered into trade agreements as a bloc as indicated by numerous treaties and free trade agreements it has negotiated with other regions. For instance, the EU and Chile have an Association Agreement that establishes a free trade zone in products and services. In addition, there the EU Agreement with Central America signed in June 2021 to improve access to the goods and services market and improve conditions of trade.¹⁶⁹ These examples show that the EU focuses on bilateral, multilateral, and free trade agreements, with tariff liberalisation and NTBS reduction as primary goals. It is at this capacity that this region serves as a model that the AfCFTA seeks to replicate. The EU has utilised trade preference schemes that eliminate or reduce

¹⁶⁵ Sophie Meunier & Kalypso Nicolaïdis, *The European Union as a Conflicted Trade Power*, Journal of European Economic Policy (Routledge 2006) (available at <https://doi.org/10.1080/13501760600838623> p 2.

¹⁶⁶ The Treaty of Lisbon of 2009.

¹⁶⁷ LE Europe, *The EU Single Market: Impact on Member States*, Study for Am Cham EU, February 2017, p. 134

¹⁶⁸ Jana Titievsavia, *EU Trade Policy: Frequently Asked Questions* (EPRS 2019) p 3.

¹⁶⁹ European Commission website available at <https://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/>. Last accessed 02 June 2021.

tariffs for developing countries. (i.e., General Scheme of Preferences (GSP), or everything but Arms). This is evidence of trade policies that are effective and inclusionary of other developing economies.

5.3 The Association of East Asian Nations (ASEAN)

The Association of South-East Asian Nations (ASEAN) was formed by five economies Indonesia, Malaysia, Philippines, Singapore and Thailand, through the signing of the Bangkok Declaration in 1967. It underwent an expansion as of date; it has ten countries.¹⁷⁰ The original goal of this agreement was to ensure political stability and security, but it gradually evolved into a vision of economic unity. The status of being a free trade area was achieved in 1992. It was accompanied by economic integration, which was spearheaded by the Common External Preferential Tariff in 1992 (CEPT), which addressed different markets. Subsequently, in 1995, the ASEAN region introduced trade in services through the ASEAN Framework Agreement on Services. Its objective was to eliminate barriers to trade in services.

Luke and Macleod have argued that the ASEAN has similarities to the AfCFTA. According to them, like ASEAN, Africa has diverse countries, faces changing headwinds in a global economy, has multiple and overlapping trade agreements, and represents a more attractive market to its trading partners when it is integrated.¹⁷¹ This striking similarity demonstrates that the ASEAN model is similar to that of the AfCFTA. It can be argued that the policies implemented by the ASEAN can be helpful for the AfCFTA since the region has so far been successful to rise above diversities to achieve economic growth collectively.

The liberalisation and economic growth success of the ASEAN lie in several key strategies. The first is the famous principle called the “ASEAN Way” that utilises flexibility and consensus in decision making.¹⁷² This principle is found in Article 20 of the ASEAN Charter, where decision-making is based on consultation and consensus.¹⁷³ The same provision states that a failure to come to a decision warrants the deference of such a decision to the ASEAN Summit. Notable is the flexibility with which this region operates, thereby ensuring that there is informality where all

¹⁷⁰ Brunei, Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

¹⁷¹ David Luke and Jamie MacLeod, *Inclusive Trade in Africa, The African Continental Free Trade Area in Comparative Perspective: ASEAN at 50 and beyond*, (Routledge) p 49, p58.

¹⁷² Asia Development Bank Institute, *ASEAN 2030: Towards a Borderless Economic Community* (ADB, 2014) p 22.

¹⁷³ Article 20 of the Charter of the Association of South-East Asian Nations of 2007.

economies are equals in decision making. Consequently, the principle afforded the member states to push for progressive development that is not above their productive capacities. All in all, this promoted regional cohesion. Secondly, the establishment of the Asia Economic Community (AEC) in 2015 introduced the four pillars: single market and production base, competitive economic region, equitable economic development and ASEAN's integration into the global economy.

The priorities of this AEC is an agenda called the ASEAN blueprint 2025, which is a long term strategy towards economic growth. The AEC Blueprint reaffirms the free flow of goods through tariff elimination. Regarding trade facilitation, the AEC Blueprint stipulates the development and implementation of a trade facilitation work programme to simplify, harmonise, and standardise trade and customs processes, procedures, and related information flows.¹⁷⁴ Such policies are progressive and can transform economies. The vision for emancipating these economies from poverty has led to realising a "RICH" ASEAN. This garners inclusive economic growth that is sustainable and equitable. In summary, the region's key development priorities can be structured along with the following four 2030 aspirations: resilience, inclusiveness, competitiveness and harmony.¹⁷⁵

Regional progress has always been channelled towards reducing poverty, promoting inclusion and narrowing development gaps. Statistics show that there have been lucrative benefits emanating from liberalising trade in the region. Chief among them is tariff reduction, increased intra-trade, investment, and trade-related infrastructure and economic growth. In 2010, all tariffs under the CEPT for more developed ASEAN-6 members were reduced to zero, and the AFTA and CEPT were replaced with an ASEAN Agreement on Trade in Goods. This was a massive milestone in terms of internal integration.¹⁷⁶ ASEAN's transformation has been reflected in both the growth of its economy and the rising quality of life of its citizen, with average GDP per capita increasing from US\$122 to US\$ 4, 034 in five decades.¹⁷⁷

There has been high sounding victory in trade-related infrastructure in areas that include mobility and ICT. This has been achieved through transport facilitation programs, namely: the ASEAN

¹⁷⁴The ASEAN Secretariat, ASEAN Integration Report 2015 (ASEAN 2015) retrieved from <https://asean.org/storage/2015/12/ASEAN-Integration-Report-2015.pdf> p 41.

¹⁷⁵ Ibid. P 115.

¹⁷⁶ Supra p 52. Note 12.

