AfCFTA: The Remedy to an Enduring Mischief?

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ABSTRACT

The pervasive legacy of colonialism and neo-colonialism is steadfast. This mischief has been and is afflicting African trade and development. Its influence has permeated the ideological foundation of African integration and has been inimical to growth on the continent. The African Continental Free Trade Area agreement is the African Union's hopeful attempt to remedy this enduring mischief. The scope of AfCFTA indicates that State Parties have adopted the multi-dimensional approach of developmental regionalism to remedy Africa's developmental challenges. However, to fulfil the precepts of this model, State Parties will have to engage in further deliberations to expand AfCFTA's scope and tune it to the nuances of African developmental ills.

Furthermore, in its current form, AfCFTA fails to resolve historical implementation hurdles and overlooks foreboding supranational crises. AfCFTA rests on Pan-African idealism and not pragmatism. Thus, if the implementation challenges and supranational crises are left unaddressed, Pan-African solidarity will fracture and State Parties will retreat into their sovereignty. Therefore, idealism must be balanced with pragmatism to forge robust collectivism to drive the remedy of Africa's enduring mischief. Only time will tell whether AfCFTA is a meretricious symbol of integration or a concerted and substantive effort to develop and unite Africa.

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Recommended soundtrack for assessment:

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ACRONYMS

ACP African, Caribbean and Pacific

AEC African Economic Community

AfDB African Development Bank

AfCFTA African Continental Free Trade Area

AGOA African Growth and Opportunities Act

AMU Arab Maghreb Union

ATO African Trade Observatory

AU African Union

CEN-SAD Community of Sahel-Saharan States

COMESA Common Market for Eastern and Southern Africa

EAC East African Community

ECA Economic Commission for Africa (also UNECA)

ECOWAS Economic Community of West African States

EEC European Economic Community

EPA Economic Partnership Agreement

EU European Union

FTA Free Trade Area

GATS General Agreement on Trade and Services

GATT General Agreement in Tariffs and Trade

GSP Generalised System of Preferences

GVC Global Value Chain

IMF The International Monetary Fund

ITO International Trade Organization

LDCs Least Developed countries

LLDCs Landlocked Developing Countries

MFN Most Favoured Nation

NBT Non-Tariff Barriers

OAU Organisation of African Unity

REC Regional Economic Community

SACU Southern African Customs Union

S&DT Special and Differential Treatment

SADC Southern African Development Community

SAPs Structural Adjustment Programmes

SEZ Special Economic Zone

SIDS Small Island Developing States

SPS Sanitary and Phytosanitary Standards

SVEs Small, Vulnerable Economies

TBT Technical Barriers to Trade

TFA Trade Facilitation Agreement

TFTA Tripartite Free Trade Area Agreement

TPP Trans-Pacific Partnership Agreement

TTIP Trans-Atlantic Partnership Agreement

UN United Nations

UNCTAD United Nations Conference on Trade and Development

UNECA United Nations Economic Commission for Africa

UK United Kingdom

US United States of America

WCO World Customs Organisation

WTO World Trade Organization

CHAPTER 1: INTRODUCTION

The 'Mischief Rule' is a principle of statutory interpretation that presupposes that the objective of a statute is to cure a mischief and advance a remedy. The African Continental Free Trade Area agreement is the African Union's latest and hopeful attempt to integrate and develop the continent. It has been proffered as a remedy to bolster intra-African trade, facilitate African participation in the global trade system and advance African development. This principle implicitly necessitates an examination of: (i) the best suited ideological choice for a purposeful remedy; (ii) the success of the legislation to reflect this choice; and (iii) the capacity to implement the agreed to obligations. AfCFTA has been negotiated for a purpose and this principle frames the proceeding analysis to ascertain what AfCFTA seeks to address, how it seeks to address it and whether in fact it will address it. Thus, it is an imperative to first look beyond the articles of AfCFTA and examine the mischief it seeks to remedy.

It is incontrovertible that Africa's present state of development and its position in the global trade order is intimately linked to its colonial history. Independence did not cut the tether between the colonisers and the colonised countries. Africa has been and is the object of intense neo-colonial interest. Thus, Africa has faced extensive foreign influence on its trade, industrial, and developmental policy. This clout has been exerted at the WTO, through preferential trade agreements and by international financing conditionalities. The influence that colonialism and neo-colonialism has had on African economies and trade is analysed in order to appreciate the nature of the mischief that AfCFTA is seeking to suppress, and remedy.

AfCFTA aims to build upon the modest gains of previous attempts to integrate and develop the continent under the OAU and the AU. These attempts have failed to remedy Africa's enduring mischief, but tracing these efforts informs the approach adopted under AfCFTA and elucidates previous shortcomings that AfCFTA must address. Consequently, the formative treaties and events leading to AfCFTA's introduction are discussed to contextualise the motivation driving AfCFTA.

Regional integration is proposed as a remedy to transform African economies by establishing augmented regional economic structures to compete in and reshape the world trade order. However, the ideological foundation of integration has been contentious. Prior models of integration have been tainted by Western interest and detached from Africa's eclectic developmental challenges. Thus, an appraisal of integration models, and law and development theory is undertaken to provide a theoretical lens to examine AfCFTA. The model of developmental regionalism through an attuned law and development theory is advocated as the remedy to address Africa's mischievous developmental ills.

The AfCFTA Treaty establishes a continent-wide legal regime. This provides the parameters in which State Parties are to liberalise and facilitate the trade in goods, services and other trade-related matters. It provides the overarching framework of obligations and institutions to oversee, manage and drive forward the creation of a single liberalised market of goods and services for the advancement of integration in Africa. Thus, this thesis analyses the provisions of the treaty in order to ascertain whether it is purposeful in remedying Africa's enduring mischief by adopting developmental regionalism as its ideological foundation.

The Protocol on Trade in Goods is a key incentive in opening up African markets to other State Parties in order to boost intra-African trade. However, tariff concessions are a sensitive matter as tariffs are an important source of revenue and a key mechanism for domestic protection. Thus, appreciating the nature of rights and obligations under this protocol is key to grappling with the viability of AfCFTA's objective. Therefore, the central provisions of the Protocol are considered to deduce whether developmental regionalism has been embraced.

Africa's trade in services has grown, but a lack of policy coherence at a domestic, regional, and continental level has prevented African countries from fully reaping the benefits of service liberalisation. Thus, the State Parties have adopted the Protocol on Trade in Services to create a rules-based, transparent, inclusive, and integrated single services market. The provisions of the protocol are studied to determine whether the ideological approach adopted will address existing challenges in the services trade.

A rule-based system governing trade is only as robust as its dispute settlement mechanism. The Protocol on Rules and Procedures of the Settlement of Disputes aims to provide an impartial procedure to settle disputes between State Parties. Dispute settlement has been a stumbling block for African countries. Thus, the ideological position adopted under the protocol is

analysed to ascertain whether the approach taken will alleviate or exacerbate these existing issues.

The AfCFTA framework indicates that State Parties have chosen a direction steered by developmental regionalism. State Parties have cast their sight beyond matters of trade and clearly appreciate that if Africa is to succeed in remedying its enduring mischief, it must take a multi-dimensional approach to its developmental challenges. However, in its present form, AfCFTA will not fully deliver on the hoped rewards of developmental regionalism.

Africa is saddled with significant implementation hurdles while simultaneously being confronted with the foreboding supranational crises of our times. These hurdles have resulted in previous integration efforts being unsuccessful. AfCFTA has failed to substantively address existing implementation challenges and the consequences of supranational crises. Therefore, State Parties must engage to strategically address existing issues and pragmatically support the coalescing principle of Pan-Africanism.

Accordingly, the State Parties have correctly embraced the model of developmental regionalism to underpin their pursuit. Nevertheless, the project remains incomplete. Thus, State Parties must address the shortcomings of AfCFTA by forging robust and pragmatic collective interest while also tuning the framework to the eclectic developmental challenges that African societies face. Failing such, the implementation hurdles and looming supranational crises will overwhelm AfCFTA and fracture Pan-Africanism. Consequently, if left unaddressed, AfCFTA will be cast to the annuls of floundered promises, and Africa's tortuous mischief shall endure.

CHAPTER 2: AN ENDURING MISCHIEF

2.1 A Frame: The Mischief Rule

The 'Mischief Rule' is a principle of statutory interpretation that presupposes that the objective of a statute is to cure a mischief and advance a remedy. This principle enables a court to examine the context in which a statute has been enacted into law, and to further consider the legislature's intention behind the adoption of the statute.[1] Its underlying rationale is that the objective of the enacted law is to cure the mischief. Therefore, while interpreting the relevant legislation, the court's role is to give effect to an interpretation that suppresses the mischief and advances the remedy.[2] AfCFTA has been negotiated for a purpose and this principle frames the proceeding analysis to ascertain what it seeks to address, how it seeks to address it and whether it will in fact address it. Accordingly, the starting point is to understand the mischief that AfCFTA seeks to cure.

The enduring mischief that has hindered African trade and development is a consequence of lingering colonialism and neo-colonialism. Colonialism structured African economies to serve the colonists. This structure has been maintained through neo-colonial trade arrangements that have imposed policy choices on African countries that maintain the extractive and parasitic *status quo.* This has been inimical to Africa's self-determination and development. Therefore, to analysis AfCFTA, it is necessary to understand the mischief that it seeks to remedy. Consequently, the effect of colonialism and neo-colonialism on African economies and trade is discussed to better understand AfCFTA's purpose.

2.2 An Enduring Mischief

2.2.1 *Colonialism*

The issues that plague Africa's economic, social and legal development are embedded in its deep-rooted history. From slavery to apartheid, Africa has experienced many of the worst

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[1] *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A); Sikandar Kola *the Labour Appeal Court's Approach to the Interpretation of Labour Legislation* (unpublished LLM University of Johannesburg 2014) p13
[2] *Ibid.*

travesties known to humankind.[3] However, of these events, European colonialism has likely had the biggest impact in shaping African society.[4] The pervasive legacy of colonialism is steadfast. From education to economics, its impact across African institutions and structures has been diffuse.[5] It is undeniable that Africa's present state of development and position in the global trade order is intimately linked to its colonial history.

Colonialism implanted a system in African society designed to deliver on a vision of political and economic exploitation. At the Berlin Conference in 1884, the colonial powers arbitrarily divvied up Africa into new colonial territories.[6] These colonial boundaries were established without regard to ethnic, linguistic, religious, cultural or demographic bonds.[7] Instead, borders were drawn to harmonise and satisfy imperial claims to the continent. The objective was to establish subservient economies from which colonial powers could expropriate and expatriate natural resources back to their metropolitan centres.[8] This economic relationship of extraction has been maintained through violence, subjugation and the dehumanisation of African peoples.

African countries gained independence in the mid to latter part of the twentieth century. However, most post-independence governments have failed to deliver the structural changes required to uplift African economies.[9] Like the colonial regimes that preceded them, many independent African states became authoritarian, undemocratic, corrupt and dominated by an elite who wielded state sanctioned violence to maintain its grip on power.[10] To this end, Fanon offers a poignant and pessimistic critique of the post-independence ruling class. He argues that the African elite adopted the decadence of the colonial bourgeoisie without emulating its innovation.[11] The acquisition of form, with the abandonment of substance.[12] Accordingly, he argued that the mission of Africa's elite has nothing to do with transforming the nation. Instead, the objective is to be the transmission line between the nation, and rampant neo-colonial capitalism.[13] While one ought to be critical of the ruling class concept, we cannot negate the invaluable role it plays in a nation's development. There is indeed some merit in Fanon's

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[3] Elizabeth Justice 'The African Union: Building a Dream to Facilitate Trade, Development, and Debt Relief' (2003) *Currents: International Trade Law Journal* p2
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.* p3
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] Frantz Fanon 'The Wretched of the Earth' (1963) p153
[12] *Ibid.* p153
[13] *Ibid.* p152

opprobrium of Africa's elite, but it is softened by the underlying design of the economic system in the colony. Economic participation of the colonised was intricately configured to produce and maintain the interests of the coloniser. The indigenous populations were excluded from meaningful economic engagement.[14] Thus, self-sustaining economies were not established. Instead, the colonial powers engineered economic dependency to maintain a system in which the colony relied on the colonial power for manufactured goods and commodity export markets.[15] This remains true today as many African countries are still heavily reliant on the export of raw commodities and natural resources.[16] The colonial powers have gone to great lengths to maintain this *status quo,* especially in West and Central Africa where compliant dictatorial regimes have been propped up in the face of widespread protests calling for democratic government.[17] In modern times, this dynamic still pervades African international trade relations with the developed world.

2.2.2 *Neo-Colonial Influence*

The independence of many African countries in the mid-twentieth century was not the seismic severance that it was symbolically held out to be. Instead, the exertion of foreign influence became more opaque. Africa, with its abundance of precious natural resources and its reservoir of cheap labour, has been and is a key site of neo-colonial and geo-political competition. Thus, both former colonial and neo-colonial powers hold significant political and economic interest in maintaining an extractive and commodity-based relationship with Africa. Consequently, there is concern that industrialised countries will wield clout to undermine Africa's latest attempt to develop in order to safeguard their own economic and political interests.[18] The effect of China's rise on the political and economic world order will make the developed world weary of welcoming Africa's ascension.[19] Accordingly, as evidenced by the US led disruption at the WTO and trade arrangements negotiated with African countries such as the EPAs and AGOA, this concern of neo-colonial meddling is well-founded.

[14] *Ibid.* p151
[15] Justice *op cit* 3 p3
[16] United Nations Economic Commission for Africa (UNECA) 'Economic Report on Africa 2015: Industrializing Through Trade.' (2015) *UNECA* p36

[17] Justice *op cit* 3 p6
[18] Yong-Shik, Lee 'Law and Development: Theory and Practice' (2022) *Routledge* p396-397
[19] *Ibid.*

The Emerging Disruption at the WTO

Since the establishment of both the GATT and the WTO, the global trading system has been dominated by the US and other industrialised nations. However, over the last two decades, the architecture of international trade has been profoundly transformed by the rise of China and other emerging economies.[20] Since China's addition to the WTO at the launch of the Doha Round in late 2001, China has become a global trade hegemon.[21] Its rapid growth at over 10% per annum created a massive demand for African commodities. Consequently, many African economies experienced unprecedented growth in the first decade of the new millennium.[22] While there was significant growth, in comparison with other emerging economies in Latin America and Asia, Africa is still way off the pace.[23] Unfortunately, the contemporary power shifts that helped democratise the WTO have ironically blunted its effectiveness as a multi-lateral institution for trade negotiations.[24]

At the Doha Round, developing countries negotiated in concert, and thereby influenced the agenda and draft agreement to be considered by the WTO.[25] The Doha Round was promising as it offered remedies to legitimate grievances held by developing countries, such as the reduction of agriculture subsidies in developed states and increased market access into those economies.[26] Importantly, in return, developing countries were not required to significantly liberalise access to their markets.[27] Thus, amongst developing countries, the Doha Agreement was widely held as a positive step in addressing the imbalances in global trade.[28] However, a contingent of developed countries, led by the US, argued that the Doha Round had become obsolete due to the significant changes in the world economy brought about by China's rise and other emerging economies.[29] The US's main compliant was against China being granted

[20] *Ibid.*
[21] Faizel Ismail ' Advancing the Continental Free Trade Area (CFTA) and Agenda 2063 in the Context of The Changing Architecture of Global Trade' (2016) *TIPS* p7
[22] *Ibid.*
[23] *Ibid.*
[24] Kirsten Hopewell 'Rising powers and the collapse of the Doha Round' (2016) *United Nations University* at *https://www.wider.unu.edu/publication/rising-powers-and-collapse-doha-round* accessed on 14 October 2021.
[25] Ismail 2016 *op cit* 21 p8
[26] *Ibid.* p8
[27] Hopewell *op cit* 24
[28] Ismail 2016 *op cit* 21 p8
[29] *Ibid.* p8

special and differential treatment. This led to a stalemate in negotiations and an impasse that the WTO has yet to overcome.[30] Instead, the US and other developed economies shifted tact.

Accordingly, with the collapse of the Doha Round, the US took a new approach to global value chains. It diverted away from multilateral negotiations towards a plurilateral approach.[31] This entailed the abandonment of the single undertaking process in favour of a single-issue approach.[32] In such negotiations, the US has demanded for higher regulatory standards and disciplines on trade-related issues that it considers to be crucial in advancing the interests of its lead firms in global value chains.[33] In much the same way as the Washington Consensus became the dominant ideology, this approach has been peddled as the anecdote to international trade woes by the epistemic community of researchers and policy thinkers at the WTO and the World Bank.[34] This approach has fragmented the African group and left them exposed to the power imbalances in trade negotiations with developed economies, such as the US and the EU.[35]

Prior to the collapse of the Doha Round, the African contingent had been negotiating as a common block and had been exerting influence on the outcomes of negotiations.[36] African countries negotiated in both official as well as *ad hoc* issue-based coalitions.[37] The move to the single-issue approach has stultified this progress by developing countries. According to Ismail, this shift shall be detrimental to African interests for three reasons: the mandate of the Doha Round to prioritise the interests of developing countries is side-tracked; the leverage to negotiate agriculture reforms in developed countries is lost; and the interests of developed countries shall be prioritised, while the concerns held by developing countries shall be peripheral.[38] Thus, the African Group, in tandem with the other groups, must consolidate its negotiating power in order to challenge and shift the present narrative in international trade.[39] This is a crucial aspiration of AfCFTA. Failing such, the developed world will determine the

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[30] Hopewell *op cit* 24
[31] *Ibid.*
[32] Ismail 2016 *op cit 21* p8
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36]Pradeep Menta; Bipul Chatterjee & George, Joseph 'The Doha Development Agenda: Prospective Outcomes and African Perspectives' in Rorden Wilkinson and James Scott *Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock* (2013) p193
[37] *Ibid.*
[38] Ismail 2016 *op cit* 21 p5
[39] *Ibid.*

global rules of trade and developing countries will be pressurised into signing these prejudicial multi- and plurilateral trade agreements.[40] The EU's EPAs and the US's AGOA illustrate this prejudice.

Preferential Trade Agreements: The Fifth Column to Africa's Development

Preferential trade agreements are proffered as great vehicles to aid the development and integration of developing countries into the global economy. However, these meretricious symbols of 'generosity' are in fact a fifth column to African development. The term Fifth Column was coined during the Spanish Civil War to describe a group of secret sympathisers who sabotaged a movement from within.[41] Accordingly, preferential trade agreements have a façade of aiding development, however, if you drill down into the detail, it is clear that it is a neo-colonial conduit to maintain the *status quo* and sabotage African industrialisation and development. Therefore, the EU's Economic Partnership Agreements and the US's African Growth and Opportunity Act are analysed to illustrate neo-colonial deception driven through PTAs.

i. The European Union: Economic Partnership Agreements (EPAs)

From the outset of GATT, the so-called Imperial Preferences granted by the UK to the Commonwealth countries was a controversial issue between the UK and the US.[42] This issue was exacerbated with the UK's incorporation into the European Economic Community because the six founding members of the EEC (Belgium, France, Italy, Luxembourg, Netherlands and West Germany) thereafter also decided to grant trade preferences and aid to their 'former' colonies.[43] Thus, in 1975, a global contingent of 'former' colonised countries gathered in Lomé, Togo to sign the Lomé Convention. This agreement granted them unilateral free access to the EEC market and entitled them to impose quotas and taxes on manufactured goods originating from the EEC.[44] This was contentious as it did not layout a plan to form an FTA as

[40] *Ibid.*
[41] Merriam Webster Dictionary 'Fifth Column' Accessed on 28 September 2021 at https://www.merriam-webster.com/dictionary/fifth%20column#other-words
[42] Ismail 2016 *op cit* 21 p6
[43] *Ibid.*
[44] Centre Virtuel de la Connaissance sur l'Europe (CVCE) 'The Lomé I Convention' at *https://www.cvce.eu/en/education/unit-content/-/unit/dd10d6bf-e14d-40b5-9ee6-37f978c87a01/9a69c7f9-1ea2-4e6c-8cdb-1dee40ac5714* accessed on 14 September 2021

required under GATT. Nevertheless, as part of its broader geo-political strategy to maintain political stability in Europe, the US supported the agreement.[45] Thus, in spite of objections by developing countries in Latin America and Asia who were not granted such preferences, the Lomé Convention persisted and was granted a waiver at the WTO.[46] This preferential trade arrangement became untenable for two reasons.

