Title page

IMPLEMENTING THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT (AfCFTA): POLICIES, REGULATIONS, LAWS AND INSTITUTIONS REQUIRED FOR DEVELOPMENT.

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in the Department of Commercial Law, Faculty of Law
University of Cape Town

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DEDICATION

To Isaac Ishaku Nagu,
Whose love, support and warm words of encouragement kept me going

and

Lydia Isaac Nagu
Through whose prayers the completion of this work was possible.

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
AfCFTA	African Continental Free Trade Area
AFDB	African Development Bank
ALDIM	Analytical Law and Developmental Integration Model
ANE	Association of Nigerian Exporters
AU	African Union
AUDA	African Union Development Agency
CAMA	Companies and Allied Matters Act
CBN	Central Bank of Nigeria
CEMA	Customs and Excise Management Act
CEN-SAD	The Community of Sahel-Saharan States
CET	Common External Tariff
CFRN	Constitution of the Federal Republic of Nigeria
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organizations
DPB	Dollars per Barrel
DRC	Democratic Republic of Congo
DSM	Dispute Settlement Mechanism
EAC	East African Community
ECA	Economic Commission for Africa
ECOWAS	Economic Community of West African States
EMT	Economic Management Team
ENFP	Enlarged National Focal Point on Trade
EOI	Export Oriented Industrialization
ERGP	Economic Recovery and Growth Plan
ESI	Electricity Supply Industry
ETLS	ECOWAS Trade Liberalisation Scheme
EU	European Union
FCCPA	Federal Competition and Consumer Protection Act
FCCPC	Federal Competition and Consumer Protection Commission
FDI	Foreign Direct Investment
FEC	Federal Executive Council
FMITI	Federal Ministry of Industry, Trade and Investment
FTA	Free Trade Area
GATT	General Agreement for Trade and Tariffs
GDP	Gross Domestic Product
HOS	Heckscher-Ohlin-Samuelson
ICT	Information and Communications Technology
IDA	International Development Association
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IP	Intellectual Property
IT	Information Technology
LDC	Least Developed Country
LFI	Legal Frameworks and Institutions
LFN	Laws of the Federation of Nigeria,
LG	Legal Governance
LLDC	Land-Locked developing country

LPA	Lagos Plan of Action
MAN	Manufacturers Association of Nigeria
MAP	Millennium Partnership for the African Recovery Programme
MFN	Most Favourable Nation
MOJ	Ministry of Justice
MSME	Micro, Small & Medium Enterprises
MTN	Mobile Telephone Network
MTNDP	Medium-Term National Development Plan
NACCIMA	National Association of the Chambers of Commerce, Industry, Mines and Agriculture
NAFDAC	National Agency for Food and Drug Administration and Control
NAI	New Africa Initiative
NAMA	Non-Agriculture Market Access
NASSI	National Association of Small-Scale Industrialists
NEDPS	National Export Development and Promotion Strategy
NEP	National Energy Policy
NEPAD	New Partnership for African Development
NEPC	Nigerian Export Promotion Council
NIIMP	National Integrated Infrastructure Master Plan
NIPC	Nigerian Investment Promotion Commission
NIRP	National Industrial Revolution Plan
NOTN	Nigerian Office for Trade Negotiation
NPL	Non-Performing Loans
NTB	Non-tariff barriers
OAU	Organisation of African Unity
OPS	Organised Private Sector
OTRI	Overall Trade Restrictiveness Index
PC	Productivity Constraints
PPG	Public and Publicly Guaranteed
PTA	Preferential Trade Agreements
REC	Regional Economic Community
RIM	Regulatory Impact Mechanisms
ROO	Rules of Origin
RTA	Regional Trade Area
S&DT	Special and Differential Treatment (S&DT)
SAPs	Structural Adjustment Programs
SDG	Sustainable Development Goals
SEZA	Special Economic Zones Authority
SME	Small & Medium Scale Enterprises
SON	Standards Organisation of Nigeria
STI	Science, Technology and Innovation
TFTA	Tripartite Free Trade Area
TRF	Trade Policy Framework
TRIPS	Trade-related aspects of intellectual property rights
TRM	Trade Remedy Mechanism
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
US	United States
VAT	Value-added Taxes
WTO	World Trade Organization

TABLE OF STATUTES AND LEGAL INSTRUMENTS

Agreement Establishing the African Continental Free Trade Area 2018 (INT).

Protocol on Settlement of Disputes

Protocol on Trade in Goods

Protocol on Trade in Services.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994 (INT).

Agriculture and Food Authority Act 13 of 2013 (K).

Constitution of the Federal Democratic Republic of Ethiopia, 1994. (E).