¹⁷⁷ Ibid. P 47.

Framework Agreement on the Facilitation of the Inter-State Transport (AFAFIST), the ASEAN Framework Agreement on the ASEAN Facilitation of Goods in Transit (AFAFGIT), and the ASEAN Framework Agreement on Multimodal Transport (AFAMT). Inclusive integration advocated for prioritising small-medium enterprises as part and parcel of economic development. The FTA has enabled the free flow of goods and positive reforms in trade facilitation. This was possible through developing a comprehensive ASEAN Trade Facilitation Work Programme (ATFWP)¹⁷⁸ and is expected to set out all concrete measures with clear targets and timelines for implementation necessary at both ASEAN and national levels.

5.4 Summation of the Assessment of Foreign Regions

Trade liberalisation through reducing tariffs on goods and regulation of trade in services is a common practice in other regions. These efforts have been accelerated by the outcome of the WTO Uruguay round. The EU is the model for all the regions in the world in so far as trade liberalisation is concerned. The EU has successfully reduced tariff on goods, minimised NTBs, and created a single market, trades in services, allow free movement of capital and persons. It is well equipped with inclusionary trade policies, functional trade-related infrastructure and smooth trade facilitation schemes. There are suitable lessons that the AfCFTA can extrapolate from this region since it has already taken the step through introducing a regulatory framework. The first lesson is the importance of legal institutions in trade. The EU has a robust framework to deal with the enforcement of trade deals. Since the AfCFTA already established a Secretariat, it must strengthen its power so that it can exert itself with authority. The same applies to the regional economic communities courts given the power to deal with disputes; they should ensure that the system is effective, fast and transparent.

Moreover, since the AfCFTA falls under the African Union, it must work towards safeguarding the interests of all the different economies in Africa despite diversities. Secondly, the AfCFTA must introduce trade remedies to prevent other regions from unfair practices such as dumping. Thirdly, the EU has demonstrated the power of simultaneous action in trade liberalisation; hence, the AfCFTA has to copy this joint effort in order for their system to be fully functional too.

¹⁷⁸ This is envisioned in Article 35 of the ASEAN Trade in Goods Agreement of 2009.

The ASEAN has managed to overcome diversity and political fragmentation and successfully pursued effective regional economic integration. The model that ASEAN economies have used can act as a compass for the AfCFTA because of the striking similarities between the two. The ASEAN is influential in using the ‘ASEAN Way’ principle, which has allowed it to practice flexibility and consensus decision making. It is without a doubt that due to these principles, there has been a positive change in economic growth, trade-related infrastructure, reforms in trade facilitation and the formation of a single market for trade. Since the African region has politically fragmented economies that trace back to colonialism, they could also introduce their ‘African way’ of approaching trade and regional integration. Introducing such will allow African economies to maintain their identity, values and foster political stability just as it has worked for the ASEAN. The ASEAN region is a suitable example for a step by step liberalisation coupled with clear objectives such as the ASEAN Blue Print 2025 and the RICH ASEAN vision. The key takeaway for the AfCFTA is incrementalism. It requires member states to take a calculative approach towards implementing the terms of the AfCFTA and gives time to countries to examine their comparative advantages thoroughly. Therefore, to effectively reap the benefits of continental integration, progressive liberalisation is efficient.

5.5 Recommendations

a) Trade Defence Instrument: Anti-Dumping

Trade liberalisation can adversely result in unfair competition and unfair trading practices. The WTO allows for the use of trade defence instruments such as anti-dumping duties and countervailing duties. Dumping is defined in Article VI (1) of the GATT 1994¹⁷⁹ as occurring when a product of one country is introduced into the commerce of another country at less than the normal value of the product. To make a successful anti-dumping claim, there should be a causal link between the dumped prices and an injury to the domestic market. African economies must use anti-dumping measures to protect their infant industries from competition. The EU classic example is the United States of America that uses anti-dumping legislation to protect its markets. The EU, likewise, has utilised Anti-Dumping legislation to protect its markets.

¹⁷⁹ The General Agreement on Tariffs and Trade of 1994.

Presently, only Africa's most economically advanced countries have national trade remedy regimes in place including Egypt, Morocco, South Africa and Tunisia.¹⁸⁰ The first step is for African economies that are not WTO member states but are AfCFTA member states to familiarise with these antidumping measures. Familiarising with the use of these measures aids in their effective execution to curb the misuse of them by economies that have little knowledge on how these measures operate using WTO standard. The second step, is for a simultaneous adoption and implementation of these measures. Otherwise, products would obtain a leeway transiting through other countries, undermining the measures in place. Therefore, using anti-dumping laws and countervailing measures is justified as a trade defence to intra-Africa trade and external trade. Consequently, these measures shield developing economies from the harsh effects of a highly competitive environment.

b) Ensure that the reduction of tariffs does not increase Non-Tariff Barriers

The creation of a free trade area can result in drastic revenue loss through the reduction of tariffs. A highly competitive trade area due to a single market may create low revenue potential, forcing African economies to revert to NTBs. Therefore, the danger that exists could be the race towards using NTBs as protectionist measures after tariffs on goods fall away. Evidence of such has been present so far in the ECOWAS region where member countries failed to remove non-tariff barriers intra-regional trade.¹⁸¹ The ASEAN is another example of a region that is equally struggling with NTBS after achieving tariff reduction. Therefore, the risk of increasing NTBs must be constantly checked through monitoring mechanisms such as the Africa Online Mechanism. Failure to manage NTBs renders redundant the progress that the AfCFTA seeks to achieve. The duty rests on the Secretariat, governments and citizens. The AfCFTA Secretariat must oversee the strict implementation of the provisions of the AfCFTA with regards to NTBS. Governments must uphold their end of the bargain and exercise good faith in reducing NTBS. The citizens/traders are tasked with reporting any encounter with NTBs through the AfCFTA online reporting mechanism.

c) Regulatory Approach

¹⁸⁰ African Union, Economic Commission of Africa and Africa Development Bank Group, *Assessing Regional Integration in Africa*, Vol VIII (ECA, AU, & AfDB 2017) p 94.