Firstly, there was international pressure for the agreement to become WTO compliant. Secondly, the attitude of the EU shifted as new members who were not colonial powers joined the EU. These members considered such preferences into the common market politically unpalatable.[47] Thus, in the early 2000s, the EU pivoted to negotiating out of the Cotonou Agreement (the subsequent PTA to the Lomé Convention) and instead advocated for reciprocal trade arrangements. Consequently, the EU commenced EPA negotiations with African, Caribbean and Pacific countries in late 2002.[48] Of concern for developing countries, is that in order to comply with the WTO, the EPAs must liberalise 'substantially all' trade between the EU and its EPA partners within a reasonable time.[49] Past practice by the EU indicates that this will be interpreted to mean that 80-90% of all existing trade shall be liberalised. This encompasses both agricultural and manufactured products.[50] The failure to provide flexibility in the levels of reciprocity is indicative of the fact that this GATT provision was drafted from the perspective of and for developed economies.[51] As a result, nascent and fragile sectors in developing countries are exposed to foreign competitors prematurely and thus, often the development of these sectors stagnate and fall away.

EPAs illustrate a pernicious trade dynamic that permeates trade agreements between developed and African economies. In 2008, countries that had failed to sign an EPA were demoted to a GSP agreement.[52] Moreover, a few years later, the EU passed a regulation that rescinded market access benefits to those countries that had failed to take steps to ratify the EPAs.[53] It was evident that this was a maneuverer by the EU to pressurise African countries to ratify the

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[45] Ismail 2016 *op cit* 21 p6
[46] *Ibid.* p6
[47] *Ibid.*
[48] *Ibid.* p7
[49] World Trade Organization, *The General Agreement on Tariffs and Trade*, 1994. (GATT) Article XXIV
[50] Stephen Hurt 'The EU-SADC Economic Partnership Agreement Negotiations: 'Locking In' the Development Model in Southern Africa?' (2012) *Third World Quarterly* p502
[51] *Ibid.*
[52] *Ibid.*
[53] Ismail 2016 *op cit* 21 p6

EPAs. For example, during EPA negotiations with Kenya, the EU imposed import tariffs on Kenya's lucrative cut flower industry to pressurise Kenya into ratifying the agreement. Shortly after the imposition of tariffs, Kenya capitulated and ratified the EPA. Thereafter, the EU removed the tariffs in time for the Valentine's Day boom.[54] The ACP Council of Ministers has publicly rebuked the amount of pressure the EU is applying on these countries during EPA negotiations.[55] African countries are heavily dependent on revenue generated from exports into the EU market and the EU has used this imbalance of dependency to force African countries into signing and ratifying the EPAs.[56] Thus, while the EU has been eager to publicly state its support for the multilateral negotiating system, it has leveraged the deadlock of the Doha Round to further its agenda in bilateral negotiations with developing countries.[57] Thus, with the WTO at an impasse and African countries likely to capitulate to EU pressure, the gains made by developing countries at the WTO will be eroded by the imbalance of bargaining power in the bi-lateral EPA negotiations.[58]

This tactic is particularly evident from the EU's desire to incorporate a number of behind the border policies in the EPAs.[59] These behind the border policies are known as the 'Singapore Issues' and include policies regarding competition, transparency in government procurement, national treatment for foreign investors and trade facilitation measures.[60] These Singapore Issues were vociferously opposed by developing countries at the WTO and was a major reason for the collapse of the Cancun Conference.[61] Thwarted at a multilateral level, the EU pursued these policy objectives through bilateral negotiations. Consequently, as the EPA negotiations progressed, it became evident that the asymmetrical bargaining power afforded the EU much greater success in this pursuit.[62] The EU paternalistically argue that liberalisation and behind the border policies are precisely the trade-related issues that will foster growth and development on the continent.[63] Conversely, as African countries attempt to unravel the

[54] Josephine Moulds 'EU Trade Agreements threaten to crush Kenya's blooming flower trade' at *https://www.theguardian.com/sustainable-business/2015/jan/16/kenya-flower-trade-eu-pressure* accessed on 14 September 2021
[55] Hurt *op cit* 50 p502
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.* p503
[63] *Ibid.* p505

spaghetti bowl of their own integration, the EPAs and the behind the border policies, threaten to further complicate and derail the African integration project.[64]

African countries have failed to negotiate as a collective unit and thus, the policy implications of the EPAs must be assessed in the broader context of the African integration project. For example, the EPAs deal with a raft of issues, such as: various liberalisation schedules for products; phase down periods; different rules of origin and other policy issues.[65] The lack of coherence between bilateral EPAs and multilateral African trade agreements, if left unaddressed, will likely be stumbling blocks to African integration.[66] Furthermore, the liberalisation of EU imports will result in the loss of import duty revenue precisely at a time when African countries require foreign earnings to participate in and launch flagship integration projects.[67] Additionally, antithetical to Pan-African aspirations, it will result in the absurdity of African countries reducing tariffs to the EU before their neighbours. Moreover, the addition of the Singapore Issues constrains African countries in adopting the Afrocentric industrial policy required to protect and develop domestic firms.[68] Thus, African countries will find themselves in a Friedmanite straitjacket preventing them from adopting alternative development strategies tailored to the developmental challenges of Africa.

African trade with the EU is desirable, but in its current iteration, it is short-termist. The EPAs are a two-pronged attempt by the EU to implant neoliberalism in Africa and maintain the extractive *status quo*.[69] The first prong, trade liberalisation, will open up burgeoning African markets to large multi-national EU firms. Secondly, the Singapore Issues will secure favourable regulatory conditions for European investment.[70] Thus, EPAs will not encourage industrialisation and will in fact be inimical to African development as African countries will lose important import revenue while simultaneously exposing domestic nascent industries to established foreign competition. The US has been keenly observing the EU trade negotiations with African countries.[71]

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[64] Ismail 2016 *op cit* 21 p8
[65] *Ibid.*
[66] *Ibid.*
[67] John Akokpari "EU Trade Relations: For Better or Worse in African Development?" Workshop School of Political Science, University of Florence, Italy 2nd May 2019. p6
[68] Hurt *op cit* 50 p505
[69] *Ibid.* p507
[70] *Ibid.*
[71] *Ibid.*

ii. USA: African Growth and Opportunity Act (AGOA)

The US wishes to pivot away from unilateral preferences in favour of reciprocal trade arrangements with African countries. In its original iteration, AGOA granted African countries unilateral trade preferences across a myriad of tariff lines.[72] This arrangement was most recently renewed in 2015 and is set to expire in 2025. The 2015 Agreement included provisions relating to reciprocity and behind the border policies. It requires the US administration and its AGOA partners to actively pursue reciprocal free trade agreements.[73] It is important to bear in mind that AGOA is a piece of national legislation, not an international agreement, and may be amended or withdrawn at any point.[74]

In order to be eligible for AGOA, African countries must comply with certain policy conditions. For example, the US Trade Development Act states that in order to qualify for trade preferences, countries must actively pursue a market-based economy which protects private property rights and eliminates barriers to US trade and investment.[75] AGOA expanded on these requirements to include the removal of high tariffs, localisation conditions and investment restrictions.[76] To ensure compliance with eligibility conditions and US trade policy objectives, the preferences granted under AGOA can be suspended, limited or withdrawn.[77] Moreover, the President is authorised to review AGOA compliance at any point and revoke a country's designation under the Act or suspend, limit or terminate any preferences.[78] Additionally, any interested person may petition a US trade representative to investigate a country's failure to comply with AGOA requirements.[79] Given the immense power that American lobby groups have, this provision of AGOA can be used by lobbyists to ensure more favourable terms of entry into African countries.[80] Thus, African countries lack concrete assurances for trade preferences, which results in uncertainty for the various sectors that trade under AGOA.

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[72] Ismail 2016 *op cit* 21 p9
[73] *Ibid.* p10
[74] Gerhard Erasmus 'What will happen to the Regional Economic Communities and other African Trade Arrangements once the AfCFTA is operational?' (2018) *TRALAC* p1
[75] Faizel Ismail 'Advancing Regional Integration in Africa Through the Continental Free Trade Area (CFTA)' (2017) *LDR* p133
[76] *Ibid.* p133
[77] *Ibid.* p134
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*

Ostensibly, AGOA aims to facilitate African countries into global trade. In substance, it has proved to be a tool of US imperialism.[81] The US has leveraged trade preferences to pry open African markets for its firms to feast.[82] The AGOA trade preferences have been largely underutilised because the US has imposed market access requirements that African countries have struggled to satisfy, and trade preferences have not been accorded to some economically important products.[83] Moreover, the trade preferences granted under AGOA encourage the trade of natural resources or low-level manufactured goods. Beneficiated or manufactured products are subject to tariff escalation and have not been granted trade preferences.[84] Tariff escalation is where a market imposes progressively higher tariffs on manufactured goods compared to commodities - thereby encouraging a dependency on commodities.[85] Thus, AGOA does not promote African development, but instead maintains the *status quo* and provides the US market with low-cost imports that it can use in its manufacturing sectors.

AGOA expires in 2025 and the trajectory is clear that the US will demand a more reciprocal arrangement. AGOA fails to foster industrialisation, it forces policy decisions on African countries and leverages trade preferences to open up African markets to US firms. Africa needs to accelerate industrialisation and requires the policy freedom to adopt policies tailored to its unique developmental challenges. African economies are not equipped for US competition, and such will hinder the development of manufacturing sectors. African countries must coalesce around the AfCFTA project and renegotiate favourable AGOA terms to ensure that it is coherent with African integration development goals.

2.3 Conclusion

African development is afflicted by the colonial and neo-colonial mischief. The above discussion illustrates the colonial engineered structural impediments and the neo-colonial interference, which have both hindered African development. This is the mischief that AfCFTA seeks to remedy. Thus, the purpose of AfCFTA is to cut the tether of colonial dependency and rid Africa of neo-colonial menaces in order for Africa to charter and determine its own

[81] *Ibid.* p135
[82] William Davis 'The African Growth and Opportunity Act and the African Continental Free Trade Area.' (2018) *American Journal of International Law* p379
[83] *Ibid* p380
[84] *Ibid*
[85] Ron Sandrey 'Export Taxes in the South African Context' (2014) p5

development. This aspiration is not new. Thus, Africa's previous attempts to address this mischief are subsequently considered to better understand AfCFTA's foundational lineage and to learn from prior failings.

CHAPTER 3: THE PROGRESSION OF AFRICAN INTEGRATION

3.1 Introduction

AfCFTA seeks to build on modest gains of previous attempts to integrate and develop the continent under the OAU and the AU. It is a rejuvenated attempt to achieve the long-heralded Pan-African aspirations. Therefore, tracing AfCFTA's foundational lineage and appraising prior integration failings helps elucidate AfCFTA's prospects of success to deliver a purposeful remedy.

3.2 The OAU: A Start

The OAU was founded in an optimistic attempt to address the repercussions of colonialism and realise the aspirations of African prosperity.[86] The OAU represented a compromise between two prevailing perspectives: (i) the idea that Africa would only survive as a united entity; and (ii) the belief that all energy should be directed to building strong independent nation-states.[87] The OAU Charter aimed to create an indomitable Pan-African union to rid Africa of the vestiges of colonialism and better the lives of the African people.[88] However, this vision remained blurry until the first executive secretary of UNECA, Adedeji Adebayo, offered substantive and programmatic direction. His influential leadership resulted in the Lagos Charter in 1975 and later the Lagos Plan of Action in 1980.[89]

The Lagos Plan of Action was founded on the notion of developmental regionalism and advocated integration based on the self-reliance, endogenous development and industrialisation of Africa.[90] However, the Lagos Plan of Action was criticised for lacking an implementation strategy.[91] In response, the OAU adopted the Abuja Treaty which provided a step by step approach to regional integration.[92] Entering into force in 1994, the Abuja Treaty created the RECs with the purpose that the RECs would be the fundamental building blocks for the establishment of the AEC by 2028.[93] The Treaty envisioned a stepwise engineering approach

[86] Justice *op cit* 3 p5
[87] *Ibid.*
[88] The Organisation of African Unity Charter
[89] Ismail 2016 *op cit* 21 p5
[90] *Ibid.*
[91] *Ibid.*
[92] Ismail, Faizel 'A Developmental Regionalism Approach to the African continental Free Trade Area (AfCFTA)' (2018) *Trade & Industrial Policy Strategies (TIPS)* p2
[93] Ismail 2018 *Ibid.*

to integration: first the establishment of FTAs in each region and thereafter a progressive deepening of integration with the formation of customs unions, common markets and monetary unions.[94] The treaty's ultimate aim was to consolidate and unite efforts across the continent in order to establish the AEC. By the early 2000s, eight RECs had been identified as the fundamental building blocks to advancing regional integration.[95] Importantly, the average applied tariff in the RECs has been substantially reduced since their formation.[96]

3.3 An End and a Beginning: The AU Invigoration

While the Abuja Treaty has been a moderate success, the OAU grew ineffectual and did little but maintain the *status quo*. Beset with challenges of civil war, foreign influence, infighting within the organisation, corruption, failure to intervene in internal conflicts and functional weaknesses of the OAU Charter itself – the OAU lacked the capacity to drive development and deliver on its objective to improve the lives of the African people.[97] A poignant indictment of the organisation's failure was its mute apathy and unwavering deference to sovereignty as African societies were torn apart by civil war, political repression and the violation of human rights.[98] The organisation failed to unite as a Pan-African body against these challenges and thus necessitated a replacement. Although the OAU did not succeed, it was an important first step that laid the foundation for the African Union.[99] Therefore, the OAU unanimously adopted the AU Constitutive Act as a solution to the OAU's failings. The AU's overarching objective is to harmonise the economic and political policy of all African states to improve pan-African welfare and prosperity. The AU is charged with presenting a unified and formidable African voice in international affairs.[100]

3.4 A Clarion Call to Action: The Road to AfCFTA

The progress integration of the RECs has been a chief aspiration of the AU. Accordingly, the RECs must be assessed according to the objectives stated in the constitutive Abuja Treaty. The

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[94] Trudi Hartzenburg 'Regional Integration in Africa' (2011) *TRALAC* p3

[95] Ismail 2016 *op cit 21* p6

[96] Stephen Karingi and William Davis 'Towards a transformative African Integration process: rethinking the conventional approaches' (2016) *UNENCA*

[97] Justice *op cit 3* p5

[98] Corrine Packer & Donald Rukare 'The New African Union and Its Constitutive Act.' (2002) *American Journal of International Law* p367

[99] Justice *op cit 3* p5

[100] *Ibid.*

treaty separates the continent into five distinct regions: North Africa, West Africa, Central Africa, East Africa and Southern Africa.[101] It was envisioned that each region would comprise a building block for the establishment of the future continental market.[102] This step-wise approach is rational as the African integration project is attempting to integrate more than fifty countries across a massive continent with diverse political, economic and social conditions.[103] Thus, it is logical to separate regions into distinct legal and operational communities acting under a quasi-federal AU banner. However, the proliferation of RECs on the continent has caused a 'spaghetti-bowl' effect with a myriad of overlapping agreements and memberships.[104] Instead of the five regional communities envisioned, there are approximately fourteen.[105] Of major concern, is that many countries cite political and strategic reasons as the main determinant for joining RECs. Economic reasons and geographical proximity are distant considerations.[106] Thus, countries have lost sight of the rational economic objectives of the Abuja Treaty and have instead wandered off into political symbolism.

The common occurrence of multiple and overlapping membership of Africa's RECs has made the implementation of Africa's integration cumbersome and costly.[107] The 'spaghetti bowl' effect has caused the fragmentation of regions, overlap of institutions, duplication of efforts, inefficient allocation of resources and disputes over legitimacy and jurisdiction.[108] RECs have lacked strong institutional and legal frameworks and thus there has been tepid commitment to rule-based trade arrangements across the continent.[109] In an attempt to consolidate efforts and overcome the challenges caused by the 'Spaghetti Bowl' effect, the Ministers of Trade and Industry for COMESA, EAC and SADC initiated the establishment of a FTA amongst these three RECs.[110] Thus, TFTA negotiations were launched in Johannesburg in 2011.[111] The

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[101] UNECA & AU 'Assessing Regional Integration in Africa II: Rationalising Regional Economic Communities' (2006) *UNECA* p14
[102] *Ibid.*
[103] *Ibid.*
[104] John Akokpari 'Dilemmas of Regional Integration and Development in Africa' in John Akokpari *et al The African Union and its Institutions* (2008) *Fanele* p99
[105] UNECA & AU *op cit 101* p14
[106] *Ibid.* p17
[107] Erasmus RECs *op cit 74* p1
[108] UNECA & AU *op cit 101* p45
[109] Gerhard Erasmus & Trudi Hartzenberg 'The Tripartite Free Trade Area – towards a new African paradigm?' (2012) *TRALAC*
[110] Ismail 2016 *op cit 21* p6
[111] *Ibid.*

instigation and the later signing of TFTA in 2011 jolted the AU Heads of State into action. Thus, the negotiations for AfCFTA were launched in June 2015 in Johannesburg.[112]

The aim of AfCFTA negotiations was to establish a continental framework amongst African countries for the liberalisation of trade in goods and services to boost intra-African trade and accelerate development across the continent.[113] Three years later, the Member States convened in Kigali where 44 out of the 55 AU member countries signed the draft AfCFTA.[114] At present, 54 out of the 55 African countries have signed AFCFTA - with Eritrea being the only outstanding country on the continent. Nevertheless, the agreement has been ratified and entered into force on the 30th May 2019. However, the commencement of trade under AfCFTA was delayed by the Covid-19 pandemic and only became operational on the 1st January 2021.[115]

3.5 Conclusion

The progression of integration leading to AfCFTA highlights Africa's integration challenges. Sovereignty and the 'spaghetti bowl effect' has led to tepid commitment and ineffectual rules-based trade arrangements. AfCFTA must build upon the gains of previous integration efforts while sidestepping and addressing historical failings.[116] Laden with lofty ambitions, the AfCFTA project is confronted by enduring challenges that will be exacerbated by foreboding global supranational crises. Given the eclectic nature of Africa's developmental challenges, the underpinning ideology employed is crucial in determining whether AfCFTA will deliver an instrumental remedy to an enduring mischief.

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[112] *Ibid.*

[113] Ernest Toochi Aniche 'African Continental Free Trade Area and African Union Agenda 2063: the roads to Addis Ababa and Kigali' (2020) *Routledge Journal of Contemporary African Studies* p7

[114] *Ibid.* p8

[115] TRALAC 'Status of AfCFTA Ratification' *TRALAC* (2021) at *https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html* Accessed on 6 October 2021

[116] Olabisi Akinkugbe 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2020) p141

CHAPTER 4: A THEORETICAL PRISM

4.1 Introduction

African attempts to eradicate colonialism and galvanise post-independence development have been coalesced around the vision of Pan-African solidarity. Underpinning this Pan-African aspiration, is the quest to remedy structural injustices that have long marginalised developing countries, and thereby establish a new international economic order.[117] In opposition to the unjust global trade order, regional integration is viewed as an opportunity to establish regional economic structures and reshape the international order.[118] Amongst scholars there is broad consensus that regional integration is a possible remedy to offset developmental challenges.[119] However, the ideological foundation employed has been a site of rigorous contestation. Therefore, the various integration models, and law and development theory are analysed in order to determine the most appropriate ideological stance for AfCFTA to adopt in its quest to remedy Africa's enduring mischief. Accordingly, developmental regionalism with an attuned law and development theoretical foundation is posited as Africa's remedy.