Constitution of the Federal Republic of Nigeria, 1999. (N)

Customs and Excise Management Act, of 2004. (N).

EAC Customs Management Act, 2004. (K).

Ethio-Sudan Trade Agreement, 2003. (E).

Finance Act, of 2018. (K).

General Agreement on Trade in Services (GATS) 1994 . (INT).

Intergovernmental relations Relations Act, of 2012. (K).

Investment Promotion Act 6 of 2004 (K).

Lagos Plan of Action for the Economic Development of Africa, 1980. (INT).

Standards Act, 496 of the Laws of Kenya.

Tax Laws (Amended) Bill , 2018of 2018 . (K).

The Constitution of Kenya, 2010. (K).

The Federal Competition and Consumer Protection Act, 2019 . (N).

Trade Competition and Consumer Protection Proclamation 813 of 2013. (E).

Trade Remedies Act 32 of 2017. (K).

Trade Remedies Act, 2017. (K)

Treaty Establishing the African Economic Community 1991. (INT).

Treaty Establishing the African Economic Community 1991. (INT).

Treaty Establishing the European Coal and Steel Community 1951. (INT).

TABLE OF CASES

LIST OF TABLES AND ILLUSTRATIONS

LIST OF ANNEXES

ABSTRACT

On 26 May 2013 at the 21st Ordinary Assembly of the African Union's Assembly, African heads of state and governments adopted a solemn declaration for the continent's development. This prompted, in 2015, the official launch of a 50-year blueprint (i.e. Agenda 2063) for the re-creation of the region through a people-driven process into one that is integrated, prosperous and defined by inclusive growth and sustainable development. This blueprint has 15 flagship projects for effectuating the aim of continental growth, transformation, and development. One of these flagship projects is the African Continental Free Trade Area (AfCFTA), Africa's most ambitious attempt at integration and development since the formation of the African Union, and the subject of this research.

The AfCFTA is an African Union member-state driven free trade area, founded on theories of trade, and driven by Pan-African values that promise an endogenous pathway to inclusive and sustainable development. The initiative, once fully operational, will have the effect of integrating the continent for the first time under one regime of liberalisation that covers goods, services, intellectual property, investment, competition, and digital trade, among others. It is submitted, however, that trade integration alone may not provide enough stimulus for the holistic development that the region deeply requires. Development imposes (in addition to increasing trade by operationalising the AfCFTA) an imperative for building regulatory and institutional capacity and (where necessary) reforming the trade governance processes in the state parties. It is against this background that this study probes into the implementation of the AfCFTA in the context of select case studies; Nigeria, Kenya and Ethiopia. The study combined doctrinal research with empirical methods that utilised semi-structured interviews with public and private sector stakeholders from the three countries.

The thesis is structured into two parts. The first one outlines the theoretical and analytical framework as a means of situating the AfCFTA in the broader conversation on development, international trade, and regional integration whilst also reflecting it as a unique and Pan-African expression of same. The second examines the mentioned case studies through the lens of the Analytical Law and Developmental Integration Model (ALDIM) developed by the researcher. The study found that a developmental implementation of the AfCFTA by the three countries that have been selected as case studies would require responses ranging from a shift in development thinking and the creation of value-driven trade policy frameworks to more pragmatic steps such as the creation of institutional mechanisms for cohesive trade policy formulation and governance, the strengthening of existing

institutions, and the institutionalisation of collaboration for a more inclusive trade policy governance. Ultimately, the study advances projections on how regional integration initiatives could yield development outcomes in domestic settings in the context of African states, thereby affirming the influence of trade as an agent for modernisation and the positive alteration of governance processes.

PART ONE

1. CHAPTER ONE: INTRODUCTION TO THE RESEARCH

> [C]cooperation among African countries, is a sine qua non for the achievement of national socio-economic goals, and not an "extra" to be given thought to after the process of development is well advanced.
>
> - Adebayo Adedeji, 1976.[1]

1.1. Introduction and research question

The subject of this thesis is the African Continental Free Trade Area (AfCFTA) initiative and the efforts by its member states to utilize it for their development planning. The AfCFTA which emerged as a product of the AU's blueprint for regional growth and transformation, promises an endogenous pathway to inclusive and sustainable development. It is a rules-based, member-state driven free trade area, founded on theories of trade, and driven by Pan-African values. Once fully operational, it will have the effect of integrating the continent for the first time under a single trade regime that ambitiously covers goods, services, intellectual property, investment, competition and digital trade, among others.