¹⁸¹ James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge 2011) p 154.

The importance of collective regulatory cooperation in the form of domestication, ratification, regulatory reform cannot be stressed any further. The AfCFTA has so far been ratified by more than thirty African countries, and that number is set to increase.¹⁸² National governments should, under the guidance of legal experts and trade negotiators, domesticate the terms of the AfCFTA. This process must be supported by competent individuals who are well versed with international trade policies and also the general law of that particular country. Countries that have not yet ratified the Agreement must deposit their instruments because establishing a large FTA requires active involvement by all African states. New legislation must be enacted in the area of trade in services. Trade in services are a relatively new phenomenon in most African economies; therefore, they require strict regulation to tackle all the critical aspects. Currently, few African economies have cyber legislation, making it difficult for law enforcement since trade in services comes along with digitalisation. The liberalisation of trade in services in the ASEAN has so far been troublesome; African economies may have to expect this and structure various ways to deal with and fortify this new trade action. In order to maximise the potential of the AfCFTA, there must be simultaneous regulatory reform. This involves the adoption of the best practices of the RECs or of the AU and best global practices of other regions and the WTO. Regulatory reform will promote legal coherence, leading to fewer costs for businesses and promoting regulatory cohesion. It speaks to ease of doing business in Africa. Policymakers must address the legal gaps, especially on the duties of RECs, the law relating to third parties, incomplete provisions and the vague language to avoid legal doubt.

d) Member states to avoid making the AfCFTA a hindrance to trade with other regions

Regional integration should not happen at the expense of external trade. The reality is that Africa cannot produce everything it needs independently; therefore, it has to enter into healthy favourable agreements with other regions. So far, the legal provisions of the AfCFTA are not explicit in terms of the relationship between the FTA and other regions. The legal gaps reflect the confusion that exists on the applicability of the treaty provisions towards third parties. Copying the EU system on external trade diplomacy will ensure that efforts to trade internally do not promote enmity or exclusionary policies. Both the EU and ASEAN can be used as precedence to illustrate the benefits

¹⁸² Philomena Apiko, Sean Woolfrey and Bruce Byiers, *The Promise of the African Continental Free Trade Area* (PEDRO 2020) p 13.

of maintaining trade alliances. The EU has entered into agreements with other blocks such as the MERCOSUR, ASEAN and NAFTA. It also continues to trade bilaterally with other countries such as China, the United States of America and South Africa. The ASEAN likewise has entered into agreements with China, the EU, and the U.S. African economies in bilateral trade with countries that are non-member states must resist charging exorbitant tariffs or using them as a tool to settle revenue loss. Therefore, transparency, good faith and MFN must still be the guiding principles even to outsiders.

e) Inclusive Trade Integration

Inclusive integration is key to achieving equitable trade that is beneficial to everyone, even to ordinary laypersons. The AfCFTA must involve a wide range of actors that include, regulatory experts, trade officials, non-state actors (private sector), consumers and investors. This involvement is in the form of engaging through forums or seminars in order to advocate for the correct implementation of the AfCFTA. This has so far been the same approach that ASEAN used, involving all persons affected in the trade value chain, and it has yielded good results. Firstly, the role of small scale traders must not be neglected because most of the trade in Africa is small scale. Therefore, the policies must be suitable to their respective levels and ensure that the private sector does not suffer at the expense of big multi-national corporations. Secondly, since the region has many developing economies, informal trade must be amplified. Countries such as Ghana have been practising informal trade which contributes to the economic welfare of the country. In this vein, informal trade must be utilised as a key to economic success by member states.

With respect to consumers, national governments are better vexed with what their people require in terms of consumption, if such needs are satisfied, ordinary lay persons will enjoy the benefits of the FTA. It is crucial at this point for integration to start from the bottom up, from national economies until the regional level. In addition, the interests of the economically vulnerable countries must not be sacrificed at the expense of more significant economies. Their bargaining power must not be taken away. This will ensure that there is a balance of power and the upholding of the rule of law. African countries with high bargaining power, such as Nigeria, Egypt, and South Africa, must consider the interests of weaker economies. This will aid in avoiding the problem of feeling as if the AfCFTA serves the purposes of the more significant economies only as they used to argue in the case of African states versus the WTO.

f) Effective Monitoring and Evaluation Systems

The AfCFTA introduced a web-based NTBs Online Mechanism for identifying and reporting NTBs elimination. Such a system has to be accompanied by a solid digital structure; moreover, its effectiveness will be measured on its speed in solving reported problems. The Secretariat must ensure that this mechanism is user-friendly for business people and laypersons. In addition, it is the duty of the Secretariat to oversee and monitor on the commitments made by the member states. It must have a strong arm for holding accountable member states on compliance. The steps that can be taken are: the Secretariat must monitor and evaluate each country's compliance with the provision of the AfCFTA without bias or prejudice. This would be a significant step since the AfCFTA prioritises progressive liberalisation; it would help keep track of such progress. If it is found that obligations are not met, then such a country must be held accountable. Consequently, it could also call for an assessment on what needs to be done and how best to assist countries lagging. If the opposite is true, then compliance must be documented to assess and evaluate the progress fully. Excellent progress from other countries in the same region will prove that the FTA has substantial benefits. This will further promote the use of best practices. An effective monitoring system would also give the LDCs time to check areas where they might need assistance from big economies in the region or even from the African Union.