4.2 Ideological Lineage

The traditional approach to regional integration was espoused by David Viner in the 1950s, which followed a linear progression to regional integration.[120] This approach to integration and trade liberalisation proposes a step-wise progression from 'preferential trade agreements' to 'free trade areas' to 'customs union' to 'common market' and lastly to a 'monetary union.'[121] Being an adherent of Ricardo's comparative advantage approach, Viner favoured adopting a trade integration strategy that was trade creating rather than trade diverting. He argued that the former would result in greater welfare gains from trade liberalisation.[122] The linear model has

[117] Francis Mangeni & Calestous Juma 'Emergent Africa: Evolution of Regional Economic Integration' (2019) p45
[118] *Ibid.*
[119] *Ibid.*
[120] Faizel Ismail 'The African Continental Free Trade Area (AfCFTA) and Developmental Regionalism: A handbook' (2021) p25
[121] *Ibid.*
[122] *Ibid.*

been subject to criticism for being inappropriate and inadequate for nuances of Africa's developmental challenges and conditions.[123]

Post-independence, fuelled by hard fought sovereignty, African countries adopted a state-led approach to development and regional integration. Underpinned by the critique of dependency on developed countries and the clarion call to disengage from the international economic order, this theory adopted an introverted stance to development.[124] State orchestrated development is founded on the belief that import substitution, driven by State Owned Enterprises, and protectionism would generate growth. This narrative was amplified and applied to regional integration and regional development.[125] However, by the 1980s, the State-led approach to development and regional integration had been discredited, discarded and replaced by neo-liberal 'open regionalism.'[126]

From the 1980s, neo-liberalism was rampantly pushed by Bretton Woods institutions as the development orthodoxy.[127] It was sold as the panacea to the weak development in the Global South. Due to the nature of the policies employed, neo-liberal driven regional integration was termed 'open regionalism.'[128] In terms of the open regionalism model, States are pressed to open up their economies to the global market through free trade, trade liberalisation and liberal economic rules.[129] Thus, open regionalism advocated the linear integration of national and regional economies into the global economy with emphasis on export-led growth.[130] The ideological foundation of open regionalism follows Friedman's free market directed development. Thus, open regionalism requires limited government economic intervention, privatisation, emphasis on private property rights, the abandonment of the welfare state, and monetary and fiscal discipline.[131] This so-called Washington Consensus was peddled by international donors and foundational to the IMF's and World Bank's Structural Adjustment Policies.[132]

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[123] *Ibid.*
[124] Akokpari 2008 *op cit* 104 p92
[125] Olabisi Akinkugbe 'Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)' (2020) p311
[126] Akokpari 2008 *op cit 104* p93
[127] Akinkugbe Theory *op cit* 125 p312
[128] Faizel Ismail 'The Changing Global Trade Architecture: Implications for Africa's Regional Integration and Development' (2017) *Journal of World Trade* Volume 51 Issue 1 p3
[129] Akinkugbe Theory *op cit 125* p314
[130] *Ibid.* p315
[131] Margaret Lee 'Regionalism In Africa : A Part Of Problem Or A Part Of Solution' (2002) p5
[132] *Ibid.*

After two decades of SAPs, there is broad consensus that SAPs were a failure and instead led to further marginalisation of African economies.[133] Accordingly, intra-African trade did not increase significantly and African markets were flooded by more efficiently and/or cheaper produced goods from developed countries.[134] In an unprecedented self-reflective critique, the World Bank admitted that its policies and programmes in Africa during the 1980s and 1990s had gone too far and were too narrow in focus, and consequently resulted in the closing of nascent industries, and the de-industrialisation and further marginalisation of a number of African countries.[135] The report concluded that the pace of import liberalisation increased competitive pressures in countries that were unable to spur dynamic and sustained manufacturing growth. Therefore, many African countries experienced the debasement of their export capacity.[136] Policies and programmes imposed by international institutions in the 1980s undermined the objective of the Abuja Treaty to create the AEC.[137] Regional integration has been subverted because African countries are heavily reliant on development funding from international institutions and foreign countries who have their own interests and priorities.[138] These funded policies focused on dismantling state-led development, promoting privatisation and maintaining commodity export reliance – while largely disregarding the crucial need to build social capital through education, training, public health and innovation promotion.[139] Therefore, African countries have been shackled by open-regionalism, and constrained in determining their own policy and ideological direction.

In a paternalistic attempt to control Africa's regional integration narrative, some theorists have advocated the External Guarantor Model (EGM). In terms of EGM, it is proposed that international organisations such as the IMF and World Bank play a supervisory role in Africa's regional development in order to prevent the reversal of politically unpopular micro-economic programmes.[140] Indicative of EGM's neo-colonial agenda, France's grip on West Africa is cited as an example of EGM, whereby the currency of West African countries is pegged to the Euro (previously Franc) and monetary reserves are held by the French reserve bank with Paris

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[133] *Ibid.*
[134] *Ibid.*
[135] Ismail LDR *op cit 75* p142
[136] *Ibid.* p142
[137] Mangeni *op cit 117* p51
[138] *Ibid.*
[139] *Ibid.*
[140] Akokpari 2008 *op cit 104* p91

serving as a guarantor and supervisor.[141] While it may embed good governance practices, EGM invariably entails intrusive and pauperising conditionalities that compound rather than alleviate Africa's developmental challenges.[142] Moreover, the transplant of good governance practices are inexorably wedded to Western conditionalities and detached from the nuances of Africa's development obstacles. Like open regionalism, EGM restricts Africa's policy options as pressure is exerted to follow policies that satisfy the guarantor's preferences rather than the region's developmental needs.[143] Therefore, like open regionalism, EGM is a wholly inappropriate ideological stance for Africa's regional integration.

4.3 Developmental Regionalism: The Ideological Cure

In opposition to above, theorists have advocated for a multidimensional approach by employing development integration theory and its evolved descendant, developmental regionalism. Both concepts incorporate the need to adopt an approach to regional integration founded on heterodox economic theory, and on an idealism of solidarity as a crucial tenet of regional integration on the continent.[144] Rob Davies, the former South African minister of trade and industry, first proposed the 'development integration' approach as a remedy to Africa's development ills.[145] Development integration emphasises the need for both macro- and micro-coordination in a multi-sectoral approach endorsing production, infrastructure and trade.[146] Cognisant of the LDCs, Davies argues that in order to achieve an equitable balance to regional integration there must be emphasis on regional industrial development. This approach has been endorsed by UNCTAD as a viable option for regional integration.[147] This laid the foundation for developmental regionalism.

Drawing on the analytical framework of Davies and UNCTAD, Ismail, a driving proponent of developmental regionalism, has identified four key interconnected pillars of developmental regionalism.[148] Such tenets being, (i) fair trade integration; (ii) transformative industrialisation; (iii) cross-border infrastructure and trade facilitation; and (iv) cooperation on developing

[141] *Ibid.* p92
[142] *Ibid.*
[143] *Ibid.*
[144] Ismail 2021 *op cit 120* p25
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.* p26
[148] *Ibid.*

democracy, good governance, and peace and security.[149] Developmental regionalism theory emphasises cooperation among countries in a broader range of areas beyond just trade and trade facilitation. Thus, countries are encouraged to cooperate in areas of regional infrastructure, regional industrial development, research, investment and information sharing.[150] This theory accounts for the eclectic nature of Africa's developmental challenges.

Cognisant of the LDCs and SVEs on the continent, fair trade integration argues that African trade agreements must adopt mechanisms to ensure balanced and mutually beneficial regional integration.[151] It is evident that ensuring fairer outcomes of regional integration will generate robust stakeholdership - which is required if Africa is to achieve its stated aspirations. Such mechanisms typically include adopting asymmetrical trade in favour of smaller economies and directing investment in a manner that drives and supports the establishment of domestic capacity.[152] With regards to the former, smaller economies have traditionally been afforded longer timeframes for liberalisation, flexibility in the rules of trade and prioritising the need for capacity building.[153] The latter, while encouraging regional investment by private firms, also requires the constraint of major private sector corporations in order to avoid the benefits of regional integration being skewed in favour of the continent's hegemonic economies.[154]

The colonial project designed African economies to serve the colonial metropolitan market. Consequently, while growth is essential to poverty alleviation, scholars have argued that transforming the structure of the economy, rather than growth per se, is essential to increasing incomes and raising the standard of living in developing countries.[155] Thus, re-engineering Africa's economies in its own vision through transformative industrialisation and structural transformation of the economy is imperative to charter Africa's new development course. The globalisation of production has resulted in the proliferation of GVCs, and as a result in 2011, 50% of global trade took place within GVCs.[156] Thus, a large proportion of economic development is driven by participation in GVCs. African economies have increasingly tapped into GVCs but remain primary suppliers of raw materials and other low-value addition

[149] *Ibid.*
[150] Ismail 2018 *op cit 92* p10
[151] Ismail 2021 *op cit 120* p27
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.* p28
[155] *Ibid.* p29
[156] *Ibid.*

manufactured goods.[157] Thus, efforts must be directed to develop industrial capacity in order to gain a foothold in GVCs for the exportation of value-added manufactured goods. Given the small domestic markets of African economies, the creation of Regional Value Chains through regional industrilisation is advanced as a remedy to integrate consolidated African economies into GVCs.[158] Therefore, developmental regionalism aims to restructure the economy by building robust regional manufacturing capacity to compete in global markets through the establishment of competitive Regional Value Chains.

There are 54 countries on the African continent, including 16 landlocked and 34 LDC states. Landlocked countries face significant development challenges as they are isolated from global markets and experience high transit costs which hamper their socioeconomic development.[159] It is estimated that landlocked developing countries spend almost two times more of their export income on transport and insurance services than coastal developing countries, and three times more than developed countries.[160] The development of regional infrastructure is necessary to reduce trade costs and amplify trade benefits. Furthermore, re-orientating the coloniality of roads and trade routes is a key aspect of developmental regionalism. Infrastructure established in the colonial era was designed to support the strategies of the colonisers.[161] Thus, existing infrastructure directs trade out of Africa with the 'former' colonial powers rather than fostering intra-African trade.[162] Moreover, the colonial partition of African countries exacerbated the poor connectivity on the continent.[163] Thus, Lopes and Mayaki conclude that industrilisation is central to Africa's structural transformation with infrastructure development as its catalyst.[164] Consequently, a key feature of developmental regionalism is cooperation on cross-border infrastructure directed at driving intra-African trade as well as linking isolated markets to the global economy.

It is evident that democracy, good governance, and peace and security are necessary conditions to foster sustainable and robust economic development.[165] Thus, states have emphasised the importance of respecting human rights, non-indifference to violation thereof, respect for the

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[157] *Ibid.*
[158] *Ibid.*
[159] Ismail 2018 *op cit 92* p10
[160] *Ibid.* p10
[161] Akinkugbe Theory *op cit 125* p304
[162] Mangeni *op cit 117* p48
[163] Akinkugbe Theory *op cit 125* p304
[164] Ismail 2021 *op cit 120* p31
[165] *Ibid.* p32

rule of law and the entrenchment of incorrupt and responsive democratic institutions.[166] Africa has been ravaged and destabilised by conflict. Cognisant of this, developmental regionalism requires states to promote and imbue principles of good governance, democracy, and peace and security.

In developing an ideological and analytical framework for AfCFTA, Akinkugbe provides valuable insight and critique. He has argued that analysing African regional integration through the prism of a linear comparison to its European counterpart has incorrectly entrenched the narrative of failure.[167] African regional integration efforts are multi-dimensional and encompass both economic and non-economic objectives. Thus, to analyse African regional integration on the basis of traditional Eurocentric assumptions fails to consider the multidimensional, nuanced and eclectic nature of African developmental challenges.[168] The dominant Eurocentric models of regional integration do not account for unequal regional development, the legacies of colonialism, the menaces of neo-colonialism and the informal aspects of African economies.[169] Thus, Akinkugbe argues that Africa must pivot away from the Eurocentric institutionalist market-led approach to regional integration and instead adopt the developmental regionalism model.[170] However, he highlights some weaknesses of the developmental regionalism model and builds on the theory with additional insight. Akinkugbe argues that while Ismail's developmental regionalism adopts a multi-dimensional approach, it is still economy centric.[171] Thus, it neglects to adequately address issues at the forefront of societal concerns, such as climate change, environmental protection and gender equality.[172] Therefore, these too, should be key pillars of regional cooperation. Furthermore, as the AfCFTA project is driven by a legal framework, developmental regionalism must be understood in the dynamic of law and development.

[166] *Ibid.*
[167] Akinkugbe Theory *op cit 125* p293
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.* p306
[171] *Ibid.*
[172] *Ibid.*

4.4 Law and Development Theory

The notion of law and development theory is that law is instrumental and purposeful in driving development.[173] In Africa's context, a law and development framework is more likely to produce positive outcomes if it is attuned to the socio-economic realities on the ground, and caters to local development needs rather than serving the ivory towers of the developed world.[174] Africa must not be constrained by the idealistic straitjacket of the one-size-fits-all approach espoused by Western scholars. Central to the role of law in driving development is its inherent purpose to shape behaviour. There is a duality in law that must be acknowledged in the integration process. Law is both instrumental as promulgated by institutions and as dictated through social practice.[175] There is a distinction, but in understanding law's role in development, it is crucial to consider this interplay. This is especially relevant in Africa. The orthodox approach to law and development theory neglects to focus on this inter-relationship.[176] Accordingly, the weight of academic research undertaken by Western scholars has advocated a positivist approach to law's role in development. Thus, the importance of the nature, structure, and relevance of social practice on developmental outcomes has been largely overlooked.[177]

Legal positivism and formalism were inherited from the colonial regimes and are deeply imbedded in the post-colonial legal tradition.[178] In promoting African development, the transplantation of formalist rules from the West was viewed as the solution to enhance the pursuit of economic and socio-political development of developing nations.[179] Advocates of the Westernisation of the legal infrastructure in the Global South anticipated the creation of neutral, more accessible and responsive government institutions.[180] Accordingly, the proponents of open regionalism pushed legal formalism as the driving legal theory. Thus, rules were developed, interpreted and applied without consideration for the unique policy objectives and contexts of developing countries.[181] While these proponents advocate legal formalism under the guise of some charitable notion, it is difficult to divorce these intentions from

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[173] Yong-Shik *op cit* 18 p398
[174] *Ibid.*
[175] Akinkugbe Theory *op cit 125* p307
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.* p312
[179] *Ibid.* p311
[180] *Ibid.*
[181] *Ibid.*

nefarious projects such as OHADA in West Africa, which used the transplantation of Western legal norms to create a conducive market for French business.

The transplantation of Western law has hindered Africa's development and regional integration process as these laws are detached from the reality and context of the diverse economic, political and cultural settings of African nations and their regional integration practices.[182] It neglects to consider the fact that the regional integration process is constructed upon and coalesced around the principles of Pan-Africanism.[183] Therefore, rather than the principle of formalism inherent in Western law, the norm of Pan-Africanism plays an instrumental role in regulating and constraining interstate relationships among African countries.[184] Consequently, the formalism and legal positivism inculcated in traditional trade agreements has resulted in weak enforcement and low legitimacy among African member states because the legal principle is disconnected from the shared experiences of African states.[185] An orthodox approach to law and development in the context of AfCFTA, will result in the failure to remedy Africa's developmental challenges. For example, it excludes the vital role and value of the informal economy on the continent. Therefore, in approaching AfCFTA, the law and development theory employed must heed the interplay of formal and anti-formal practices of law. Pluralising the roles of law will result in broader application and increased legitimacy to the regional integration process.[186] In this regard, legal reform incorporating both formalist and anti-formalist aspects is viewed as a critical aspect of remedying Africa's developmental challenges.

AfCFTA must adopt an approach to law and development theory that encourages the simultaneous and strategic use of both formalist and anti-formalist legal mechanisms.[187] Cognisant of the limitations of law, scholars have advocated the importance of the latter through the use of both soft legal and non-legal norms.[188] This approach allows for the necessary recognition of the role that Pan-Africanism plays in determining interstate relationships. Moreover, this approach pays heed to the role that non-state actors and civil society can play in norm creation, monitoring and compliance oversight.[189] In regard to the

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[182] *Ibid.* p312
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.* p309
[186] *Ibid.* p310
[187] *Ibid.* p312
[188] *Ibid.* p316
[189] *Ibid.*

former, it is important to establish a robust dispute settlement mechanism with responsive and impartial institutions. Interestingly, the last decade has seen a markable increase of active participation in the formal legal system by African countries through strategic litigation in sub-regional courts.[190]

4.5 Conclusion

The preceding discussion provides a prism through which the provisions of AfCFTA can be analysed in order to ascertain its chosen ideological stance. Developmental regionalism partnered with an underpinning law and development theory that is attuned to the socio-economic realities of African countries is advocated as the appropriate ideological position to remedy Africa's enduring mischief.

[190] *Ibid.* p318

CHAPTER 5: THE AFCFTA FRAMEWORK TREATY

5.1 Introduction

AfCFTA is a rejuvenated attempt to provide a panacea to Africa's weak trade position and economic development. The treaty establishes a continent-wide legal regime governing trade in goods, services and other associated trade-related matters.[191] The objective is to provide a framework within which State Parties harmonise existing trade relations and establish new preferential trade arrangements amongst African countries - of whom many still trade under WTO MFN tariffs.[192] This aspiration is to be achieved through successive rounds of negotiations to progressively liberalise trade in goods and services, as well as develop policy on other trade-related matters.[193] The treaty addresses the objectives and core principles of AfCFTA, institutional structures to oversee implementation, continental preferences, transparency and the procedural operation of the AfCFTA framework.[194] The aims of AfCFTA are aspirational and extensive.[195] The purpose of AfCFTA is to remedy Africa's enduring mischief and thus the provisions of the treaty are considered to discern whether the treaty has adopted the posited cure of developmental regionalism.

5.2 Objectives and Principles

AfCFTA is established by Article 2, yet interestingly, it fails to expressly address the legal status of AfCFTA – i.e. whether it is an international organisation, and thus accorded with the privileges and immunities under international law necessary to serve its function, or if the State Parties must themselves ensure conformity to AfCFTA obligations.[196] It would appear from its institutional reliance on AU structures that the AU, in conjunction with the State Parties, is charged with ensuring compliance with the obligations under AfCFTA.

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[191] Gerhard Erasmus 'The African Continental Free Trade Area According to its Legal Instruments' (2020) *TRALAC* p5

[192] *Ibid.* p5

[193] International Trade Centre (ITC) 'A business guide to the African Continental Free Trade Area Agreement.' (2018) *ITC*. P14

[194] Gerhard Erasmus 'How, according to the Founders, will the AfCFTA Agreement be implemented and the Continental Free Trade Area come about?' (2019) *TRALAC* at *https://www.tralac.org/blog/article/14344-how-according-to-the-founders-will-the-afcfta-agreement-be-implemented-and-the-continental-free-trade-area-come-about.html accessed* on 10 September 2021

[195] African Union 'The Agreement Establishing the African Continental Free Trade Area (AfCFTA)' (2018) Article 3

[196] Erasmus Legal *op cit 191* p3

The scope of AfCFTA is extensive and multi-dimensional to address the eclectic nature of the continent's developmental challenges. Article 6 provides that AfCFTA will regulate and govern matters within the scope of trade in goods, services, investment, intellectual property (IP) rights and competition policy. Phase I negotiations led to the adoption and subsequent operation of the Protocol on Trade in Goods, Protocol on Trade in Services and the Protocol on Dispute Settlement.[197] State Parties have affirmed their commitment to negotiate protocols on: investment; intellectual property rights; competition policy; and additionally e-commerce.[198] In accordance with the State Parties' commitment to the single undertaking principle, all protocols and additional instruments within AfCFTA's scope shall form an integral part of the treaty.[199] As AfCFTA is member-driven, the scope of AfCFTA can be widened to cater for new or pressing issues - perhaps climate change adaptation and mitigation policy may be brought to the fold.