g) *Free Movement of Persons*

Migration is a very delicate topic among African economies, owing to the high unemployment rates in other countries. It only fits that the liberalisation of trade in goods and services be accompanied by free movement. If free movement of persons is not liberalised, it might stifle trade in services and goods. This will enable the AfCFTA to maximise the potential that each country has to offer. Due to its diversity, it could be easily discovered the comparative advantages regarding technical skills, labor, and academia. Currently, the African Union Free Movement of Persons has received considerably less political attention and this is evidence by only four countries that have ratified it.¹⁸³ This interferes with the vision for continental integration. Since, the AfCFTA is a collective effort, pulling different experts from different countries and regions, free movement must be hastened. Therefore, free movement will aid in the smooth sailing of labour

¹⁸³ Ibid. p 15.

and services and must be taken seriously. Regions such as the European Union have made this possible, and it has benefited them greatly.

h) The role of Education

Some areas in Africa still have the lowest rate of literacy. A study conducted by the UNESCO Institute of Statistics showed that Sub-Sahara, in particular, is still below 60%.¹⁸⁴ African governments bear the sole responsibility to include their citizens on this new development of the AfCFTA and its implications. Focus can be made towards all sectors that are involved in trade. For professionals, the African Union must organise seminars for the exchange of ideas focusing on specific issues. Domestically, governments can utilise the media, such as newspapers, to publish timely in local languages selected for that period. Education must stretch to the academia, to the tertiary education sector to equip them with the necessary knowledge of what the AfCFTA entails.

i) Political Will

Africa is politically fragmented, and the region is vulnerable due to political instability, terrorism, conflict, genocide and xenophobia. These challenges raise grounds of hostility between the economies, and if they are not appropriately addressed, they will derail the process. Consequently, difficulties will surface, thereby delaying signing the Protocol on Free Movement of persons. It is clear that the AfCFTA is a member driven system, so such a system demands a joint effort in harmonising regulations and policies. This cannot happen if member states are not united. These factors, if not addressed they will derail the process of having a united Africa. Member states must display the political will to cooperate and the Secretariat towards harmonised trade system.

5.6 Conclusive Remarks

This thesis argued that there is a consensus that trade liberalisation leads to economic growth. The theory of comparative advantage coined by Ricardo has driven economies towards the production of goods or services that they are mostly skilled at or where they are produced at an affordable cost. Empirical evidence shows that trade liberalisation has led to economic growth; the evidence is found in the European Union and the ASEAN regions. In the African region, there are regional

¹⁸⁴ UNESCO Institute for Statistics, *Literacy Rates Continue to Rise from One Generation to the Next. Fact Sheet No. 45* (UNESCO 2017) available at <http://uis.unesco.org>. Last accessed 02 June 2021.

economic communities such as the East Africa Community and the Southern African Development Community, whose economic growth is supported by statistics. Consequently, trade coupled with comprehensive policies can promote without doubt sustainable development. There is no doubt that the AfCFTA is on the same path, it establishes a sound institutional framework to promote trade liberalisation. The Agreement shows the will by African economies to promote growth, emancipate masses from poverty and achieve the status of trading as a bloc.

The thesis brought to light three areas of the AfCFTA: trade policy, trade-related infrastructure and trade facilitation as areas where reform will be foreseen. Liberalising trade in goods and services will channel economic growth. Tariff reduction and NTBS removal will promote the free movement of goods while trade in services introduces competitiveness. Trade policy under the AfCFTA includes gender-sensitive trade policies, industrial policies, and flexible rules of origin reinforced by an enforceable legal framework. The AfCFTA uses the Action Plan for Boosting Intra Africa Trade of 2012 as a guiding map concerning trade-related infrastructure. The draft contains sound infrastructure programs that member states will implement. The first port of call is improvement in transport modes that include road, rail, air, sea through the various programs that the African Union Commission has developed. The second stage will be the improvement of ICT infrastructure, thereby enhancing digitalisation. Reforms in Trade Facilitation are critical for the transit of goods and services between borders, and when it is done correctly, it will lower the cost of transactions. Proper implementation will introduce harmonised system procedures and one-stop border posts to deal with delays effectively.

The AfCFTA is a paradigm shift. It is reflected through its approach, which consolidates the previous African regional treaties that include the Lagos Plan of Action, Abuja Treaty, Constitutive Act of the African Union, and the Action Plan for Boosting Intra-Africa Trade. The AfCFTA language is geared at progressive liberalisation, indicating that it is pursuing a comprehensive approach to trade. Its highly flexible system is required for the scope and depth of such a market and practical regulatory cooperation. Its principle of special and differential treatment is crucial in Africa since it has some of the least developed countries that would need time and flexibility to comply with the terms of the AfCFTA. Increased trade through the AfCFTA is also expected to spur reforms that enhance productivity and job creation, decreasing poverty. The interviews conducted with the AfCFTA experts highlighted that the AfCFTA is building a formidable trade area, and the success and losses of the previous regional economic communities will act as a

compass for the AfCFTA. However, the AfCFTA requires action and cooperation with other member states to implement its trade liberalisation purpose.

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SUMMARY

An economic game changer: An analysis of the Africa Continental Free Trade Agreement of 2018.

1. Introduction

This research aims to shed light on trade liberalisation in Africa, specifically the relationship between trade and economic growth. The analysis critically examines how the Africa Free Continental Trade Area Agreement (AfCFTA) would foster investments. The thesis addresses three main areas of the AfCFTA agreement: trade policy, trade-related infrastructure, and trade facilitation. The study undertakes a critical analysis of the provisions of the AfCFTA to emphasise its importance in fostering economic growth through its robust implementation mechanisms. A double standard is required for trade liberalisation to align with national interests and regional interests. The research findings show that the AfCFTA marks a positive step towards economic growth in the African region by creating a free trade area, which in parallel involves reducing tariffs and non-tariff barriers.

2. Research Questions

Some concerns come with addressing this research topic. The African region has engaged in trade bilaterally, multilaterally but never as a free trade area. Therefore, there are questions concerning the nature and scope of the AfCFTA. Moreover, the AfCFTA is set to operate in a region where multiple treaties have been signed to foster continental economic integration. Consequently, doubts raise on whether the AfCFTA will be successful or not in establishing a solid framework. This also applies to previous attempts by the different regional economic communities that have made previous efforts on tariff elimination and non-tariff barriers reduction. The region is composed by eight regional economic communities (RECs), namely, the Arab Maghreb Union (AMU), the Economic Community of West Africa States (ECOWAS), East African Community (EAC), Intergovernmental Authority on Development (IAD), Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central African States (ECCAS) and Community of Sahel- Sahara States (ECCAS). These regional economic communities have tackled the policy areas that the AfCFTA seeks to address with little or no progress. It remains to test whether the failures and successes of these

regional economic communities will serve as a lesson to the AfCFTA. Against this backdrop, the following research questions are:

- a) What is Trade Liberalisation? What is the scope and nature of the Africa Continental Free Trade Agreement?
- b) Does the AfCFTA represent an Agreement introducing reforms in trade policy, trade-related infrastructure and trade facilitation?
- c) Does the AfCFTA establish an enforceable legal framework?
- d) What are the practical examples Africa may learn from on the approach taken by other regions (EU and the ASEAN) with similar agreements on implementation of the Agreement?
- e) What are the recommendations or measures that can be implemented to fully achieve the Agreement's benefits in the betterment of the continent?

3. Objectives of the Research

This thesis aims to propose a functional free trade area in Africa. It also seeks to examine the feasibility of the AfCFTA as a tool for economic growth. To AfCFTA member states, it aims to find solutions on how intra-Africa trade and continental trade can further be achieved and how this attempt by the AfCFTA can succeed. To policymakers of the AfCFTA, this study aims to highlight the legal gaps that warrant reconsideration. From an academic perspective, it seeks to analyse trade liberalisation in Africa and to contribute to the pool of knowledge as this topic is minimally researched. Furthermore, this research is significant for understanding the gains and possible losses of consolidating a region with multiple regional economic communities.

4. Methodology

This paper adopts qualitative analysis to trade liberalisation, tracing it from the General Agreement on Tariffs and Trade (GATT) of 1987 and the formation of the World Trade Organisation (WTO). A series of interviews were conducted with six experts of the AfCFTA selected from the four central regions in Africa to determine their position on the benefits of the AfCFTA. The results obtained indicate that the AfCFTA is an economic game-changer for Africa. It uses the terms 'progressive liberalisation' to indicate that it is a step-by-step calculative approach channeled towards economic growth. A survey was conducted with thirty African participants of different

nationalities, and its quantitative and qualitative results indicated that the AfCFTA would impact socio-economic development in Africa. The study referred to the European Union region and the Association of South-East Asian States (ASEAN) as regions that have successfully tackled tariff liberalisation. Their approach and progress are used as recommendations of the AfCFTA.

5. Literature Review

Trade Liberalisation and Economic Growth

International trade liberalisation is concerned with creating opportunities for all states to gain market access and promoting international trade based on “equality in fact” rather than “equality in law”. Trade liberalisation is confined to tariff reductions or MFN criterion or short-term bilateral preferential arrangements.

A clear positive relationship exists between trade liberalisation and economic growth, and theories and empirical literature support this. The classical and neoclassical theories show evidence of economic growth. Mercantilism is the exception since it suggests that such a positive relationship does not exist. This is so because mercantilists advocated for close government regulation of international trade. Gold and silver were used as a measure of wealth. However, its unreliability is exposed as it presents an unfair economic system limiting consumer choice in products.

In contrast, the founding fathers of trade liberalisation, Smith and Ricardo, offered a plausible theory of trade liberalisation. Adam Smith advocated for absolute advantage where specialised production culminates in economies of scale, which leads to increased productivity and economic growth. The rationale of this theory is that international trade takes place between economies because one country can produce a particular good efficiently compared to the other. In this way, free trade enables companies to specialise. Absolute advantage is not automatic because a country can shift labour to focus on a specific good, which is impossible in some sectors.

Ricardo opposed this theory in his seminal work, *The Principles of Political Economy*, published in 1817 through comparative advantage. This theory of comparative advantage is the foundation of today’s traditional international trade theory according to which, whenever a producer’s opportunity cost is lower than that of another, they are said to have an absolute advantage in producing that good. Nevertheless, criticisms that can be levelled against this theory relate to how it fails to explain comparative costs. The shortcomings of Ricardo’s theory of comparative advantage led to the reformulation of the comparative advantage theory to the factor hypothesis or

the Heckscher – Ohlin (HO) theorem. According to the hypothesis, “trade is influenced by the fact that different countries have varying factor endowments”.

Other scholars such as Chatterjee, Chauvin, Chen and Gupta have attempted to define the relationship between trade and economic growth. Chatterjee submits the same sentiments by highlighting that trade liberalisation has been confined to tariff reduction or the most-favored-nation standard, short-term bilateral preferential agreements, or a generalised system of preferences. Chen and Gupta explored the significance of trade openness on economic growth for the SADC region from 1990 to 2003 for positive as a result of trade impact tend to dominate those over the negative impact. Chauvin et al. found that the trade, growth, and welfare benefits for each African country are dependent on the trade liberalisation modalities, with more significant gains from the decrease of non-tariff measures in products and the upgrade of trade facilitation conditions (Chauvin, Ramos, Porto, 2017). Greenway cases for positive as a result of trade impact tend to dominate those over the negative impact. Tahir and Azid (2015) utilised the ratio of industry output to GDP to measure trade openness to examine the link between international trade openness and economic growth in fifty developing economies. Their outcome was that the relationship between trade openness and economic prosperity was significantly positive.