To ensure that State Parties do not waywardly implement the aspirations of AfCFTA, State Parties have recorded general and specific objectives as well as core principles to guide, account and hold in check the AfCFTA project.[200] A major objective of the Treaty is to increase the competitiveness of African countries both globally and regionally. Therefore, the State Parties have identified industrial development as a key tenet of AfCFTA, which is to be achieved through economic diversification, the establishment of regional value chains, agricultural development and food security.[201] Recognising economic and social development challenges, State Parties aim to advance and accomplish sustainable and inclusive economic growth, gender equality and economic structural transformation.[202] Furthermore, illustrating future aspirations of integration and solidarity, it is an aim of the Treaty to provide the foundation for a continental-wide Customs Union.[203]

In light of these objectives and for the purposes of fulfilment thereof, Article 4 states specific actions that State Parties shall implement. Namely that State Parties shall: progressively remove tariff and non-tariff barriers to the trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights, competition policy and all trade

[197] World Bank 'The African Continental Free Trade Area: Economic and Distributional Effects' (2020) *The World Bank* p15
[198] TRALAC 'The African Continental Free Trade Area: A Tralac Guide' (2020) *TRALAC* p4
[199] AfCFTA *op cit* 195 Article 8
[200] *Ibid.* Article 3 & 4
[201] *Ibid.* Article 3
[202] *Ibid.*
[203] *Ibid.*

related areas; cooperate on customs matters and adopt trade facilitation measures; create a dispute settlement mechanism; and form and maintain an institutional framework for the administration and application of AfCFTA.[204] These actions shall be guided by the core principles.

Core and Guiding Principles

Article 5 of the Treaty sets out core principles that shall guide the implementation of AfCFTA and all future negotiations and deliberations by the State Parties.[205] AfCFTA shall by governed by the following core principles:

i. Member Driven

In the WTO context, 'member driven' refers to a rule-based trade arrangement that relies on its members to enforce such rules under negotiated and agreed procedures.[206] The AfCFTA treaty is a quintessential member-driven trade arrangement as the rights and obligations are placed on the State Parties, while private firms conduct trade as importers, exporters, service providers and investors.[207] Thus, State Parties, rather than a supranational institution, shall chart the course of AfCFTA. Future AfCFTA developments, additional rules and obligations, and new practices shall be the result of deliberations and negotiations amongst the members.[208] Interestingly, the provision specifically states, 'Member States of the AU,' rather than State Parties, which does raise some questions. For example, what role does a Member of the AU who is not a State Party play in driving AfCFTA - such as Eritrea, or a State Party who subsequently withdraws from the agreement. This may lead to future tension between State Parties and AU Member States. Fortunately, 54 out of 55 Members of the AU have signed the AfCFTA agreement with 38 having ratified it at the time of writing. It is crucial that there is widespread ratification in order to effectively create one integrated continental market.[209]

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[204] *Ibid.* Article 4
[205] Erasmus Legal *op cit 191* p8
[206] Gerhard Erasmus 'Implementing the AfCFTA: Obligations, Qualifications and Exceptions' (2018) *TRALAC* p13
[207] Erasmus Founders *op cit 194*
[208] Erasmus Legal *op cit 191* p8
[209] Erasmus Founders *op cit 194*

ii. RECs building blocks, Acquis & Best Practices

The RECs have since their inception been promoted as the fundamental building blocks to the African integration project. The Lagos Plan of Act and the Abuja Treaty acknowledged that the strengthening of the RECs and integration at the REC-level were fundamental to achieving an AEC.[210] This principle has been consistently reiterated in AU instruments as well as in various founding treaties of the RECs.[211] AfCFTA recognises that there is an existing foundation on which to build. The principle of 'acquis' emerged during the TFTA negotiations and has subsequently been incorporated in AfCFTA. Acquis is a French word meaning "that which has been agreed."[212] Thus, AfCFTA must consolidate, build on and expand existing tariff liberalisation and trade facilitation measures adopted amongst the REC members.[213] The RECs have provided testing grounds for policy and thus at a AfCFTA level, the State Parties must nit-pick the best practices and emulate such on a continental-scale. For example, ECOWAS has effectively encouraged and managed regional cooperation in the free movement of persons, integration funding mechanisms, peace and security apparatuses and moreover, several member states are in a monetary union (being UEMOA) and have a regional stock exchange.[214] Additionally, the EAC has an operational common market and is on track to form a monetary union and political federation, and COMESA has established innovative mechanisms in customs harmonisation as well as institutions such as a development bank and a reinsurance company to facilitate trade..[215] Under the banner of AfCFTA, REC best practices should be implemented across all RECs to harmonise and accelerate integration.[216]

iii. Variable Geometry, Flexible and special and differential treatment

Africa has a wide variety of countries that face unique developmental challenges. Thus, AfCFTA recognises the need for countries to receive special attention and specific treatment.[217] Accordingly, flexible, special and differential treatment and variable geometry are guiding principles of AfCFTA.

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[210] Business Guide *op cit 193* p6
[211] *Ibid.*
[212] Erasmus Legal *op cit 191* p16
[213] *Ibid.*
[214] African Union Commission (AUC) '2019 African Regional Integration Report: Towards an integrated and prosperous and peaceful Africa' (2019) *AUC* p16
[215] *Ibid.*
[216] *Ibid.*
[217] Ismail 2018 *op cit 92* p8

In the WTO context, flexibility, special and differential treatment provides developing countries with special and more favourable rights, such as longer time periods for compliance and implementation, measures to increase trade opportunities and technical capacity support.[218] This has been a fairly common principle in trade arrangements. However, AfCFTA goes a step further and introduces the principle of variable geometry. Variable geometry is an approach to regional integration that affords member states the ability to integrate at different speeds according to capacity as well as political, social and economic viability.[219] With the vastly varied stages of development and capacity, the principle of variable geometry is a requirement for African integration. However, it could further complicate already stalled integration efforts. In operation, variable geometry must be guarded and its specific applicability periodically under review.

iv. Consensus

Decision-making by consensus means that decisions are adopted without a formal vote. A decision will be deemed to be taken should no State Party formally object.[220] The deliberation process, prior to the decision being made, accommodates debate of divergent viewpoints.[221] Decisions taken by consensus allows for State Parties to protect their interests. This has its benefits as decisions are acceptable by all members and there is buy-in to follow through on the decision taken.[222] However, in practice, it is arduous to reach consensus amongst such a large membership, and thus this consensus mechanism could lead to watered-down decisions or the lowest common denominator prevailing.[223]

v. MFN, National Treatment & Reciprocity

Non-discrimination has been a central tenet of multi-lateral trade liberalisation arrangements. The MFN principle is a guiding principle of AfCFTA.[224] The principle must be understood

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[218] WTO 'Special and Differential Treatment Provisions' (2021) *WTO Trade and Development Committee* accessed on 28 October 2021 at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm
[219] Sewagegnehu Taye *Variable Geometry of African Integration and its Implication on AfCFTA* (unpublished LLM thesis, University of Pretoria, 2019) p74
[220] Erasmus Legal *op cit 191* p10
[221] *Ibid.*
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.* p18

carefully and operate rationally within the context of existing trade arrangements. Thus, MFN should not be interpreted to result in intra-REC preferences being immediately extended to non-REC State Parties as these parties have expended time and resources in negotiating such preferences and arrangements.[225] Importantly, unlike comparable trade agreements, AfCFTA qualifies the operation of MFN as preferences are accorded on the basis of reciprocity.[226] Thus, a country cannot benefit under the MFN principle unless it reciprocates and grants substantively similar preferences to that country.[227] This simultaneously protects existing trade agreements from freeloaders, and shall proliferate liberalisation.

In addition to its qualification of the MFN principle, reciprocity is a stand-alone guiding principle. It is a key instrument of market opening as it provides an incentive for State Parties to overcome adjustment concerns that would otherwise hinder unilateral preferences.[228] Reciprocity, in conjunction with MFN, will amplify and accelerate liberalisation as it will eliminate the need to conduct bilateral negotiations with each party to the trade agreement.[229] In the context of GATT, reciprocity is interpreted in a substance over form approach. Thus, reciprocity does not mean that the parties eliminate the same market access barriers to achieve identical market access.[230] Instead, the focus is on the balance of trade volumes. Accordingly, the preferences granted are to result in equivalent changes in bilateral trade flows.[231] Thus, members are not required to totally eliminate their trade barriers or have the same levels protection but are instead expected to make similar concessions.[232] Furthermore, the National Treatment principle is implemented in its traditional form. Thus, once a like imported product has been cleared by customs, it cannot be treated less favourably than a like domestic product.[233]

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[225] UNCTAD, 'Designing Trade Liberalisation in Africa: Modalities for Tariff Negotiations Towards an African Continental Free Trade Area' (2020) *UNCTAD* p21
[226] Erasmus Legal *op cit 191* p18
[227] *Ibid.* p19
[228] *Ibid.*
[229] UNCTAD Modalities *op cit 225* p21
[230] Juan Marchetti, Martin Roy & Laura Zoratto 'Is there Reciprocity in Preferential Trade Agreements on Services?' (2012) *World Trade Organisation: Economic Research and Statistics Division* p3
[231] *Ibid.*
[232] *Ibid.*
[233] Erasmus Legal *op cit 191* p20

vi. Substantial Liberalisation

AfCFTA will require State Parties to progressively eliminate tariffs across 97% of tariff lines, which must account for 90% of intra-African imports.[234] This accords with the accepted interpretation of 'substantially all trade' under GATT.[235] While under GATT this has generally been understood to occur within 10 years, due to varied levels of development on the continent, a more staggered and phased approach according to capacity will be adopted under AfCFTA.[236]

vii. Transparency & Disclosure of Information

The principle of transparency and disclosure will give State Parties and the public an indication of progress under AfCFTA. If delivered upon, it could prove highly valuable considering the historically opaque manner in which trade has been conducted on the continent.[237]

5.3 Institutional Oversight and Administration

The Treaty outlines the institutional framework responsible for the implementation, facilitation, administration, and monitoring of AfCFTA - which includes the AU Assembly, the Council of Ministers, the Committee of Senior Trade Officials, the Secretariat and various technical committees.[238] The highest decision-making body of the AfCFTA arrangement is the AU Assembly, which shall provide oversight and strategic guidance.[239] The Assembly is comprised of all AU Heads of States and Government. It has the exclusive authority to adopt interpretations of the Treaty on the recommendation of the Council of Ministers, such interpretations being adopted by consensus.[240] This reflects WTO practice.

Article 11 establishes the Council of Ministers, which comprises of Ministers for Trade or other nominees designated by State Parties.[241] The Council reports to the AU Assembly and is responsible for the effective implementation and enforcement of AfCFTA. This includes,

[234] *Ibid.*
[235] World Bank *op cit 197* p15
[236] UNCTAD Modalities *op cit 225* p27
[237] Business Guide *op cit 193* p10
[238] AfCFTA *op cit 195* Article 9
[239] Erasmus Legal *op cit 191* p14
[240] AfCFTA *op cit 195* Article 10
[241] TRALAC 'The African Continental Free Trade Area (AfCFTA) Frequently Asked Questions' (2021) *TRALAC* p4

amongst others, taking measures to: promote objectives; harmonise policies; establish committees and supervision thereof; make regulations and issue directives; consider budgets of AfCFTA and its institutions; and make Treaty interpretation recommendations.[242] Council decisions are binding on the State Parties who must adopt the necessary measures to implement these decisions.[243] Decisions that have financial, legal or structural consequences will only be binding once the Assembly has adopted it.[244] Considering the nature and scope of AfCFTA, this bureaucratic sign off may hinder the Council's ability to direct and promote AfCFTA.

The Committee of Senior Trade Officials consists of Permanent Secretaries or other officials designated by State Parties.[245] This appears to be the engine room of AfCFTA as it implements decisions of the Council; is responsible for the development of implementation programmes and action plans; monitors and reviews AfCFTA development; directs the Secretariat with particular assignments; and may request the appointment of a Technical Committee to investigate a matter.[246] Accordingly, the Assembly shall establish the Secretariat as a permanent and functionally autonomous AfCFTA institution.[247] The Secretariat is charged with administrative and support functions to coordinate the implementation of AfCFTA. However, it doesn't have inherent powers and instead the Council, directed by Committee of Senior Trade Officials, assigns tasks to the Secretariat.[248] In terms of the Protocols, specific technical committees shall be established to assist with implementation. The role of RECs in this institutional framework is uncertain.[249] It is not clear as to how RECs, most of whom have separate legal personality, will be involved in the long-term consolidation of AfCFTA and the establishment of a unified continental trade regime.[250]

The decisions taken by AfCFTA institutions on substantive issues shall be taken by consensus.[251] As the highest decision-making body of AfCFTA, if consensus cannot be reached at the Committee or Council-level, the Assembly shall decide the matter.[252] Questions of

[242] AfCFTA *op cit 195* Article 11(3)
[243] *Ibid.* Article 11(5)
[244] *Ibid.* Article 11(5)
[245] *Ibid.* Article 12(1)
[246] *Ibid.* Article 12
[247] *Ibid.* Article 13
[248] Erasmus Legal *op cit 191* p4
[249] *Ibid.*
[250] *Ibid.* p5
[251] AfCFTA *op cit 195* Article 14(1)
[252] *Ibid.* Article 14(2)

procedure as well as a dispute as to the nature of the issue, i.e. whether it is substantive or procedural, shall be decided by a simple majority.[253]

Notably, it is the Council of Ministers that is authorised to decide whether to grant a State Party a waiver of an obligation imposed under the Treaty.[254] A waiver can only be granted in exceptional circumstances and if *at least* three-fourths of the State Parties vote in favour of such decision (failing consensus).[255] Where the requesting party has failed to perform in terms of an obligation that is subject to a transition period or staggered implementation, such waiver can only be granted by consensus. [256] The exceptional circumstances justifying the waiver must be outlined and the waiver must be reviewed annually as to whether the exceptional circumstances are still present. Thereafter, the Council may extend, modify or terminate the waiver.[257] State Parties must be discerning as to when and which obligations they permit to waive. This provision is modelled off GATT and thus guidance can be taken from WTO practice.

5.4 Transparency

Considering the opaque manner in which trade has been conducted on the continent, these provisions if delivered upon, will prove highly valuable to intra- and extra-African trading partners and business interests on the continent.[258] State Parties are obliged to publish and make accessible its laws, regulations, procedures and administrative rulings of general application and moreover, its commitments made under other international agreements relating to trade within the scope of the Treaty.[259] Should a State Party adopt or propose a measure that may materially affect the operation of the Treaty or another State Party's interests, it must notify State Parties through the Secretariat and thereafter, at request, provide relevant information and submit to questions regarding the actual or proposed measure.[260] Furthermore, State Parties are not required to disclose confidential information if such information would hinder law enforcement or be contrary to public interest or prejudice legitimate commercial interests of

[253] *Ibid.* Article 14(4)
[254] *Ibid.* Article 15(1)
[255] *Ibid.* Article 15(1)
[256] *Ibid.* Article 15(1)
[257] *Ibid.* Article 15(3)
[258] Business Guide *op cit 193* p10
[259] AfCFTA *op cit 195* Article 16
[260] *Ibid.* Article 17(2)&(3)

specific enterprises, public or private.[261] This proviso may appear innocuous, however, in the context of African countries negotiating EPAs with the EU, it may prove a stumbling block to integration. EPAs and other similar agreements often contain confidentiality clauses with harsh consequences for breach and thus countries may use this caveat to justify confidentiality. This may hinder the harmonisation of trade law and policy on the continent.

These are important provisions to enhance trade transparency, but the availability, collection and dissemination of this data has been a perennial governance challenge. Thus, the ATO has been established as an open portal for trade and trade-related data, nevertheless, its success is dependent on State Parties regularly providing accurate and updated data.[262] In conjunction with the dissemination of data, it would be prudent to establish a peer review mechanism under AfCFTA to scrutinise compliance, enhance transparency, provide surveillance and engagement with various stakeholders.[263]

5.5 Continental Preferences

Non-discrimination is a central tenet of trade liberalisation arrangements and thus MFN is a key provision under AfCFTA. However, its implementation under AfCFTA has been qualified as preferences are accorded on the basis of reciprocity.[264] Article 18 obliges State Parties, following the implementation of AfCFTA, to grant each other, on a reciprocal basis, preferences that are no less favourable than those given to *Third Parties* .[265] Thus, future preferences accorded to Third Parties will be extended to State Parties provided such grantee State Party reciprocates. Additionally, State Parties will be afforded an opportunity to negotiate preferences granted by other State Parties to Third Parties before the Treaty had entered into force. Crucially, Article 18(3) states that the Treaty shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with Third Parties.[266]

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[261] *Ibid.* Article 16(2)
[262] Erasmus Legal *op cit 191* p21
[263] Nick Charalambides 'Ensuring the AfCFTA is implemented and applied.' (2020) *European Centre For Development Policy Management (ECDPM)* accessed on 20 October 2021 at https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/ensuring-afcfta-implemented-applied/
[264] Erasmus Legal *op cit 191* p18
[265] AfCFTA *op cit 195* Article 18(1)
[266] *Ibid.* Article 18(2)&(3)

The implications of this provision must be analysed carefully. It appears that there is no obligation to accord MFN treatment to preferences given prior to AfCFTA by one African country to another African country who are both now State Parties as Article 18 applies to preferences granted to Third Parties.[267] At first this may seem peculiar, but in the context of the main liberalisation requirements under AfCFTA coupled with the fact that preferences extended to Third Parties will be subject to the qualified MFN principle, it is unlikely to hinder integration. Article 18 will help accelerate trade integration on the continent as it will ensure that African integration keeps pace with trade preferences extended to Third Parties and the requirement of reciprocity will incentivise African countries to open up markets.

The Treaty is operating in conjunction with multiple RECs and thus in the event of a conflict or inconsistency between the Treaty and another regional agreement, the Treaty shall prevail to the degree of such conflict or inconsistency.[268] However, should the REC members have accomplished a higher-level of integration than required under the Treaty, State Parties shall maintain such higher-level amongst themselves.[269] Thus, in approaching tariff liberalisation, it would be logical to first negotiate with State Parties outside of an existing preferential arrangement.[270]

5.6 Procedural Provisions

Unlike many other international agreements, AfCFTA does not permit a State Party to make any reservations when signing, ratifying or acceding to the Treaty.[271] Thus, a State Party cannot exclude or modify its obligations. State Parties are further constrained as once the Treaty entered into force, they cannot withdraw for a period of five years from the date of entry into force.[272] However, once the five year period has lapsed, a State Party can notify the depositary of its intention to withdraw from AfCFTA. However, such withdrawal will only become effective two years later.[273] Considering the difficulties exhibited by Brexit, two years may prove to be too short to facilitate a manageable transition, but hopefully parties can establish a

[267] Peter Lunenborg‘ Phase 1B of the African Continental Free Trade Area (AfCFTA) negotiations’ (2019) *Trade for Development*: *South Centre* p8
[268] AfCFTA *op cit 195* Article 19(1)
[269] *Ibid.* Article 19(2)
[270] Lunenborg *op cit 267* p7
[271] AfCFTA *op cit 195* Article 25
[272] *Ibid.* Article 27(1)
[273] *Ibid.* Article 27(2)

sensible agreement for withdrawal. In an effort to ensure effectiveness and further deliberation, the Treaty shall be reviewed every five years from the date of entry into force. Moreover, State Parties can make recommendations for amendments, which are adopted by the Assembly after a comment and deliberation procedure has been concluded.[274]

The core principles aforementioned are key to the interpretation and application of the provisions of the Treaty and the Protocols. Thus, AfCFTA shall not be interpreted in a manner that derogates from the principles and values contained in the various instruments key to the establishment and sustainability of AfCFTA, unless specified for in the Protocols.[275] Similar to South Africa's constitutional dispensation, these core principles provide a conceptual framework within which State Parties must operate. The abstract nature of principles provides flexibility in the operation of AfCFTA. In my view, this is fundamentally important to the success of a legal regime as flexibility provides dynamism to deal with changing circumstances. Considering the complexity and ever-shifting nature of Africa's developmental challenges, a fixed and static legal arrangement would hinder rather than aid AfCFTA's aspirations.

5.7 Conclusion

The conclusion of AfCFTA is an important step in the right direction, but it does not ensure new trade flows. AfCFTA provides a framework of international legal instruments. However, legal instruments have too often been lauded for their principles yet fail to deliver on their objectives. AfCFTA has steered towards developmental regionalism as it has adopted a multi-dimensional and flexible framework cognisant of the diverse developmental challenges on the continent. However, issues such as climate change and REC rationalisation are left unaddressed. Moreover, the sheer scale of its aspirations raises doubts as to its ability to address countries' specific developmental challenges. Nevertheless, the framework is by nature flexible and encourages State Parties to further collaborate, cooperate and deliberate to address outstanding issues. Thus, the conclusion of AfCFTA must be applauded as a worthwhile step in remedying Africa's enduring mischief. Accordingly, a key feature to AfCFTA's success is the liberalisation of trade in goods.