6. The African Continental Free Trade Area and Economic Growth

The 2020 World Bank Report proposes that the episode of the AfCFTA is expected to boost African trade, with ninety per cent of countries seeing the volume of services grow under AfCFTA. The United Nations Conference on Trade and Development fortifies this stand. Its findings reveal that the AfCFTA might enhance Africa’s economy by harmonising trade liberalisation, encourage economic diversification and intra-Africa trade at a continental level. Parshotam (2018) also submitted that a successfully implemented AfCFTA agreement would reap benefits such as improved transportation, more straightforward trade rules, customs procedures and the removal of NTBs. According to Luke and MacLeod (2019), the AfCFTA establishes a solid legal basis for economic integration and re- envisages the first integration process from a continental customs union based on a merger of regional customs to a free trade area.

7. Results and Discussion

7.1 The three core arguments

The research is based on the first phase negotiations of the AfCFTA. This covers Protocols on Trade in Goods, Trade in Services and Procedures for Settlement of Disputes. The seven trade areas covered by the first phase are policy, infrastructure, finance, information, market integration, boosting productivity and trade facilitation. However, this research limited the discussion to three trade areas: trade policy, trade-related infrastructure and trade facilitation. The AfCFTA awards an opportunity for African economies to be competitive, diversify their exports, boost manufacturing capacity, and usher in more regional trade.

a) *Trade policy*

Trade policy in the AfCFTA is intended to support the efforts towards the liberalisation of goods and services. The AfCFTA policy strategies include reducing tariffs and NTBs, introducing a common regulatory framework, harmonised rules of origin, improvements in industrial policy, and gender-sensitive trade policy. The AfCFTA aims to eliminate 90% tariff on goods and reduce non-tariff barriers.¹⁸⁵ The elimination of these tariffs is guided by the WTO principle of the most-favoured-nation that will ensure that standard non-discriminatory tariffs are charged. The significance of removing NTBs barriers is that it engineers economic growth and assists in attaining sustainable development goals (SDGs). The AfCFTA, in its process of tariff reduction, promotes inclusion, especially for countries in Africa that do not belong to any REC or customs union. As a result, tariff negotiations will begin between the African Union and other member states that are not currently in a regional preferential agreement or customs union. Tariff reduction is expected to increase intra-Africa trade by 52.3% (\$34.6 billion), compared with a baseline scenario without a CFTA in 2022.

The AfCFTA is renowned for introducing an enforceable legal framework. There are previous legal instruments signed by African economies: The Lagos Plan of Action 1980, 1991 Abuja Treaty, the 2000 Constitutive Act of the African Union, the Boost Intra-Africa Trade (BIAT) of 2012 and the respective RECs treaties. Henceforth, the AfCFTA reigns supreme in the event of any inconsistencies (Article 19(1)) of the AfCFTA. It introduces a rule-based calculative approach

¹⁸⁵ Project Syndicate, How Africa should Approach Trade and Industrialisation 23 April 2021 accessed at <https://www.project-syndicate.org/commentary/african-free-trade-area-ignores-limited-capacity-by-nimrod-zalk-1-2021-04 on 23 April 2021>.

towards the regulation of the terms of the AfCFTA. This harmonises legislation and promotes legal coherence. It prevents cherry-picking of laws by member states. Henceforth, the AfCFTA complements the existing legal framework and fortifies it by establishing a Dispute Settlement Mechanism as per Article 20 of the AfCFTA. It is salient to mention the importance of rules of origin under the AfCFTA. The AfCFTA aims to promote locally produced goods. This is seen in the mantra 'buy Africa' and 'Made in Africa.' Therefore, rules of origin in the AfCFTA will aid in identifying the origin of goods and preserve intellectual property rights. Fortunately, their application under the AfCFTA has not been made stringent lest they hinder trade.

Furthermore, the AfCFTA seeks to revamp industrial policies that will effectively introduce product diversity and produce competitive African economies. Agriculture is an important economic sector for Africa, generating around US\$ 100 billion or 15% of the continental GDP annually. For primary commodities, Africa has primarily traded commodities such as minerals, petroleum oils, and crude. This is changing under the AfCFTA, and it positively impacts African economic industries.

The AfCFTA has stressed the importance of the inclusion of women in trade policies. This policy move had been long overdue, especially in Ghana, where most informal traders are women. The catastrophes that usually befell women in trade were confiscating goods, imprisonment and being coerced to bribe. For this reason, tariff reduction would offer security to women traders and also address the gender wage gap will also be addressed. Furthermore, the AfCFTA addresses integration. The Agreement is explicit in pushing for Africa to trade as a block in the future. An integrated Africa allows for the movement of goods, services and capital. This will link the eight RECs, promoting intra – trade and a harmonised fiscal, monetary policies. On the whole, the policies that the AfCFTA seeks to address are vital for the success of the Agreement.

b) Trade-Related Infrastructure

The significance of proper infrastructure is not underplayed in the AfCFTA. Transport infrastructure and services are vital preconditions for trade, especially for Africa with many landlocked countries. Infrastructure in Africa contributes as one of the common non-tariff barriers. The travel corridors for transiting goods are in a bad state, which has caused many delays in trade. The AfCFTA uses the BIAT Action Plan that contains comprehensive plans on the improvement of infrastructure. One of them is the Programme for Infrastructure Development in Africa (PIDA), developed by the African Union Commission (AUC) and the AfDB. PIDA has since covered a

wide range of transport, telecommunication, and energy and transboundary water. In addition, there is the Integrated High-Speed Train network project to connect all of Africa's capitals since most countries are landlocked. To realise this vision, economic integration is a prerequisite.