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[274] *Ibid.* Article 28 & 29
[275] *Ibid.* Article 21

CHAPTER 6: PROTOCOL ON TRADE IN GOODS

6.1 Introduction

In spite of Africa removing trade barriers to the rest of the world, Africa's global trade performance remains poor and peripheral.[276] AfCFTA aims to reduce barriers to intra-African trade and create a large continental market to achieve economies of scale, sustain production systems and markets on the continent. This will enhance Africa's competitiveness in the global trade order.[277] Accordingly, the manufacture and beneficiation of goods is a cornerstone objective of the Protocol. Thus, regional cooperation is required to establish African manufacturing capacity and product diversification.[278] The multi-dimensional and cooperative approach of developmental regionalism is the correct integration theory to achieve these objectives and attain the benefits of liberalising trade in goods. Consequently, the provisions pertaining to the Protocol's scope, MFN, liberalisation, rules of origin, trade facilitation, trade remedies, and cooperation are considered to determine the likelihood of the Protocol to fully deliver the benefits of developmental regionalism.

6.2 Objectives and Scope

The foremost objective of this Protocol is to create a large liberalised market on the African continent.[279] Thus, under the Protocol, the State Parties are obligated to progressively remove tariffs and non-tariff barriers; increase customs procedure efficiency; enhance trade facilitation and transit; cooperate on matters of technical barriers to trade, and sanitary and phytosanitary measures; develop regional and continental value chains; and foster socio-economic development, diversification, and industrialisation across Africa.[280] This Protocol applies to all matters relating to the trade of goods. The scope is further fleshed out in the annexes to the Protocol which are integral thereto and provide comprehensive rules, relating to amongst others: Tariff Schedules, Rules of Origin, Non-Tariff Barriers.[281]

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[276] UNECA & AU *op cit 101* p14
[277] *Ibid.*
[278] Trudy Hartzenburg 'The African Continental Free Trade Area Agreement – what is expected of LDCs in terms of trade liberalisation?' (2019) *United Nations* at *https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/* accessed on 20 October 2021
[279] AfCFTA The Protocol on Trade in Goods, 2018. Article 2
[280] *Ibid* Article 2
[281] *Ibid* Article 3

6.3 Principle of Non-Discrimination

The MFN reciprocity requirement operates with a substance over form approach and is not merely a *quid pro quo* between States.[282] This requirement encourages liberalisation because should a State Party grant a preference to a Third Party and another State Party fails to negotiate and reciprocate such preference; African products will be disadvantaged compared to the like products imported from Third Parties.[283] Importantly, State Parties are permitted to conclude or maintain preferential trade arrangements with Third Parties, subject to any preference or benefit being extended to State Parties on a reciprocal basis.[284] Article 4 introduces a new caveat as the conclusion or continuance of a preferential trade arrangement with a Third Party is only permitted, provided it does not impede or frustrate the object of the Protocol.[285] This is a welcome qualification that could potentially address concerns held regarding the EPAs and other preferential trade agreements. However, it is reliant on political will and thus prospective backlash from global trading partners will likely defuse its operation. Notwithstanding the above, it is expressly stated that the operation of the MFN provision shall only commence from the date AfCFTA entered into force. Thus, preferences extended to Third Parties or other State Parties prior to the launch of AfCFTA shall not be automatically extended to State Parties.[286] Instead, State Parties will be afforded an opportunity to negotiate such prior agreed preferences.[287] Importantly, the requirement of reciprocity is guided by considering the levels of development of the relevant State Parties. Thus, there is a recognition of special and differential treatment.[288]

The principle of National Treatment is a traditional transplant from the WTO system.[289] Thus, State Parties must ensure that once like imported products have cleared customs, they are treated in a manner no less favourable than like domestic products. Consequently, all measures affecting the sale and conditions thereof are subject to national treatment. [290] Thus, governments cannot impose any extra charges, levies or conditions on imported products as

[282] Marchetti *op cit 230* p3
[283] Landry Signé &Colette van der Ven 'Keys to success for the AfCFTA negotiations' (2019) *Brookings Institute: African Growth Initiative* p4
[284] Goods Protocol *op cit* 279 Article 4(2)
[285] *Ibid.* Article 4(2)
[286] *Ibid.* Article 4(4)
[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.* Article 5
[290] *Ibid.*

this would distort competition and result in the protection of domestic products.[291] This provision only applies once the imported product has cleared customs. Thus, a State Party can adopt other forms of discrimination or entry conditions at the border, such as import duties, rules of origin or technical barriers to trade.[292] However, these conditions of entry cannot amount to arbitrary non-tariff barriers. These rules and procedures are further set out in the annexes.[293]

6.4 Liberalisation of Trade

Trade liberalisation refers to the removal or reduction of restrictions placed on the exchange of goods between and amongst countries. This includes the removal or reduction of tariff barriers, such as import duties and charges as well as NBTs such as quotas.[294] The idea originated from free market principles as a mechanism to curb government influence in the market and instead allow the market to dictate the efficient allocation of resources. It was a policy move originally advocated by the World Bank and the IMF.[295] Trade liberalisation was imposed upon Africa by the IMF and the World Bank in response to global economic crisis in the 1980s. This opened up African markets to foreign competition too early and killed off nascent domestic industry.[296] Thus, the push for African industrialisation and development was thwarted.[297] Thus, fair trade integration principles are crucial.

Tariff Liberalisation

In accordance with their Schedule of Tariff Concessions, State Parties are obligated to progressively eliminate import duties or other charges of an equivalent effect imposed on goods originating from State Parties.[298] No new charges shall be imposed on products subject to liberalisation.[299] The Protocol permits exceptions, such as antidumping, countervailing or safeguard measures.[300] State Parties must negotiate and apply preferential tariffs, which shall be outlined in the Schedules of Concessions and applied in accordance with the adopted tariff

[291] Business Guide *op cit 193* p17
[292] *Ibid.* p17
[293] *Ibid.* p17
[294] Emeka Iloh & Michael Nwokedi *et al* 'World Trade Organization's Trade Liberalization Policy on Agriculture and Food Security in West Africa' in Regional Development in Africa (2020) *IntechOpen* p4
[295] *Ibid.* p5
[296] *Ibid.*
[297] Ismail JWT *op cit* 128 p16
[298] Goods Protocol *op cit* 279 Article 7(1)&(2)
[299] *Ibid.* Article 7(1)&(2)
[300] *Ibid.* Article 7(3)

modalities.[301] Members of RECs that have reached higher-levels of tariff and NBT reduction shall maintain, and endeavour to improve upon the higher-level of integration.[302] This illustrates the preservation of the *acquis.* State Parties are yet to finalise their Schedules of Concessions. The delays have been caused by concerns of over-extending tariff liberalisation ambitions and the application of special and differential treatment.[303]

The Treaty requires that State Parties progressively eliminate tariffs across 97% of their tariff lines, which shall account for 90% of their intra-African import volume.[304] In terms of tariff modalities, there is a distinction made between LDCs and non-LDCs. LDCs have 10 years to progressively eliminate 90% of tariff lines, whereas non-LDCs must comply within 5 years.[305] The remaining 10% of tariff lines are divided into 7% of sensitive products and 3% of products excluded from liberalisation obligations.[306] The latter exclusion is of concern as intra-African trade is highly concentrated with 1% of tariff lines representing 74% of imports on average.[307] Thus, protectionism could be maintained through the 3% exclusion allowance. However, the application of this exclusion clause is limited in two ways. Firstly, there is an anti-concentration clause in that the 3% exclusion allowance cannot account for more than 10% of import volume.[308] And secondly, designating products as 'sensitive' or 'excluded' must be related to matters of food security, national security, fiscal revenue, livelihood and/or industrialisation.[309]

Non-LDCS are obligated to eliminate tariffs on sensitive products within 10 years, however, for the first 5 years the status quo can be maintained, and liberalisation shall commence in the 6th year. In comparison, LDCs have 13 years to eliminate tariffs on sensitive products - similarly they may maintain the present tariffs for the first 5 years.[310] However, LDCs and non-LDCs within the same Customs Union must apply the same timeframes for implementation. The decision as to how this shall be implemented is uncertain.[311] Furthermore, additional allowances are made for the so-called G7, being Djibouti, Ethiopia, Madagascar, Malawi, Sudan, Zambia, Zimbabwe.[312] These countries are required to initially reduce their tariff lines

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[301] *Ibid.* Article 8(1)
[302] *Ibid.* Article 8(2)
[303] Business Guide *op cit 193* p18
[304] World Bank *op cit 197* p15
[305] UN Hartzenberg *op cit 278*
[306] *Ibid.*
[307] World Bank *op cit 197* p15
[308] Lunenborg *op cit 267* p4
[309] TRALAC FAQS *op cit 241* p6
[310] UN Hartzenberg *op cit 278*
[311] Lunenborg *op cit 267* p11-13
[312] World Bank *op cit 197* p18

by 85%, but within a 15 year period must reach the standard 90%.[313] The tariff modalities illustrate the principles of variable geometry, special and differential treatment and flexibility.

In exceptional circumstances, State Parties may modify their schedules of tariff concessions. A State Party must make such request to the Secretariat and furnish the exceptional circumstances justifying the modification.[314] If a State Party is deemed to have a substantial interest in the consequences of modification, the relevant parties, facilitated by the Secretariat, shall enter into negotiations with the intention of reaching an agreement on compensatory adjustments.[315] No modification of the schedules of tariff concessions shall be of any effect until such time as the compensatory adjustments have been made and endorsed by the Council of Ministers. Importantly, the compensatory adjustments are granted on an MFN basis.[316] Thus, coupled with MFN compliance, this article safeguards against State Parties backsliding on liberalisation commitments while still providing a measure of flexibility as the overall balance of concessions can vary over time. In terms of calculating the net effect of the compensatory measures, the provision is silent on the procedures and methods used to determine as to whether the overall balance of concessions has been maintained after the modification.[317]

<u>Elimination of Non-Tariff Barriers</u>

NTBs are trade restrictions other than tariffs - such as quotas, prohibitions, import licensing systems, regulations and conditions or market requirements that have a trade restricting effect.[318] The Protocol imposes a general elimination of quantitative restrictions on imports from or exports to other State Parties. This includes the arbitrary application of non-tariff measures imposed with a protectionist intention.[319] It is well-established that NTBs are more of a hinderance to cross-border trade than the application of tariffs. However, African trade integration efforts have largely focused on tariff liberalisation rather than NTB elimination.[320] Consequently, while tariffs amongst regional members have been substantially reduced, the application of NTBs is still high and are often applied in a protectionist manner.[321] NTBs are costly and time-consuming impediments to cross-border trade. Thus, NTBs have a detrimental

[313] *Ibid.*
[314] Goods Protocol *op cit* 279 Article 11
[315] *Ibid.* Article 11(5)
[316] *Ibid.* Article 11(6)(7)
[317] Business Guide *op cit 193* p18
[318] *Ibid.*
[319] Talkmore Chidede 'The AfCFTA legal framework for the elimination of NTBs' (2019) *TRALAC* p1
[320] *Ibid.*
[321] *Ibid.*

effect on supply capacity and competition.[322] It is estimated that the reduction of NTBs could double intra-African trade and improve the benefits of AfCFTA three- to four-fold. [323] Therefore, the elimination of NTBs is a key objective of AfCFTA.

The State Parties have adopted a binding legal and institutional framework to govern the progressive elimination of NTBs.[324] Annex 5 regulates the elimination, identification and categorisation of NTBs and further provides for monitoring and reporting mechanisms.[325] Drawing from the WTO, Annex 5 provides guidance by establishing general categories of NTBs, which include TBTs; SPS measures; government involvement in trade and tolerance of restrictive practices; customs and administrative entry procedures; specific restrictions and charges placed on imports; transport; and clearing and forwarding.[326] These categories are guides and are not definitive indicators of a measure's illegality.[327] State Parties are obligated to develop a National Time Bound Elimination Matrix in terms of which a State Party must publish its plan and subsequent progress of the elimination of NTBs.[328] The principle of best practice of the RECs can be drawn from as a guide for implementation under AfCFTA. For example, the EAC has successfully developed a regional matrix, which is routinely updated and provides information on unresolved, resolved and new NTBs.[329]

The Secretariat is responsible for forming the NTB Coordination Unit as a high-level coordinator and liaison amongst the various AfCFTA, REC and national NTB institutions.[330] At the national-level, State Parties are obligated to establish a National Monitoring Committee and National Focal Point. The former shall comprise both public and private sector representatives to identify, resolve and monitor domestic NTBs and further provide guidance to the business community for the elimination thereof.[331] Whereas the latter is an authorised government body charged with the elimination of NTBs under domestic law.[332] Interestingly, RECs are required to form or improve regional NTB monitoring mechanisms and to work with the NTB Sub-Committee, RECs NTB Units and National Focal Points to resolve NTBs.[333]

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[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid.*
[326] Annex 5 Non-Tariff Barriers Article 3(1) read with Appendix 1
[327] Chidede *op cit 319* p3
[328] Annex 5 *op cit 326* Article 13
[329] Chidede *op cit 319* p3
[330] *Ibid.* p4
[331] *Ibid.*
[332] *Ibid.*
[333] Annex 5 *op cit 326* Article 10

While this ought to be carried out, RECs are not members of the AfCFTA Agreement and thus cannot be bound to any obligations therein.[334]

In an attempt to leverage technology, an AfCFTA NTB online mechanism has been established to expediate and facilitate the identifying, reporting and elimination of NTBs under AfCFTA.[335] Any State Party or economic operator may register a complaint on the online mechanism.[336] This online mechanism should be used to establish an accessible and extensive database on NTBs to assist interested parties in identifying and assessing the impact of NTBs on cross border trade.[337] This would be conducive with State Parties' transparency and disclosure obligations. While economic operators may register a complaint on the online mechanism, only State Parties can submit a complaint to another State Party.[338] Thus, economic operators will have to lobby their respective State Party to advance their interests. This will likely dissuade private sector engagement with the online reporting mechanism, which is unfortunate as private firms are the entities that conduct international trade.[339]

Two major NBTS are: TBTs and SPS measures. Annex 6 addresses TBTs and is based on the WTO TBT Agreement. TBTs are technical regulations and procedures relating to standardisation, conformity assessment, processes and production methods, terminology, packaging and accreditation amongst other technical requirements.[340] Annex 6 is centred on facilitating cooperation amongst State Parties to eliminate TBTs, promote transparency and identify priority areas.[341] SPS measures have been major impediments to African countries importing fresh produce to other markets, such as the EU. African countries have lacked scientific, technical and financial resources to comply with the onerous SPS requirements.[342] Annex 7 focuses on balancing the safety of human and plant life while enhancing cooperation and transparency to ensure that SPS measures are not applied in a manner to protect domestic

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[334] Chidede *op cit 319* p5
[335] *Ibid.* p7
[336] Annex 5 *op cit 326* Article 12
[337] Chidede *op cit 319* p11
[338] Annex 5 *op cit 326* Appendix 2
[339] Chidede *op cit 319* p7
[340] UNCTAD 'Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations.' (2021) *UNCTAD* p19
[341] *Ibid.*
[342] *Ibid.* p18

industries from imports which developing countries have often alleged against developed countries. [343] Annex 7 aims to harmonise SPS regulation amongst the State Parties.[344]

6.5 Rules of Origin

Rules of origin regulate the application of concessions available under preferential trade arrangements. The underlying rationale is to ensure that there is a prescribed minimum level of local value addition to a product to constitute a good originating from within the preference zone.[345] Thus, foreign firms cannot benefit from the concessions without investing within the preference zone. In negotiating the rules of origin, State Parties must not lose sight of the objective of AfCFTA and thus must ensure that the rules of origin do not disincentivise the use of preferential tariffs and trade promoting non-tariff measures.[346] Should compliance with the rules of origin prove too costly under AfCFTA relative to expected benefits, traders will forgo AfCFTA and seek opportunities in other markets.[347] The design of the rules of origin will have a direct impact on gains forecasted from tariff liberalisation.[348] The rules of origin under AfCFTA must be drafted to encourage firms to utilise tariff and non-tariff preferences, which shall in turn facilitate the active participation by firms in regional value chains and the industrialisation process in Africa.[349]

Rules of origin negotiations have been epitomised by two contrasting ideological positions. On the one side, economists argue that rules of origin must not be used as a protectionist or industrial policy tool. Instead, they argue, it must be confined to ascertaining and authenticating the origin of goods.[350] Applying rules of origin as a conduit for development will ultimately distort trade and undercut efficiency.[351] Conversely, rules of origin can be used as industrial policy to capture the benefits of new productive activities and regional production networks.[352] Accordingly, the local content requirements produces a demand for local intermediate goods, which are necessary value additions to the final product to ensure rule of origin compliance.

[343] *Ibid.*
[344] *Ibid.*
[345] Business Guide *op cit 193* p18
[346] UNCTAD 'Economic Development in Africa Report 2019: Made in Africa – Rules of Origin for Enhanced Intra-African Trade' (2019) *UNCTAD USA* p45
[347] *Ibid.* p44
[348] *Ibid.*
[349] *Ibid.* p45
[350] *Ibid.* p47
[351] *Ibid.*
[352] *Ibid.*

Thus, this creates an opportunity for African firms to be suppliers of such intermediate goods.[353] Consequently, rules of origin can be used as an industrial policy tool to encourage African countries to engage in manufacturing, technological advancement and diversification in an attempt to capture the benefits of local content requirements across a wide range of product lines.[354] However, complementary policy measures must be adopted to ensure that these African intermediate goods are at competitive prices.[355] Looking to the experience of NAFTA, the evidence indicates that the local content requirements for rules of origin led to the decrease of imports of intermediate goods from third parties.[356] In spite of these benefits, rules of origin must not be used for domestic protection as this will hinder the integration process. Thus, to guard against regulatory capture and protectionist lobbying by firms, negotiations and the application of rules of origin must be transparent and open.[357]

The requirements, procedures and related costs of rules of origin have a direct impact on trade flows. The issue of associated compliance costs is especially pertinent considering Africa's missing middle problem.[358] Africa has a high number of SMEs that compete with a few large and more profitable companies.[359] The larger firms are more capable of absorbing compliance costs than the SMEs. Thus, the rules of origin must be drafted to ensure that African SMEs can take advantage of AfCFTA.[360] Accordingly, research comparing the effect of restrictive versus flexible rules of origin has established that adopting restrictive rules results in a reduction of trade flows.[361] In contrast, adopting a flexible approach with product-specific rules increases trade volumes.[362] If rules of origin are drafted in a restrictive and onerous fashion it will restrict trade, misdirect investment, impede productivity growth and diminish welfare gains otherwise attainable.[363] However, while there are negative consequences associated with adopting stringent rules, rules of origin that are too flexible likewise have downsides because if they are too flexible the benefits of local value addition and participation in regional value chains are reduced.[364] Thus, the State Parties must achieve a balanced application of the rules of origin.

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[353] *Ibid.* p45
[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.* p47
[358] *Ibid.* p46
[359] *Ibid.*
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.*
[363] *Ibid.*
[364] *Ibid.*

Annex 2 of the Protocol outlines a detailed framework governing rules of origin. It prescribes the requirements for products to qualify for originating status under AfCFTA and examines the method by which the goods were produced.[365] Importantly, some aspects of the annex are still to be finalised. There are two categories of goods that will qualify for originating status: wholly produced;[366] or sufficiently worked on or processed within a State Party.[367] The former includes, amongst others, products such as minerals, animals and plants originating from a State Party.[368] This category is not contentious. The latter category is controversial as 'sufficiently worked on or processed' is not concrete in meaning. In order to constitute sufficiently worked on or processed, one of the following criteria must be satisfied: value-added; non-originating material content; change in tariff heading; or specific processes.[369] Further detail is to be specified in Appendix I. However, this has not been finalised and is still under negotiation. Article 6 shall be the site of the ideological choice: restrictive or flexible rules of origin. It is advocated that AfCFTA adopts flexible rules of origin, especially at its inception, to ensure that there is sufficient uptake. This can be reviewed and adapted at a later stage as institutional and productive capacity grows and more is understood about the operation of AfCFTA.