Interests have been made before, for establishing the Single African Air-Transport Market is another illustration of a project achieved through liberalised trade policies. Infrastructure Consortium for Africa (ICA) has made efforts to address gaps in regional infrastructure integration. Information and Communications technology is a lucrative field for economic development, especially for the AfCFTA with its aim of trade in services. Article 2 (2) (a).¹⁸⁶ The Agreement's objective is also to enhance the competitiveness of services through the development of trade-related infrastructure. This comes at a crucial point to promote digitalisation and be globally competitive.

c) *Trade Facilitation*

Trade facilitation is critical for enhancing Africa's competitiveness. The AfCFTA harmonises transit procedures in Annexes 3 and 4. Annex 3 deals with Customs Co-operation and Mutual Administrative Assistance, whereas Annex 4 is on Trade Facilitation. A prerequisite is that member states have to develop/ maintain National Trade Facilitation Committees. This bottom-up approach will yield benefits and lead to domestic coordination and implementation of the provisions. Cameroon, the Democratic Republic of Congo, Egypt, Nigeria and Tanzania are likely to benefit the most from the AfCFTA's implementation with a ten-per cent-point reduction in trade costs. The trade facilitation problems in Africa are police roadblocks, lengthy customs procedures and domestic regulations. These factors have caused severe delays to products that are being transported. With reduced NTBs to trade, faster procedures will be implemented and ensure that corruption and bribery are eliminated.

The campaign in the AfCFTA is channelled towards the reduction of roadblocks. Roadblocks are significant trade barriers. They cause severe delays to products that are being transported by road. With reduced NTBs to trade, faster procedures will be implemented and ensure that corruption and bribery are eliminated. The issue of roadblocks had been prominent for counties in the ECOWAS. Considering that the AfCFTA aims to eliminate NTBs, reforms are expected to be

¹⁸⁶ See Article 2 (2) (a) of the Agreement establishing the African Continental Free Trade Area of 2018.

affected. Regarding the importance of a one-stop border post, Zambia, a SADC member, is exemplary because it has managed to initiate a one-stop border post with Malawi.

8. Regulatory Overview

The regulatory analysis indicates that the AfCFTA is umbrella legislation. History indicates that the Lagos Plan initiated the first phase for continental economic integration for Action in 1980 to foster Africa economic independence. The second phase was the 1991 Abuja Treaty for progressive liberalisation and proliferation of more RECs. The third phase was the 2000 Constitutive Act of the African Union which focused on socio-economic integration of the continent. The recent attempt was the 2021 Boost Intra-Africa Trade (BIAT) decision that offered practical solutions towards creating a free trade area. The three significant contributions of the BIAT is that it attempted to merge the SADC, COMESA and EAC into a Tripartite Free Trade Area. Secondly, it renewed hope to fix the problem of overlapping memberships. Thirdly, by casting a net over the multiple RECS, a customs union will eventually be formed. The final phase of all these efforts became the launch of the negotiations for AfCFTA in 2015.

The AfCFTA's regulatory structure is composed by:

- a) The Agreement that defines its goals and objectives.
- b) The Protocols on Trade in Goods, Protocols on Trade in Services, Protocol on Procedure and Settlement of Disputes.
- c) The Annexes, guidelines and instructions of Protocols.

The AfCFTA mirrors a sound legal standpoint that creates rights and obligations for state parties. An analysis of this framework reflects that the AfCFTA is drafted and does not mince words in the progressive liberalisation policies. The AfCFTA is lauded for using the most favoured nation standard, transparency, introducing a continental rule-based system to trade and special and differential treatment. The MFN standard used in the AfCFTA is crucial for advocating for fair treatment and promoting the practicability of giving freedom to African economies to engage in PTAs. The AfCFTA text is seen as a rulemaking instrument through the use of the peremptory provision. These peremptory provisions place obligations among RECs, state parties and international organisations. This rule-based system is fortified by establishing a Secretariat which will be implementing a rule-based system for trade.

Principles such as transparency have been priorities. Article 5(e) of the AfCFTA states transparency and disclosure of information as guiding principles to the Agreement. The Annexure on Non-Tariff Barriers likewise encourages transparency in the exchange of information relating to resolved NTBs. This is important for citizens to obtain trade information, and between member states, this is significant for ensuring predictability of the actions they will take. The AfCFTA is a progressive instrument, and this is indicated in the principles of special and differential treatment (SDT), variable geometry and flexibility (Article 5 (c) (d) of the AfCFTA) These principles give member states the time to implement the terms of the AfCFTA at a pace that is in tandem with their level of development. Through the differential treatment, the AfCFTA guards against a one size fit all policy and avoid using the same standards on economies that cannot achieve faster development.

The Protocol on Trade in Goods is significant for liberalising the market for goods, promoting intra-trade and advocating for locally produced goods. The Protocol on Trade in Services is essential for introducing a harmonised system for trade in services. Its advent introduces a harmonised system for trade in services. Consequently, the outcome will be the introduction of new legislation by the member states to regulate trade in services. These services are strengthened by administrative justice principles that extend to laypersons and mutual recognition of standards, licences from countries within Africa. The Protocol on Procedure and Settlement of Disputes is valuable for the security and predictability of the regional trading system (the rule of law). Its Dispute Settlement Mechanism represents an effective procedural system that is prompt and efficient. Evidence of such is the fact that in any event of a conflict, countries may choose to approach regional economic communities' court before approaching the AfCFTA. This is a significant achievement because decentralisation promotes the efficiency of legal recourse.

However, the provisions in these legal texts are not exhaustive enough to fully liberalise and achieve continental integration. The legal framework contains provisions that shall short of clarity, clear parameters, which may create problems on its implementation and enforceability. The language of the texts is either vague or open to many statutory interpretations. Furthermore, the AfCFTA is a member-driven system. It is dangerous to give too much power to member states, plus the multiplicity of voices is foreseen. It can be argued that some members will want to impose their rules on others in avoidance of having to change. The AfCFTA meant to cast a net to all the existing regional economic communities; however, it failed to deal with the consolidation of these

multiple memberships amply. These overlapping memberships are described as the 'spaghetti bowl', a term coined by Jagdish Baghwadi. The consolidation of RECs to the framework of the AfCFTA is complicated, even more, when the text refers to specific duties that are placed on RECs. The RECs are not member states of the AfCFTA; therefore, no obligation arises from them.