6.6 Customs Cooperation and Trade Facilitation

The Protocol addresses the interrelated objectives of improving customs cooperation, trade facilitation and transit to enhance trade efficiency. It provides a framework for customs cooperation amongst State Parties with the objective of simplifying and harmonising customs laws and procedures in order to enhance trade flows.[370] To achieve such, common measures shall be adopted to provide State Parties with guidance to formulate their customs laws and procedures.[371] AfCFTA has adopted the international standards of the WCO as a guide in establishing this framework. Thus, State Parties are obliged to adopt customs tariffs and statistical nomenclatures in accordance with the international Harmonised System

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[365] Business Guide *op cit 193* p18
[366] Annex 2 Rules of Origin Article 5
[367] *Ibid.* Article 6
[368] *Ibid.*
[369] *Ibid.*
[370] TONBOFA, 'Summary of the Agreement Establishing the African Continental Free Trade Area and its Protocols' (2020) *at https://tonbofa.com/summary-of-the-agreement-establishing-the-african-continental-free-trade-area-and-its-protocols-2/* accessed on 14 November 2021
[371] Annex 3 Customs Co-operation and Mutual Administrative Assistance Article 2(1)

convention.[372] State Parties are to provide each other with Mutual Administrative Assistance in an effort to ensure customs laws and procedures are adhered to, customs offences penalised, documentation is made available, and procedures are harmonised and simplified.[373] For example, State Parties could jointly manage a customs border post to alleviate traders from the burdens of duplicating processes. This would cut costs and delays.[374] State Parties shall establish a continental, regional and national institutional framework, which shall monitor and coordinate efforts to ensure smooth trade flows and supply chain integrity through customs harmonisation and simplification.[375]

Related thereto, Annex 4 governs trade facilitation with the aim to simplify, modernise and harmonise import and export procedures. Trade facilitation is crucial to unlocking the benefits of AfCFTA as bureaucratic delays, red tape and corruption are major costs to intra-African trade.[376] The AfDB has reported that Africa's cost of trade is decreasing at the slowest rate compared to other regions.[377] Thus, UNECA forecasts that if trade facilitation was enhanced, intra-African total trade volumes would increase by 21.9%.[378] Annex 4 is guided by the WTO TFA and has two objectives: to simplify and harmonise international trade procedures and logistics to expedite importation, exportation and transit; and to make the movement, clearance and release of goods, including cross-border transit, efficient and fast.[379] The principles of the annex must be interpreted in accordance with the principles of transparency, simplification, harmonisation, and standardisation of customs laws, procedures and requirements.[380] The interesting innovation of the annex is the leveraging of technology to enhance trade efficiency. Article 17 requires State Parties to use technology to expedite release of goods procedures. This is supported by permitting traders to submit documents online and establishing an accessible data base with trade-related information.[381] This is an example of AfCFTA going beyond the TFA. This provision could significantly simplify trade procedures and increase

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[372] *Ibid.* Article 3(2)
[373] *Ibid.* Article 2(2)
[374] Karingi & Davis *op cit* 96
[375] Annex 3 *op cit 371* Article 2(1)
[376] Chidede *op cit 319* p1
[377] *Ibid.*
[378] *Ibid.*
[379]UNCTAD Bio *op cit 340* p21
[380] Annex 4 Trade Facilitation Article 3
[381] *Ibid.* Article 17

transparency.[382] Increasing trade facilitation and reducing delays is especially important considering the abundance of fresh produce traded on the continent.[383]

6.7 Trade Remedies

Trade remedies are import duties or restrictions applied as a defence against another State's action that is causing economic disruption or harm. This can arise through predatory pricing by foreign firms, unlawful subsidies or a general surge in imports.[384] The levying of an import duty is to rebalance the economic distortion created by such action and correct competition conditions.[385] Due to gravity of these remedies, comprehensive economic assessments by a responsible authority must be conducted and thereafter conclude that there is in fact serious injury to domestic producers.[386] Annex 9 governs the application of trade remedies, which draws from the WTO as many State Parties do not have developed bodies of law or institutions relating to trade remedies.[387] Recognising capacity shortcomings, the Protocol provides for technical assistance and cooperation for the adoption of AfCFTA implementation guidelines.[388]

State Parties are entitled to apply anti-dumping and countervailing measures, subject to certain conditions.[389] In simple terms, dumping occurs when a good is sold at a much reduced price in the importing market than it is sold on the market of the exporting country.[390] Thus, State Parties are entitled to depart from the non-discrimination principle, and levy an additional anti-dumping import duty on the relevant product from the exporting country in order to bring the price of the product closer to the determined 'normal value' and thereby remove the harm caused to the domestic industry.[391] It is important to note that it is required that the dumping is causing harm to the domestic industry.[392] Countervailing measures are used to counter the

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[382] UNCTAD Bio *op cit 340* p21
[383] *Ibid.*
[384] Business Guide *op cit 193* p20
[385] *Ibid.*
[386] *Ibid.*
[387] *Ibid.*
[388] *Ibid.*
[389] Annex 9 Trade Remedies Article 4
[390] WTO 'Technical Information on Anti-dumping' accessed on 24 September 2021 at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm
[391] *Ibid.*
[392] *Ibid.*

economic distortions resulting from unlawful subsidies.[393] Thus, State Parties can apply an import levy on a product that benefits from a subsidy in the exporting country if such subsidy causes harm to the domestic industry of the importing country.[394] These measures must lapse when the harm is remedied and the offending measure has ceased. Importantly, provisional measures can only be applied after sixty days of the investigation commencing and cannot be applied for longer than four months unless the relevant authority decides otherwise.[395]

State Parties are entitled to apply safeguard measures as an emergency action when there is a sudden surge of quantities of an imported product (absolute or relative to domestic production), which results in serious harm to a domestic industry of a like or directly competitive good.[396] Subject to prior investigation, a State Party can adopt a safeguard measure to protect its domestic industry. This could be in the form of a temporary quota restriction to give the domestic industry time to adjust, or a duty placed on the product.[397] Preferential safeguards can only be applied for four years and may be extended for a further four years if deemed appropriate by the relevant authority. A State Party cannot simultaneously apply a preferential and global safeguard measure on the same product.[398]

Furthermore, to ensure that State Parties still have policy autonomy to regulate certain sensitive issues, the Protocol makes allowances for general exceptions, such as for public safety and public morals as well as for restrictions to protect the balance of payments for its financial security. Importantly, the IMF determines the legality of the latter restrictions.[399] These measures must not be arbitrary, disproportionate or applied with an ulterior motive.[400]

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[393] AfCFTA Guidelines on the Implementation of Trade Remedies
[394] *Ibid.* Guideline 37
[395] *Ibid.* Guideline 32 & 36
[396]Gerhard Erasmus ' Are Trade Remedies important for achieving the AfCFTA goals?' (2018) *TRALAC* at *https://www.tralac.org/blog/article/12764-are-trade-remedies-important-for-achieving-the-afcfta-goals.html accessed on 30 September 2021*
[397] *Ibid.*
[398] Annex 9 *op cit 389* Article 4
[399] IMF 'Balance of Payments and International Investment Position Statistics' (2021) *IMF* accessed on 30 September 2021 at https://data.imf.org/?sk=7A51304B-6426-40C0-83DD-CA473CA1FD52
[400] Ji Yeong Yoo. 'Restructuring GATT Balance-of-Payments Safeguard in the WTO System' (2019) *Journal of World Trade*

6.8 Complementary and Cooperation Policies

Recognising the various levels of development and the need to encourage and protect the growth of nascent industries on the continent, the Protocol introduces complementary policies in conjunction with liberalisation and trade facilitation to achieve broad continental growth and upliftment. Accordingly, State Parties are encouraged to establish SEZs as a mechanism of targeted development of a particular sector.[401] SEZs encourage investment in a sector by creating favourable regulatory conditions for business, such as tax or competition incentives.[402] Goods produced in an SEZ will satisfy the rules of origin requirements.[403] Furthermore, cognisant of industries vulnerable to competition, State Parties are allowed to adopt reasonable measures to protect strategically important infant industries - provided that such measures are administered in a non-discriminatory manner and for a prescribed period of time.[404] The Secretariat shall coordinate with State Parties, RECs and other partners to provide technical assistance and capacity building to assist with the implementation of the Protocol.[405]

6.9 Conclusion

The Protocol on Trade in Goods has adopted a fair trade integration approach to liberalisation through its rules of special and different treatment, flexibility and variable geometry. Thus, the State Parties have agreed to tariff modalities that account for the varying capabilities of the State Parties. Furthermore, the Protocol encourages cooperation on developing industrial capacity to drive forward transformative industrialisation and moreover, addresses cost reduction of intra-African trade through trade facilitation and customs efficiency. Thus, the Protocol has embraced the tenets of developmental regionalism. However, the Protocol does not provide for mechanisms that address the varied sectoral challenges in goods trade. Nevertheless, the framework caters for further deliberations to address more nuanced approaches. Accordingly, recognising the global importance of the trade in services, the goods protocol is complimented by a protocol regulating the trade in services.

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[401] Goods Protocol *op cit* 279 Article 23(1)
[402] *Ibid.*
[403] Annex 2 *op cit 366* Article 9
[404] Goods Protocol *op cit* 279 Article 24
[405] *Ibid.* Article 29

CHAPTER 7: PROTOCOL ON TRADE IN SERVICES

7.1 Introduction

International trade and investment in services has increased significantly over the past few decades and is a significant feature of global trade. Thus, trade in services is a key component of bi-lateral, regional and multilateral trade negotiations.[406] This increasing economic importance of services is reflected in the composition of countries' GDP. Accordingly, services account for 50% of the GDP in low-income countries, 54% in middle-income countries, and about 72% in high-income countries.[407] Tapping into the potential of Africa's service sector through liberalisation and associated regulatory reform poses significant opportunity to alter Africa's trajectory. African countries have previously attempted to address services at a domestic, regional and multi-lateral level, but such attempts have lacked multi-level policy coherence.[408] The lack of policy harmonisation has failed to unlock the benefits of service liberalisation.[409] To address such shortcomings, the State Parties have adopted the Protocol on Trade in Services to create a coherent, transparent, liberalised and integrated single services market on the continent.

In contrast to other regional integration efforts, a distinctive feature of AfCFTA was its concurrent negotiations on both goods and services.[410] Indeed, one limitation of African regional trade pacts has been its formalistic adherence to Viner's linear model of integration. This approach has resulted in the relegation of services to the latter stages of integration. Therefore, its economic weight and significance has been largely disregarded.[411] Detractors of Viner's antiquated model have shifted the paradigm. Instead, champions of African integration have advocated a multi-dimensional and concurrent approach that embraces a broader array of policies – including goods, services, investment, competition and other behind the border issues - to better address Africa's idiosyncratic developmental challenges.[412] A breakaway from a model that had almost exclusively focused on border measures.[413] Thus, the provisions

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[406] Regis Simo 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) p66
[407] *Ibid.*
[408] *Ibid.*
[409]*Ibid.* p67
[410] *Ibid.*
[411] *Ibid.*
[412] *Ibid.*
[413] *Ibid.*

pertaining to the Protocol's scope, MFN, domestic regulation, liberalisation, market access, trade distortion and policy harmonisation are considered to ascertain whether the Protocol reflects this epistemic shift to developmental regionalism.

7.2 Scope and Objective

The Protocol regulates all measures taken by State Parties that have an effect on trade in services. This applies to both measures adopted by government as well as non-government bodies that exercise delegated public power.[414] To demonstrate the scope of the Protocol, the jurisdictional breadth of 'trade in services' must be established. The Protocol, adopts the internationally endorsed GATS definition of 'trade in services.' Thus, in analysing the Protocol, trade in services means the supply of services: (i) from the territory of one State Party into the territory of another; (ii) in the territory of one State Party to a service consumer of another; and (iii) by a service supplier of one State Party via a commercial presence or a natural person(s) in the territory of another State Party.[415] Crucially, services procured by government organs for governmental purposes are expressly excluded, provided that such services are not for commercial re-sale.[416]

The foremost objective of the Protocol is to create a single liberalised market for trade in services to increase the competitiveness of African service providers through economies of scale, decreased business costs, enhanced continental market access and resource allocation efficiency.[417] A key tenet of this objective is to foster cooperation amongst State Parties in order to: increase domestic and foreign investment in service industries; promote research and technological advancement in services; and encourage capacity building for the development of service sectors.[418] Unlike with the trade of goods, the liberalisation of services is not as straightforward as reducing import tariffs. Instead, the liberalisation of services requires a broader range of policy negotiations for the regulation and governance of market access and service provision.[419]

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[414] *Ibid.* p79
[415] AfCFTA Protocol on Trade in Services Article 1(p)
[416] *Ibid.* Article 2
[417] Services Protocol *op cit 415* Article 3
[418] Simo *op cit 406* p80
[419] TONBOFA *op cit 370*

7.3 Principle of Non-Discrimination

State Parties are under the general obligation to accord treatment to other State Party services and service suppliers that is no less favourable than that granted to like services and service suppliers of any Third Party.[420] The MFN obligation operates in respect of 'like' services and service suppliers. Thus, any alleged discrimination must overcome the hurdle of establishing the often blurry notion of likeness.[421] The purpose of the 'likeness' analysis is to establish whether the services or service suppliers are in a competitive relationship and if so, the measure cannot cause discrimination as it would unfairly alter the conditions of competition.[422] State Parties can conclude trade in services agreements with Third Parties, but they must satisfy certain conditionalities. Firstly, such preferential agreement cannot impede or frustrate the objectives of the Protocol.[423] Secondly, such preferential treatment accorded to a Third Party must be granted to State Parties on a reciprocal and non-discriminatory basis.[424] Thus, the MFN provision ensures that State Parties are not discriminated against should a peer enter into a preferential service agreement with a Third Party.[425] Consequently, any service trade negotiations with a non-AfCFTA party is invariably considered within the AfCFTA paradigm as any benefit accorded therein will be offered to other State Parties.[426] This ensures that African countries negotiate from a position of solidarity as the consequences of granting benefits to non-AfCFTA parties frame the negotiations.[427]

It is important to remember that the granting party is in theory protected by the requirement of reciprocity. However, in practice, reciprocity could be a fictional benefit as there may not be any economic opportunity for the granting State Party in the other State Party's market. Thus, the '*quid pro quo'* may be of little benefit. Nevertheless, it does provide some protection and aids in leveraging liberalisation. Furthermore, the Protocol provides certain exclusions for State Parties to protect their interests. Accordingly, agreements concluded prior to AfCFTA entering into force are specifically excluded from MFN.[428] However, the provision states that such party *may* afford other State Parties an opportunity to negotiate for the same preferences, but it is

[420] Services Protocol *op cit 415* Article 4
[421] Simo *op cit 406* p82
[422] *Ibid.*
[423] Services Protocol *op cit 415* Article 4(2)
[424] *Ibid.*
[425] Simo *op cit 406* p82
[426] *Ibid.*
[427] *Ibid.*
[428] Services Protocol *op cit 415* Article 4

clear that there is no obligation to do so.[429] As a point of departure from MFN, the Protocol permits State Parties to accord benefits to bordering countries to facilitate exchanges. This is limited to adjacent frontier zones of services that are both locally produced and consumed.[430]Additionally, State Parties are allowed to establish an exemption list and maintain identified measures that are inconsistent with the MFN principle.[431] However, MFN exemptions must be reviewed periodically with the view to eliminating them.[432]

At a domestic-level, State Parties cannot adopt measures that alter the conditions of competition in favour of their domestic service suppliers in the sectors that they have committed to liberalise market access.[433] Thus, State Parties are obligated to accord like services of other State Parties no less favourable treatment than domestic suppliers.[434] The discrimination analysis takes a substantive over formalist approach and looks to the measure's effect on conditions of competition.[435] To ensure that parties are held accountable to the principle of non-discrimination, State Parties are obliged to be transparent with the measures they adopt. Thus, State Parties are required to promptly publish and make publicly accessible all measures of general application that affect trade in services.[436] State Parties shall establish review mechanisms and enquiry points whereby State Parties may request access to specific information concerning laws, regulations and administrative practices.[437]

7.4 Domestic Regulation, Liberalisation and Market Access

Domestic regulation is central to trade in services as barriers are found not at the border but in the manner that countries regulate services within their domestic market.[438] Thus, in comparison to the Protocol on trade in goods, the liberalisation of services poses a more complex task than tariff reduction. Instead, the liberalisation of services requires deeper governance reform to tackle inhibiting domestic regulation as well as the stifling extent of

[429] *Ibid.*
[430] *Ibid.*
[431] *Ibid.*
[432] *Ibid.*
[433] Simo *op cit 406* p74
[434] Services Protocol *op cit 415* Article 20(2)
[435] *Ibid.* Article 5
[436] *Ibid.*
[437] *Ibid.*
[438] Business Guide *op cit 193* p34

public ownership in the service sector.[439] To enhance the business environment for commercial services in intra-African trade, behind the border policy reform will have to occur.[440] Consequently, national regulators rather than customs officials will be at the forefront of service liberalisation.[441] However, regional integration efforts must ensure that countries still have the policy freedom to regulate services to achieve national policy objectives, such as consumer protection.[442] Accordingly, Article 8 states that insofar as domestic regulation does not detract from the rights and obligations under the Protocol, State Parties have the freedom to regulate services within their territory.[443] Recognising that the trade in services will largely occur under domestic jurisdiction, the Protocol obligates State Parties to maintain or establish judicial, arbitral or administrative tribunals for the prompt review of administrative decisions affecting trade in services.[444] The Protocol provides an overarching framework for governance. However, domestic regulation and administrative law will instead provide the primary avenue of redress for aggrieved service providers.[445]

Article 18 requires the progressive liberalisation of services through successive rounds of negotiations in order to eliminate measures with adverse effects on services, and thereby improve market access for African firms to boost intra-African service trade.[446] State Parties have identified five key sectors to propel service sector growth, namely – transport; telecommunications; financial services; tourism; and business services.[447] In contrast to negotiating service liberalisation in a single-round, this progressive and targeted liberalisation strategy is advisable as it offsets the capacity shortcomings experienced by many African countries.[448] The scope of the Protocol is not limited to the aforementioned identified sectors and moreover, to be GATS compliant, liberalisation under the Protocol must have 'substantial sectoral coverage.'[449] Thus, further deliberations will occur to target other sectors, but as a starting point these sectors have been prioritised.[450] State Parties will negotiate a framework

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[439] Gerhard Erasmus,' What is the AfCFTA approach to the regulation of Trade in Services?' (2019) *TRALAC* at *https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html* accessed on 30 January 2022
[440] *Ibid.*
[441] Erasmus Legal *op cit 191* p15
[442] Business Guide *op cit 193* p34
[443] Services Protocol *op cit 415* Article 8
[444] Erasmus Legal *op cit 191* p15
[445] *Ibid.*
[446] Services Protocol *op cit 415* Article 15 & 17
[447] Signe & van der Ven *op cit 283* p6
[448] Business Guide *op cit 193* p35
[449] *Ibid.* p36
[450] *Ibid.* p35

for each sector to regulate and govern trade therein. Thus, regulation can be tailored to the specific nuances of each sector.[451] The liberalisation frameworks are still under negotiation and the annex, which will expand upon this provision, is yet to be finalised.

With regards to the adoption of these obligations, recognising the varied implementation challenges faced by State Parties, the Protocol takes a pragmatic position to ensure that there is increased participation and benefit by providing for special and differential treatment as well as variable geometry.[452] Thus, identified State Parties will be afforded certain flexibilities and longer transitional periods to execute their obligations. Additionally, specific sectoral liberalisation will benefit less-developed countries as targeted technical assistance and capacity building programmes under Article 27 can be implemented.[453]

In conjunction with liberalisation obligations, State Parties are to establish a Schedule of Specific Commitments in line with agreed modalities to regulate market access for the supply of services.[454] The Schedule identifies the relevant sectors or sub-sectors to be liberalised and specifies the terms and conditions applicable for market access.[455] Consequently, in granting market access on this basis, State Parties commit to affording treatment to services and service providers of other State Parties no less favourable than the terms and conditions as agreed and prescribed in the Schedule.[456] In sectors where specific commitments are agreed, measures of general application must be administered in a reasonable, objective, transparent and impartial manner.[457] State Parties may modify their Schedule of commitments after three years, subject to compensatory adjustments.[458] Importantly, unless otherwise agreed and specified in the Schedule, State Parties are prohibited from imposing limitations on: the number of service providers; the number of natural persons employed; the value service output; types of legal entities; the total value of service transactions and foreign capital.[459]

To expand upon the latter, State Parties are not allowed to adopt measures that restrict international transfers and payments.[460] The free flow of capital and investment is an important

[451] Services Protocol *op cit 415* Article 18(2)
[452] Simo *op cit 406* p84
[453] *Ibid.*
[454] Services Protocol *op cit 415* Article 19(1)
[455] Simo *op cit 406* p84
[456] Business Guide *op cit 193* p37
[457] *Ibid.* p34
[458] Services Protocol *op cit 415* Article 23
[459] Ibid. Article 19(2)
[460] *Ibid.* Article 13

objective of AFCFTA. This secures the value of commitments made by State Parties as market access and national treatment would be severely undermined if State Parties could restrict international transfers and payments for service transactions in identified sectors.[461] An exception to this obligation are restrictions adopted to safeguard the balance of payments. This exception recognises the financial pressures that State Parties will experience in implementing developmental programmes as well as their obligations under AfCFTA.[462] Thus, State Parties are entitled to safeguard their financial position by adopting balance of payments restrictions.[463] However, the implementation of the balance of payments restrictions cannot be discriminatory, inconsistent with IMF obligations, unnecessarily harmful to commercial and economic interests, and must be proportionate and temporary.[464] These restrictions cannot be maintained to protect any sector, instead, they must be used to safeguard a sector integral to a developmental programme. Unlike GATS, the Protocol does not provide for the restriction of international transfers and payments at the request of the IMF.[465] This signifies the aspiration of self-determination and non-interference.[466]

7.5 Trade Distortion: Monopolies and Subsidies

A general objective of AfCFTA is to remove trade distorting measures. Traditionally, public ownership through State monopolies has been extensive in the service sector.[467] Thus, in attempting to enhance intra-African service trade, there are concerns that State sanctioned monopolies will engage in anti-competitive practices and thereby cause trade distortion.[468] Consequently, the Protocol obliges State Parties to ensure that a monopoly service provider does not act inconsistently with its obligations under the Protocol by engaging in anti-competitive practices.[469] Additionally, suppliers must act strictly within the scope of their monopoly and cannot use their monopoly position to influence other service activities beyond the scope of their monopoly.[470] In accordance with transparency obligations, State Parties may request information regarding monopoly operations and also request consultations to remove

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[461] WTO Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) WT/DS285/R
[462] Services Protocol *op cit 415* Article 14
[463] *Ibid.* Article 14(2)
[464] *Ibid.* Article 14(2)
[465] Business Guide *op cit 193* p35
[466] Services Protocol *op cit 415* Article 14(3)
[467] Erasmus Service *op cit 439*
[468] *Ibid.*
[469] Services Protocol *op cit 415* Article 11
[470] *Ibid.*

anti-competitive practices.[471] Furthermore, trade distortion is caused by the provision of subsidies. However, interestingly, the Protocol permits State Parties to maintain subsidies in relation to trade in services.[472] This is a divergent position to GATS and indicates the importance of subsidies as a policy tool for African developmental programmes.[473]

7.6 Policy Harmonisation

Attempts at service liberalisation on the continent have been undermined by the lack of policy harmonisation amongst the three levels of trade. Thus, the Protocol provides for a mechanism of mutual recognition to smoothly facilitate the cross border trade of services. This includes recognition of education, satisfied technical requirements, licenses and certifications.[474] The underpinning notion is that if a service provider can lawfully supply a service in one jurisdiction, such service should be provided in another participating country without additional compliance requirements.[475] In other words, the supply of services should be transferable without an inhibiting hassle. This removes bureaucratic red tape which has contributed to Africa's developmental challenges. The European Court of Justice offers valuable guidance in the application of this principle. In the case of *Cassis de Dijon,* the ECJ stated that unless the importing State Party 'can demonstrate that the laws of the exporting country are not functionally equivalent to its own laws,' there is presumption that the goods or services of the exporting country must be granted market access without restriction.[476] In accordance with the principle of acquis, State Parties should look at the practices of the EAC for guidance. The EAC has even implemented the mutual recognition of professional qualifications, which allows for the seamless transfer of skills amongst members.[477] Mutual recognition cannot be used as discrimination or as a disguised restriction of trade.[478] State Parties shall negotiate a standardised continental framework of mutual recognition to avoid discrimination.[479]

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[471] *Ibid.* Article 12
[472] *Ibid.* Article 17
[473] Business Guide *op cit 193* p35
[474] Services Protocol *op cit* 415 Article 10
[475] Simo *op cit 406* p76
[476] *Ibid.* p75
[477] *Ibid.* p76
[478] Services Protocol *op cit 415* Article 10(3)
[479] *Ibid.* Article 10(5)

7.7 Conclusion

The services protocol has taken a pragmatic approach to liberalisation by first prioritising specific sectors. This crucially allows for a tailored approach to sectoral development challenges and aids targeted capacity assistance. Thus, the service protocol embraces a law and development theory that is attuned to the nuances of service sectors. Moreover, it has endorsed the principles of variable geometry, special and differential treatment, and flexibility to ensure fair trade integration. Furthermore, the sectoral approach embraces fair trade principles as it caters to states that have capacity constraints as the targeted approach means State Parties can consolidate and prioritise identified sectoral liberalisation rather than overextending their capacity across multiple sectors. Trade facilitation is endorsed through mechanisms such as mutual recognition. Additionally, cognisant of need for accelerated service sector growth, the Protocol permits the provision of subsidies to aid structural transformation. Thus, the Protocol adopts developmental regionalism. Accordingly for the proper functioning of the service protocol as well as for the goods protocol and framework treaty, AfCFTA requires a dispute settlement mechanism.

CHAPTER 8: PROTOCOL ON RULES AND PROCEDURES ON THE SETTLEMENT OF DISPUTES

8.1 Introduction

The objective of AfCFTA is to establish a continent-wide rules-based trade regime. Rules-based trade governance provides certainty in markets, predictability of state conduct, and the availability of remedies when rights are invariably infringed.[480] The compliance of policy measures adopted by State Parties are immediately tested against the legal framework.[481] Thus, both national and international measures adopted by State Parties must be within the parameters of the AfCFTA framework.

AfCFTA is an extensive trade governance regime that imposes a myriad of rights and obligations on State Parties. Thus, inexorably disputes regarding the correct interpretation and application of legal provisions shall arise.[482] Consequently, for AfCFTA to function and achieve its aspirations, disputes must be settled by an impartial and robust settlement procedure. This shall bring about finality, certainty and predictability.[483] Conversely, unilateral retaliation will achieve the opposite and is inimical to fostering trade development.[484] Thus, the State Parties have agreed to the Protocol on Rules and Procedures on the Settlement of Disputes. The Protocol applies to all disputes that emerge between State Parties regarding their rights and obligations under AfCFTA and the Protocols.[485]

Historically, African countries shy away from dispute settlement. Fair trade, trade facilitation and good governance require a robust and participatory dispute settlement procedure. Therefore, the mechanisms to resolve disputes such as alternative dispute resolution procedures, formal panels and appellate bodies are discussed against the backdrop of African countries' aversion to disputes in order analyse whether the Protocol addresses existing issues and provides a procedures that will facilitate the successful implementation of developmental regionalism.

[480] Gerhard Erasmus 'Dispute Settlement under the AfCFTA' (2018) p1
[481] *Ibid.*
[482] *Ibid.*
[483] *Ibid.*
[484] *Ibid.*
[485] AfCFTA 'The Protocol on Rules and Procedures on the Settlement of Disputes' (2018) Article 3

8.2 African States: Aversion to Disputes

Participation in formal dispute settlement procedures has not been a common feature of intra-African trade.[486] This is possibly a consequence of a few factors, namely: a belief that openly declaring a dispute fractures Pan-African solidarity; the low-levels and nature of intra-African trade; fear of repercussions by countries exercising more market power; lack of hard obligations; and technical capacity deficits.[487] In addition to low intra-African dispute settlement, African countries have been meek participants at multi-lateral dispute settlement mechanisms.[488] Low participation, coupled with forum shopping, has resulted in the meagre development of African influenced trade jurisprudence. Thus, the Protocol expressly states that disputes must not be considered contentious and precludes State Parties from instituting disputes elsewhere once instituted under AfCFTA.[489] The establishment of a dispute settlement mechanism under AfCFTA is an opportunity for African countries to develop a unified body of trade and commercial jurisprudence.[490] The Protocol's directives must effectively dissuade forum shopping and encourage formal dispute resolution under AfCFTA.[491] Importantly, the Protocol is largely a transplant of the WTO dispute settlement system, which is a concern because previous transplants have been met with discontent and apathy.[492] Thus, in implementing the Protocol, State Parties must be cognisant of the reasons that African countries shy away from participating in formal dispute settlement.[493]

8.3 The Dispute Settlement Body and Resolution Procedure

The Dispute Settlement Body (DSB) was established to administer the provisions of the Protocol. Thus, the DSB has the authority to establish a Panel, an Appellate Body, adopt Panel and Appellate reports, oversee the implementation of rulings, and authorise the suspension of concessions and obligations pursuant to rulings.[494] The DSB is comprised of State Parties' chosen representatives and its decisions are taken by consensus. However, following the WTO

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[486] Erasmus Dispute *op cit 480* p1
[487] Gregory Shaffer 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) p1
[488] Erasmus Dispute *op cit 480* p2
[489] Dispute Protocol *op cit 485* Article 3
[490] Akinkugbe *op cit 116* p139
[491] *Ibid.* p145
[492] *Ibid.* p145
[493] *Ibid.* p139
[494] Dispute Protocol *op cit 485* Article 5

approach, consensus is taken in two different ways.[495] As a general rule, consensus is reached if no delegation formally objects to the decision at the time the decision is proposed. Thus, only one delegation needs to object to prevent a decision being taken.[496] Conversely, when the DSB establishes panels, adopts Panel or Appellate Body reports or approves retaliatory measures, the DSB must sanction the decision unless there is *consensus against it*.[497] Thus, these decisions are taken by reverse consensus, which means that one State Party can insist that the decision is taken.[498] All State Parties are included in the decision-making process of the DSB. Thus, the party requesting approval of these decisions will likely ensure reverse consensus is met.[499] The first avenue of redress when a dispute emerges is to establish a consultation with the view of arriving at an amicable resolution.[500] Additionally, parties do have other alternative dispute resolution mechanisms available to resolve disputes.[501] Failing such, a State Party can request the DSB to establish a Panel for the purposes of formal resolution.

Consultations and ADR Mechanisms

The preliminary step to resolving a dispute between State Parties is the initiation of a consultation with the view to reaching an amicable resolution.[502] Thereby avoiding the more time consuming, contentious and costly formal dispute settlement procedure. State Parties with a substantial interest may request to join consultations.[503] This procedure is confidential and without prejudice to future proceedings. If no resolution is found within 60 days, the requesting party may request a Panel.[504] As aforesaid, the non-litigious nature of African States has resulted in a meagre record of trade integration disputes.[505] Therefore, the consultation procedure can enmesh this culture into the formal structures of AfCFTA. Nevertheless, there must not be an overreliance on consultations.[506]

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[495] Akinkugbe *op cit 116* p145

[496] WTO 'WTO Bodies involved in the Dispute Settlement Process' at *https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm#txt1* accessed on 24 March 2022.

[497] *Ibid.*

[498] *Ibid.*

[499] *Ibid.*

[500] Dispute Protocol *op cit 485* Article 6

[501] *Ibid.*

[502] Akinkugbe *op cit 116* p146

[503] Dispute Protocol *op cit 485* Article 7

[504] *Ibid.* Article 8

[505] Akinkugbe *op cit 116* p146

[506] *Ibid.* p147

Furthermore, Good Offices, Conciliation and Mediation as well as arbitration are available as ADR mechanisms. In the consultation process, the requesting State Party can require the offending party to reply to the allegations and failing such, require them to appear before a Panel.[507] Conversely, Good Offices, Conciliation and Mediation are entirely voluntary and can be terminated unilaterally at any point. These procedures can occur concurrently to Panel proceedings.[508] Furthermore, parties may by mutual agreement refer a dispute to arbitration.[509] Arbitration is an alternative private dispute settlement procedure in which parties refer a dispute to a chosen neutral third party to consider and determine the rights and obligations of the disputants.[510] The arbitrator provides an award setting out its decision. The arbitral award is binding on the parties and will be refered to the DSB for enforcement in accordance with the mechanisms outlined below.[511]

Rules-based regimes in their essence require confrontation. Thus, these mechanisms must not descend into political leveraging whereby legitimate grievances are swept aside and the legal framework remains untested. Africa must develop its own quintessential trade integration jurisprudence, and such necessitates formal dispute resolution.

Panels

Should the ADR mechanisms fail, the complainant may request that the DSB establish a Panel to formally resolve a dispute. State Parties nominate panellists to the Secretariat who are, thereafter, considered and approved by the DSB.[512] Panellists must have expertise in law, international trade or other areas covered by AfCFTA. Accordingly, panellists are to be chosen on the principles of objectivity, reliability, sound judgement and must be impartial and independent.[513] To avoid a conflict of interest, Panellists cannot be a national of either of the disputing parties.[514] Quorum varies according to the number of disputants: if there are two disputants, quorum is three panellists and if more than two, quorum is five.[515] From the date of

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[507] Mitsuo Matsushita, Thomas Schoenbaum, Pertros & Mavroidis, *et al.* 'The World Trade Organization: Law, Practice and Policy.' (2015) p91
[508] Dispute Protocol *op cit 485* Article 8
[509] *Ibid.* Article 28
[510]Emilia Onyema 'Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of African Continental Free Trade Area Agreement' (2020) p454
[511] Dispute Protocol *op cit 485* Article 27(5)
[512] *Ibid.* Article 10
[513] *Ibid.*
[514] *Ibid.*
[515] *Ibid.*

establishment, Panels have 20 days to consider the relevant provisions and make findings to assist the DSB in making a ruling.[516] As with consultations, third parties can be joined to the dispute should they demonstrate a substantial interest in the matter. Third Parties shall have the full array of dispute mechanisms available to them.[517] The Panel is empowered to seek information from any source that it deems appropriate. Thus, it may request information or technical advice from any State Party as well as call for expert testimony for scientific or technical aspects.[518] The deliberations of the Panel are confidential and additionally, to protect the independence of Panellists the reports are anonymous.[519] The Panel is charged with delivering a report outlining its reasons and justifications for making a finding. The Panel report is circulated, and State Parties may submit objections to the DSB prior to consideration thereof.[520] All State Parties are entitled to participate in these deliberations.[521] Within 60 days from circulation, the report must be considered and adopted by the DSB, unless a disputant gives notification of an appeal.[522] This decision is taken by reverse consensus and thereafter is binding on the disputants.

Appellate Body

A disputant may appeal the findings of a Panel report and request the establishment of an Appellate Body (AB). The AB is comprised of seven persons on a rotational basis and requires a quorum of three panellists to adjudicate a matter.[523] Likewise, the AB panellists must demonstrate the qualities required at the Panel-level.[524] Only the initial disputants at the panel-level will have the requisite locus standi to appeal a matter.[525] Importantly, third parties previously deemed to have a substantial interest in the dispute may be heard and make written submissions at the appeal.[526] In light of the economic consequences of contravening AfCFTA provisions, the AB must timeously consider and publish a report within 60 days of the disputant lodging an appeal. The AB can request a 30 day extension, but the proceedings cannot exceed

[516] *Ibid.* Article 11
[517] *Ibid.* Article 13
[518] *Ibid.* Article 17
[519] *Ibid.* Article 18
[520] *Ibid.* Article 19
[521] *Ibid.*
[522] *Ibid.*
[523] *Ibid.* Article 20
[524] Akinkugbe *op cit 116* p149
[525] *Ibid.*
[526] Dispute Protocol *op cit 485* Article 21(1)

90 days.[527] The AB is bound by the record of the Panel and thus is confined to the issues of interpretation and law covered therein. Accordingly, the AB is empowered to uphold, modify or reject the legal findings of the Panel and produce a single report attesting the views of the majority.[528] This report shall be anonymous to ensure independence and shall be adopted by the DSB in accordance with reverse consensus.[529]

Rulings

Should the Panel or AB conclude that a State Party's action is inconsistent with AfCFTA provisions, it shall recommend compliance and suggestions for the implementation of such.[530] This recommendation is binding upon adoption by the DSB. Thereafter, State Parties are obliged to promptly comply with the rulings and recommendations of the DSB.[531] If it is infeasible to implement these recommendations immediately, the State Party must comply within a reasonable time.[532] The DSB is charged with monitoring compliance and implementation of the ruling.[533] Accordingly, should the contravening party fail to implement the DSB ruling within a reasonable period of time, the aggrieved party is entitled to adopt compensation measures, suspend concessions or other obligations owed to the offending party on a temporary basis.[534] However, these measures are not in lieu of implementation, but are measures used to compel compliance. These measures must be authorised by the DSB and shall lapse once the ruling has been implemented.[535] These measures are not confined to the same sector of contravention as practically this may not have the desired deterring effect.[536] Thus, the aggrieved party may suspend concessions or obligations in any other sector under AfCFTA.[537] However, the aggrieved party is bound by the principle of proportionality. Thus, the suspension of concessions must be of an equivalence to harm suffered.[538]

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[527] *Ibid.* Article 21
[528] *Ibid.* Article 22
[529] *Ibid.*
[530] *Ibid.* Article 23
[531] *Ibid.* Article 24
[532] *Ibid.* Article 24
[533] *Ibid.*
[534] *Ibid.* Article 25(1)
[535] *Ibid.* Article 25(2)
[536] Akinkugbe *op cit 116* p150
[537] *Ibid.* p150
[538] *Ibid.*

8.4 Conclusion

A robust and participatory dispute settlement mechanism is key to giving effect to the objectives of AfCFTA as well as implementing the precepts of developmental regionalism. The Protocol has relied on operational and structural guidance from the WTO system. The transplantation of Western systems has not been conducive to African integration. Thus, the implementation of the dispute settlement mechanism must be contextualised to African realities and attitudes. The best practices of the RECs must be adopted to mitigate the incongruence of formalistic Western principles with African social practice. Accordingly, the treaty and its protocols operate in tandem and thus the proceeding discussion expands upon the ideology threaded through the framework.

CHAPTER 9: AFCFTA: IDEOLOGICAL CONCLUSIONS

9.1 Introduction

The objectives of the AfCFTA treaty and protocols indicate an attempt to break from Western integration lineage as State Parties seemingly aspire to implement the fundamental tenets of developmental regionalism. Nevertheless, cutting through the political bluster and viewed through the ideological prism outlined above – does AfCFTA in fact provide a significant departure and deliver an attuned legal framework inculcated with developmental regionalism to quell the mischief and advance the remedy? AfCFTA has taken the correct step, but further deliberations are required to truly give expression to the precepts of developmental regionalism.

9.2 The Treaty and Trade Protocols

Developmental Regionalism

AfCFTA has embraced fair trade integration by incorporating special and differential treatment, flexibility and variable geometry in both trade protocols. Thus, identified State Parties have longer time periods and flexibility to implement obligations. Variable geometry permits State Parties to implement AfCFTA decisions at varied speeds and prioritise certain sectors as required by their unique developmental needs. This is reflected by the varied Tariff Modalities under the goods protocol, which progresses according to capability. Furthermore, the sectoral approach adopted under the services protocol embraces fair trade principles. It caters for states that have capacity constraints as the targeted approach means State Parties can consolidate and prioritise identified sectoral liberalisation rather than overextend their capacity across multiple sectors. Additionally, the requirement of reciprocity in terms of MFN under both protocols operates in accordance with these fair trade principles. Consequently, the asymmetry of trade flows under both protocols ensures the fair sequencing of trade integration according to capacity.