Another problem that exists relates to the continental customs union; it takes away the sovereignty of states since trade deals will be entered into on behalf of the whole customs union. The Settlement of Disputes Protocol is problematic on the legibility of those who can approach it for recourse. It appears only member states can invoke this provision; hence, third parties may be left with no recourse. There is a risk that the DSM will be redundant; African economies rarely take legal recourse against each other. There is a common unwritten principle of brotherhood mainly rooted in political reasons and the desire to uphold their reputations. These gaps warrant reconsideration, but as it currently stands, they are not too detrimental to the AfCFTA implementation.

9. Results from Interviews and Survey

a) *Interviews*

During multiple interviews held with the experts, it emerged that the AfCFTA is indeed a tool of economic growth in Africa. It takes a bold step towards boosting intra-Africa trade. Its benefits are economic, legal and social. The economic aspect concerns the AfCFTA as a tool to foster economic growth and promote intra-trade. The AfCFTA will create a significant trade pact, one of the largest in the world, with Africa's population of approximately 1.3 billion and a combined gross domestic product (GDP) of approximately USD 3.4 trillion.

Consequently, the trade pact has the potential to lift millions of Africans out of poverty. The benefit that accrues legally is establishing a robust legal framework that is binding and enforceable, which will, in turn, promote legal coherence. The AfCFTA introduces a continental rule-based system compatible with the WTO rules and consolidates the previously signed African treaties on trade. The social benefit of the AfCFTA is the continental unity and free movement of persons, which had long been envisioned over 50 years ago. Therefore, the AfCFTA text is explicit in its vision to ensure that economic benefits flow from it. Diverging views obtained indicate that in trade, what is moving is capital; therefore, the idea of economic growth being automatic must be negated.

Additionally, the AfCFTA is not meant to be protectionist. It is primarily meant to promote intra-African, which currently stands at despicable levels. The AfCFTA creates more winners than losers despite the regional differences in Africa that are political, economically and culturally vested. A common position was obtained regarding the three trade areas; all the experts agreed that AfCFTA would improve the infrastructure, trade policy, and facilitation. The AfCFTA will incentivise all these problems and create a trading block such as the European Union at a progressive step. Its approach will be to utilise the existing continental framework and also the best practices from the regional economic communities. Therefore, the AfCFTA text is explicit in its vision to ensure that economic benefits flow from it. Lessons will be drawn from this report on the successful wins of the RECs, which may serve as a lesson and how failures can be avoided. Examples are given, such as the Zambian-Zimbabwe one-stop border post, which has lessened the burden of traders. Furthermore, a lot has been said about the COMESA simplified trade regime and the ECOWAS approach to regulating and liberalising services.

b) *Survey*

The survey adopts a qualitative and quantitative analysis with responses obtained from thirty participants. Specifically, 95, 7% believe that reducing tariffs is essential for trade, with a lower tiny percentage thinking otherwise. This means the AfCFTA has found support from its citizens since it aims to eliminate tariffs on goods by 90% progressively. The question focusing on the core arguments of the paper reflected a positive percentage of 73.3 % where participants believe that the AfCFTA will improve trade facilitation, policy and trade-related infrastructure. This can be influenced by the fact that the participants are from different RECs; hence some RECs have been successful, for example, the EAC and SADC. While 26.7% are neutral, this is due to the little progress made by other RECs to achieve this, and this problem is mainly dominant in ECOWAS. Participants formed a consensus that economically, the AfCFTA will promote reducing tariffs, accelerate trade, and create a single market, leading to foreign direct investment and employment opportunities. African economies will benefit immensely from the AfCFTA through integration and lose if they decide to pursue isolated policies. The AfCFTA is an excellent initiative to improve the general standard of living for Africans and create employment, especially for the youth. Looking at other regional blocks that already have free trade agreements, one is tempted to argue that it will also work for Africa.

10. Recommendations

For the AfCFTA to effectively implement these trade policies, it should start by implementing trade defence instruments such as anti-dumping policies. Anti-dumping policies will protect African economies against intra-region dumping and dumping by external companies from other regions. Moreover, African economies should ensure that the reduction of tariffs does not increase non-tariff barriers. There is a danger that a drastic reduction of tariffs might increase non-tariff barriers. There is a need for simultaneous regulatory reform by African economies; governments must domesticate the provisions. New legislation has to be drafted to regulate services since trade in services is practically a new phenomenon in Africa. Since the AfCFTA is an agreement between African member states, they must ensure that the region does not become exclusionary to trade with other regions. The EU and ASEAN can be used as model to illustrate the benefits of maintaining trade alliances. The EU has entered into agreements with other blocks such as the MERCOSUR, ASEAN and NAFTA. Inclusive integration is key to achieving equitable trade that is beneficial to everyone, even to ordinary laypersons. Africa is politically fragmented, and the region is vulnerable due to political instability, terrorism, conflict, genocide and xenophobia.

11. Conclusive Remarks

This thesis found that there is a consensus that trade liberalisation leads to economic growth. The theory of comparative advantage by Ricardo has made economies specialise in producing goods or services that they are most skilled at or where they are produced at an affordable cost. Empirical evidence is obtained from the EU and the ASEAN, making significant progress through trade openness. The AfCFTA is a paradigm shift: it is reflected through its approach, which consolidates the previous African regional treaties that include the Lagos Plan of Action, Abuja Treaty, Constitutive Act of the African Union, and the Action Plan for Boosting Intra-Africa Trade. The AfCFTA language is geared at progressive liberalisation, indicating that it is pursuing a comprehensive approach to trade. Its highly flexible system is required for the scope and depth of such a market and practical regulatory cooperation. Increased trade through the AfCFTA is also expected to spur reforms that enhance productivity and job creation, decreasing poverty. The interviews conducted with the AfCFTA experts highlighted that the AfCFTA is building a

formidable trade area, and the success and losses of the previous regional economic communities will act as a compass for the AfCFTA.