AfCFTA recognises that structural transformation and transformative industrialisation are critical to establish African self-reliance. Thus, State Parties are encouraged to cooperate on

regional industrialisation to create regional value chains that are globally competitive. The establishment of regional markets and collective cooperation under AfCFTA will augment African capacity and unleash African competitiveness on the global stage. Therefore, State Parties are encouraged to promote the diversification and beneficiation of goods and services to add export value. In support thereof, parties are afforded certain latitudes to promote and protect industrilisation programmes, such as exclusion lists from liberalisation obligations for both goods and services. Furthermore, under the protocol on goods, State Parties can establish SEZs to encourage industrialisation investment and can also implement certain measures to protect infant industries. Moreover, State Parties can maintain subsidies in service sectors to facilitate transformative catch-up in an increasingly important global sector. Additionally, the protocol on services adopts a step-wise progression by strategically targeting identified service sectors to develop and transform. This also makes it more viable for State Parties to offer technical capacity assistance to one another in targeted service sectors.

Trade facilitation is a crucial focus of AfCFTA to reduce trade costs and delays on the continent. Under the protocol on goods, State Parties have established frameworks to progressively remove and identify NBTs, and to harmonise customs procedures. Furthermore, under the services protocol, State Parties are obligated to develop rules that govern the mutual recognition of services to cut out bureaucratic red-tape and facilitate smooth cross border service trade. Increasing connectivity is crucial to facilitating trade in goods and services. Thus, State Parties are obligated to cooperate on the establishment of strategic cross-border trade infrastructure development. However, a concrete framework for the establishment of regional trade infrastructure has not been negotiated. Furthermore, Africa has been ravaged by conflict and the violation of human rights. In addition to the human toll, conflict is inimical to trade. Thus, through the incorporation of Agenda 2063 and other AU projects, AfCFTA requires that State Parties embrace democracy and good governance. However, in line with historical deference to sovereignty, AfCFTA does not create concrete obligations thereto.

Law and Development Theory

The AfCFTA treaty and protocols have taken significant guidance from WTO instruments. State Parties have attempted to adapt these obligations to African conditions as indicated by the novel requirement of MFN reciprocity and the staggered liberalisation to account for varied developmental conditions. Nevertheless, the AfCFTA framework is largely guided by WTO

law and thus it is likely that as implementation occurs, this detachment from African conditions will surface. Africa suffers from highly varied and eclectic developmental challenges. These idiosyncrasies are lost in generalised obligations as a general principle fails to descend into the particulars of localised needs. Conversely, the protocol on services strategically focuses on identified sectors and thus sectoral-frameworks can be developed by the State Parties to appreciate the nuance of sectoral conditions. Thus, State Parties should adopt appendices to the protocol on goods for identified sectors, such as agriculture, in order to flesh out further nuances on a sectoral-level.

Nevertheless, the sheer scale of AfCFTA requires obligations to be framed in a generalised manner. Thus, AfCFTA's role as law to facilitate development cannot be intimately attuned to the socio-economic and political conditions on the ground. It is a Marxist utopian attempt to transform a continent on the basis of a legal framework and as aforesaid, law is more likely to produce positive developmental results if it is attuned to localised conditions. Thus, it is recommended that State Parties mitigate these weaknesses by adopting further instruments with strategic sectoral focus to facilitate a stepwise engineered transformation. Nevertheless, it is evident that AfCFTA as a legal framework will yield positive results for intra-African trade as it encourages State Parties to deliberate and cooperate on trade as well as broader policy issues. However, whether it is sufficient to rid Africa of its mischief is uncertain.

9.3 The Dispute Settlement Mechanism

The functioning of the dispute settlement mechanism is critical to the success of the inter-relationship of law and development. The dispute settlement structure outlined above is a transplantation of the WTO procedure. Historically, the transplantation from Western contexts has not fended well in Africa. In lieu of the conclusions about law and development above, the operation of the AfCFTA dispute settlement procedure must be contextualised to reflect African attitudes to dispute resolution as well as the political and socio-economic realities.[539] State Parties must look at the acquis and best practices of the RECs to best contextualise AfCFTA's dispute settlement procedure. Importantly, while the dispute settlement procedure must recognise the non-litigious nature of African States, it must simultaneously encourage adversarial dispute resolution as this is the only way to ensure the development of African

[539] Akinkugbe *op cit 116* p155

directed trade jurisprudence. The DSB process must not be operationalised as an alternative dispute mechanism, but rather a comprehensive system of both adversarial and ADR mechanisms.[540]

The jurisdiction of the dispute settlement procedure is limited to disputes arising between State Parties. However, it is the private entities that will drive cross-border trade and investment under AfCFTA.[541] Under this system, private entities will have to petition their State Parties to institute a dispute on their behalf. Commercial cross-border trade will invariably give rise to disputes between private parties. Thus, it begs the question whether the current framework is fit for purpose.[542] It is evident that commercial entities will be the parties that suffer the effects of AfCFTA contravention. Thus, it seems prudent to integrate private parties into the dispute settlement architecture of AfCFTA as they will have clear commercial interest to address disputes and won't shy away from adversarial resolution.[543] Moreover, experience from the RECs indicates that locking private actors out of the dispute settlement architecture has led to the demise of a functional dispute resolution system.[544]

It is evident that Africa's paltry participation at the multi-lateral level has been informed by imbalanced trade dynamics. The fear of retribution, amongst other reasons, has dissuaded the initiation of disputes despite legitimate grievances.[545] Thus, AfCFTA members must exercise unfettered and aspirational political will to achieve the objectives of AfCFTA.[546] Consequently, political backlash as a result of the initiation of disputes must be quelled by the collective to uphold AfCFTA.[547] Dispute resolution is key to achieving the peace and security, and good governance tenet of developmental regionalism. It bears repeating the success of AfCFTA depends on the political will to favour the collective over the individual.

[540] *Ibid.*
[541] Onyema *op cit 510* p446
[542] *Ibid.* p447
[543] *Ibid.*
[544] Akinkugbe *op cit 116* p156
[545] *Ibid.* p158
[546] *Ibid.*
[547] *Ibid.*

9.4 Conclusion

The scope of AfCFTA is evidently multi-dimensional and State Parties have further committed to negotiating protocols on competition, IP, investment and E-commerce. This embraces the holistic approach required to remedy the multi-faceted nature of Africa's developmental challenges. In light of above, it is evident that AfCFTA has embraced developmental regionalism as its ideological foundation. However, State Parties will need to conduct further deliberations to concretise the sentiments espoused in AfCFTA and further expand the scope to include matters such as climate change and gender equality to fully embrace the multi-dimensional model of developmental regionalism. Furthermore, the sheer scale of AfCFTA's aspirations invariably means that it cannot be fine-tuned to the specific development challenges of State Parties. Thus, to embrace a conducive law and development theory, State Parties must develop further instruments with strategic sectoral focus that cater to the nuances of various development sector challenges. Additionally, the dispute settlement mechanism must look to the best practices of the RECs to contextualise the system to the nuances of African state practices.

The State Parties may have attempted to embrace the most appropriate regional integration theory, but the success of AfCFTA will hinge on the capacity of State Parties to implement these obligations and ideas. Historically, African States have been quick to promulgate obligations and aspirations but have repeatedly struggled to deliver upon them.

CHAPTER 10: IMPLEMENTATION HURDLES

10.1 Introduction

AfCFTA is a rejuvenated attempt by the AU to remedy the pernicious and enduring consequences of the colonial and neo-colonial mischief. A push to cut the tether of reliance and embrace an African chartered developmental rise. Previous iterations of this aspiration have been undermined by ideological impositions that were detached from Africa's requirements. Thus, prior endeavours have failed to bring about Africa's rise. The provisions of AfCFTA indicate an ideological break from African integration lineage as the AU has embraced the theory of developmental regionalism. An ideological shift may have occurred, however, whether or not AfCFTA remedies the mischief of colonialism and neo-colonialism hinges on the State Parties' willingness and capacity to implement their stated obligations. AfCFTA has not addressed existing implementation issues nor catered for looming supranational crises, such as climate change, nuclear tensions and the deterioration of democracy. Thus, unless fortified by pragmatic collective benefit, these hurdles will unravel AfCFTA and splinter Pan-African solidarity. Accordingly, if left unaddressed, the State Parties will fail to rid Africa of its enduring mischief.

10.2 A Tired Symbol of Solidarity

Pan-Africanism has been used as a principle to coalesce and unite a diverse continent. The principle dictates social practice amongst African countries. The failure of Western theories to account for such, has resulted in low legitimacy and weak enforcement of previous integration efforts. Underpinned by developmental regionalism, AfCFTA centres Pan-Africanism through its inward focus of liberalisation and repeated insistence for regional cooperation and capacity building. Implicit to AfCFTA is an element of African protectionism as it prioritises liberalisation amongst its members prior to liberalising trade with external countries. This is illustrated in the operation of the MFN principle as trade negotiations with third parties are invariably framed by intra-African trade liberalisation. Furthermore, the variable geometry principle implicitly endorses a common destiny through varied paths. Practical differences, but shared dreams – this is the Pan-Africanist foundation. However, AfCFTA is a long-term project and the benefits derived therefrom will not be immediate nor equally spread. Accordingly,

AfCFTA is confronted by considerable implementation hurdles while we as a specie simultaneously face supranational crises that could shake our very existence. Thus, will AfCFTA's Pan-African centrepiece hold through turbulence, or will it fracture and splinter? Did idealism triumph where pragmatism ought to have prevailed?

10.3 Implementation Hurdles

AfCFTA is the largest free trade area ever created. It incorporates 54 countries and 1.3 billion people across 30 million square kilometres of land.[548] The sheer scale of this endeavour is unprecedented and extensive. Accordingly, past experience indicates that trade agreement negotiations are hampered where there is a high number of participating countries, and where negotiations are amongst poorer countries who lack transparency.[549] For AfCFTA, the shoe fits. Furthermore, African countries and regional integration efforts have consistently suffered institutional and human capital deficits.[550] This limitation is exacerbated by the duplication of efforts and the overlapping of institutions brought about by the 'spaghetti bowl effect.' The spaghetti bowl effect was coined to describe the proliferation of regional groupings and overlapping memberships in these communities.[551] For example, some countries are members of a customs union yet engage in negotiations to be party to another - which by definition is contradictory.[552] The overlapping memberships serve to dissipate efforts and resources.[553] Multiple and overlapping membership in regional communities prevents countries from fully committing to the aspirations of either regional community, and therefore undercuts the efficiency and effectiveness of regional integration.[554] Even in instances where objectives are complimentary, membership in numerous communities still drains significant material, financial and human resources.[555] AfCFTA was launched with the objective of counteracting the spaghetti bowl effect, but the numerous RECs still exist alongside AfCFTA and moreover parties to TFTA are still proceeding with negotiations. AfCFTA neglects to comprehensively address the role of RECs in the continental framework and has further failed to outline a plan

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[548] World Bank *op cit 197* p1
[549] AU & UNECA 'Boosting Intra-African Trade: Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast tracking of a Continental Free Trade Area' (2012) p13
[550] *Ibid.* p13
[551] Akokpari Dilemmas *op cit* 104 p99
[552] AU & UNECA 2012 *op cit 549* p13
[553] Akokpari Dilemmas *op cit* 104 p100
[554] *Ibid.*
[555] *Ibid.*

to rationalise and streamline REC membership. Thus, countries are confronting regional integration commitments on multiple fronts while still contending with domestic and international politics. The rise of popularism and nationalism globally provides a cautionary tale to AfCFTA and African regionalism. Additionally, State Parties are also negotiating EPAs and AGOA, which further requires institutional, human and financial capacity. Furthermore, African countries have failed to negotiate the EPAs and AGOA as a united block and thus there is a high chance that these agreements will be incoherent with regional integration commitments. In addition, these PTAs are laced with neo-colonial interest and thus will likely be contrary to AfCFTA's objectives.

AfCFTA is a member-driven trade arrangement that relies on State Parties to drive forward, administer and abide by the obligations agreed to in the treaty. African countries have a poor record of adhering to agreed to obligations. A much better record of professing them.[556] Thus, integration efforts have been blighted by puffery and rhetoric. For example, African governments have shown little inclination to implement regional commitments made in respect of good governance and peace.[557] This failure to deliver upon good governance commitments, repeatedly endorsed at the AU, is indicative of a larger issue that is a considerable hurdle to AfCFTA. Accordingly, the preservation of sovereignty and statehood is of the utmost importance to African States. Conversely, inherent to regional integration is the cession of some sovereignty to supranational institutions. Accordingly, in a clash between state sovereignty and regional authority, African governments tend to retreat, and protect state autonomy.[558] Thus, submitting to AfCFTA review mechanisms, recommendations of various protocol committees, DSB decisions and implementing painful obligations may be dismissed as unwarranted intervention into domestic affairs.[559] Furthermore, Africa is replete with corrupt dictators and elites hiding behind sovereignty who wield power for their own benefit while their populations suffer inhumane living conditions. Therefore, in addition to vacuous decadence, African dictators and elites are the chinks that can splinter the solidarity needed for AfCFTA to succeed. These elites can sell off strategic national assets for personal gain, to the crippling detriment of long-term statehood and regional objectives. This is illustrated by the French involvement in West Africa as aforementioned.

[556] *Ibid.*
[557] *Ibid.* p101
[558] *Ibid.*
[559] *Ibid.*

Against the backdrop of popularism, the distribution of benefits and burdens under AfCFTA is of concern. AfCFTA is a long-term project whose fruits will take time to yield and pain to bear.[560] History is plentiful with examples of stultifying integration disputes relating to the sharing of costs and benefits.[561] For example, the EAC collapsed in 1977 as a result of Tanzania and Uganda's discontent that Kenya received the lion's share of integration benefits.[562] Thus, some countries remain skeptical of integration due to the fear that African hegemons will dominate.[563] To exacerbate such tendencies, our present society is short-termist, fickle and temperamental, which means that the domestic political environment is volatile. Accordingly, AfCFTA has encoded asymmetrical trade and funding mechanisms to assist and support underdeveloped countries. The discontent to support underdeveloped countries is illustrated by the EU's struggles with Brexit as well as by the EU's and USA's move to reciprocal trade arrangements. Moreover, the delays in finalising the Schedule of Concessions under the goods protocol due to discord re asymmetrical trade mechanisms, illustrates this hesitancy. When it comes to bearing financial burdens even the most staunch professors of loyalty begin to sweat and manoeuvre. Furthermore, the establishment of AfCFTA requires a significant outlay of finances to develop complimentary infrastructure, institutional capacity, skill enhancement and manufacturing capability.[564] This financing will be raised from both African hegemons as well as neo-colonial interests and institutions. Both avenues have their downsides and propensity to agitate disquiet. The former, as evidenced by Brexit, will breed discontent with regards to the distribution of burdens and the support of 'freeloaders.' While the latter comes with conditionalities that are inimical to AfCFTA's aspirations. Neo-colonial states have significant economic interests to protect in Africa and thus financing will be used as a weapon to impose these interests. As seen globally and in Africa, these interests are immensely powerful and are prepared to employ malevolent tactics to protect them. Thus, corrupt African dictators and elites are the ideal Trojan horse for further neo-colonial capture.

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[560] *Ibid.* p100
[561] *Ibid.* p103
[562] *Ibid.* p105
[563] AU & UNECA 2012 *op cit 549* p13
[564] *Ibid.*

10.4 Conclusion

AfCFTA rests on a tired Pan-African symbol that has been too often proffered yet not realised. It is a rushed attempt to achieve continental unity without having substantively addressed existing regional integration issues. Idealism can only get you so far. The reality is that Africa is an incredibly diverse continent that faces a myriad of different developmental challenges. The ideal of Pan-African solidarity is a general principle that seeks to overcome this diversity and difference, but when you descend into the particulars you strike those distinctions. In light of the implementation challenges and foreboding supranational crises, those differences shall widen and Pan-African solidarity will fracture. Pan-Africanism attempts to stretch the divide and integrate the continent, but in actuality there isn't robust commonality to form steadfast continental integration. The principle of variable geometry may mitigate some of these weaknesses, but again the developmental polarities amongst State Parties will likely breed political discontent over time. Thus, as is habit, State Parties will retreat into their sovereignty as they confront AfCFTA implementation hurdles. While AfCFTA may have adopted the most viable integration theory by choosing developmental regionalism, the sheer scale of its objectives and the implementation hurdles thereto, makes me skeptical that AfCFTA will remedy Africa's enduring mischief.

Nevertheless, the horse has bolted and AfCFTA is in operation. Thus, rather than a new blueprint, measures must be adopted to mitigate its frailties. Accordingly, to offset the weaknesses of coalescing around Pan-Africanism, pragmatic projects underpinned by technocratic functionalism should be developed to induce commonality. Under the guise of AfCFTA, State Parties must develop regional infrastructure projects to provide tangible examples that State Parties can cite as benefits of regional integration, for example, in order to quell rising nationalism. These regional infrastructure projects should be centred around energy, water, telecommunications and transportation links. Thus, functionalism can be used as a mechanism to forge commonality between countries as they invest in shared infrastructure. This should be incepted at a REC-level with AfCFTA acting as a quasi-federal framework for oversight and direction. To this end, if AfCFTA is to succeed at remedying Africa's enduring mischief, the rationalisation of REC membership is paramount. The Abuja Treaty had the correct idea to divide Africa into five pillars of integration that slowly merge into a large continental community. The scale of AfCFTA's aspirations is a major stumbling block , but if

Africa could rationalise and forge REC memberships that negotiate under the quasi-federal guise of AfCFTA, I believe this would be the best method at achieving continent-wide integration. Therefore, it is imperative that State Parties adopt a cogent and pragmatic stance to REC membership rather than one of idealism. Thus, to overcome implementation hurdles, State Parties must negotiate a protocol that rationalises REC membership and governs the role that RECs play in the development of AfCFTA.

CHAPTER 11: CONCLUSION

The implementation of AfCFTA has occurred at a remarkable moment in human history, as the world order finds itself at a confluence of crises of startling severity.[565] It is a unique moment that is both ominous in portent and bright with the hope of a better future for all.[566] The stability of our society is threatened by the deterioration of democracy, climate change, a worldwide pandemic, and growing tensions amongst nuclear hegemons.[567] All international in character, African nation-states must soften their post-independence cling to sovereignty and confront these crises to realise the long-espoused Pan-African ideals underpinning AfCFTA.[568]

AfCFTA is an ambitious remedy to a firmly embedded mischief. It is an invigorated Pan-African effort to forge continental solidarity and restructure the continent's position in the world economic order. It seeks to remedy the structural and societal distortions caused by the lingering legacy of colonialism, and the menaces of neo-colonialism. The State Parties have correctly embraced the model of developmental regionalism to underpin this pursuit. Nevertheless, the project remains incomplete. State Parties must address the shortcomings of AfCFTA by forging robust and pragmatic collective interest, while also expanding and tuning the framework to the eclectic developmental challenges that African societies face. Failing such, the implementation hurdles and looming supranational crises will overwhelm AfCFTA and the mischief shall endure. Africa has suffered many underwhelming attempts to integrate and thus, in the broader global context, this feels like a now or never moment for African integration. If African nations can effectively co-operate and continue deliberations to address AfCFTA's present weaknesses, AfCFTA has the potential to remedy Africa's enduring mischief and transform African economies out from the periphery of international trade.

Only time will tell whether AfCFTA is a meretricious symbol of integration or a concerted and substantive effort to develop and unite Africa. The Lions may have been in slumber, but it is hoped that AfCFTA provides a caffeinated rise, and the Lions march forward to remedy this enduring mischief.

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[565]Chomsky, Noam 'Internationalism or Extinction' (2020) *Progressive International* at *https://progressive.international/wire/2020-09-18-noam-chomsky-internationalism-or-extinction/en* accessed on 01 May 2021

[566]*Ibid.*

[567] *Ibid.*

[568] *Ibid.*

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