It is submitted however, that the rules based trade framework provided by the AfCFTA may not be sufficient by itself to stimulate holistic development. This is particularly so, where the domestic environment within which it is to be implemented is not properly aligned to its core aims and the institutional capacity for its implementation in its state parties is inadequate. The problem is further exacerbated when the major supply-side constraints which can readily impede its aims remain pervasive. In other words, optimising the AfCFTA imposes a critical imperative for reforms by way of domestic development planning accompanied by institutional capacity and trade governance reconfiguration. Simultaneously, there needs to be a purposeful effort in member countries to address supply-side constraints or productivity

[1] Adebayo Adedeji was the longest serving Executive Secretary of the ECA (1975-1991), regarded as the father of African Integration, having led the creation of the Lagos Plan of Action in 1980. Adebayo Adedeji *Africa, The Third World and the Search for a New Economic Order* (1976). See also Asante S K *African development: Adebayo Adedeji's alternative strategies* (1991) 6; See also David Simon (eds) *Fifty Key Thinkers on Development* (2006) 4; Adebajo A 'A Tale of Three Cassandras: Jean Monnet, Raúl Prebisch, and Adebayo Adedeji' In Region-Building in Africa (2016) 53-67.

inhibitors such as infrastructural deficits, issues related to trade finance, productive capacity deficits amongst others.

It is against this background that this study examines the pre-implementation measures essential to the optimisation of the AfCFTA in the context of three distinct case studies, namely, Nigeria, Kenya and Ethiopia. The research questions guiding this study therefore are:

1. How suitable is the African Continental Free Trade Area (AfCFTA) agreement for enabling development in its member states?
2. In what ways should the legal and institutional frameworks of African Countries reconfigure to support the AfCFTA in a manner that advances their development?
3. What factors are key to the effective implementation of the AfCFTA as an enabler of development while addressing the supply-side constraints and advancing the industrialisation of its member states?

Since the determinants of legal and institutional 'AfCFTA-readiness' vary from country to country due to the peculiarities of differing political economies, it was imperative to apply an adjustable rubric by way of an interdisciplinary approach. This allowed for the accommodation of asymmetries in variables such as economic policy, political history and development outlook, among others.[2] In this regard, law, development, and economic integration theories were helpful. Law and development theories and economic integration theories are similar in that they have both been applied in the study of development conditions in the Global South. They only differ in that, while the theory of law and development puts the instrumentality of law at the centre of its analysis, economic integration theories emphasise the pivotal role of trade policies. Insights from both have been carefully combined in this work to create a framework used in analysing the domestic legal conditions under which AfCFTA development objectives should be advisedly pursued.[3]

1.2. Background to the study

When renowned Nigerian Pan-Africanist, Nnamdi Azikiwe, argued that the realisation of a new Africa could only be possible if the African were to cultivate a balance that leads to social regeneration, thereby realising economic determination, becoming

[2] This is elaborated on in chapter two

[3] This framework, articulated as the 'Analytical Law and Developmental Integration Model (ALDIM)' is elaborated on in Chapter Two.

emancipated, and ushering in a political resurgence,[4] the continent was young (in geopolitical contexts), newly independent, and only beginning to grapple with the intricate dynamics of statehood.[5] The inspiration for creating this 'new Africa' was largely the consolidation of post-independence gains; and to unite towards charting a course for development through which the continent could find healing.[6] This argument has remained relevant for over half a century since the call for the cultivation of this balance was made. Through the founding of the Organisation of African Unity (OAU) in 1963 and its eventual transmutation to the African Union (AU), the vision of this development through regional collaboration was formalised in policy frameworks such as the Monrovia Declaration, the Lagos Plan of Action, and the Abuja Treaty.[7] However, it was argued that because the ideologies through which earlier African integration initiatives were driven were more political than developmental, the region's intergovernmental or integration coalitions (such as the OAU) performed sub-optimally.[8]

Due to critiques like these, the AU (the OAU's successor) prioritized continental development and transformation over everything else. Accordingly, on the 26 May 2013 at the 21st Ordinary Assembly of the African Union's Assembly, African heads of state and governments adopted a solemn declaration for the continent's development.[9] This prompted the official launch in 2015[10] of a 50-year blueprint (i.e. Agenda 2063) for the recreation of the region through a people-driven process into one that was integrated, prosperous and defined by inclusive growth and sustainable development.[11] This blueprint has 15 flagship

[4] KAB Jones-Quartey *A life of Azikiwe* (1965) 10.

[5] Like Nnamdi Azikiwe, other Pan-Africanists that played significant roles in the emancipation of Africa included Julius Nyerere and Kwame Nkrumah. Kwame Nkrumah acknowledged that the solution to the problem of underdevelopment in Africa was in uniting for a common purpose. For Julius Nyerere the goal of unity was not only to lead to development but liberate the African peoples from humiliation. See P Bjerk *Julius Nyerere* (2017); N Kwame *I Speak of Freedom: A Statement of African Ideology* (1961) xi-xiv.

[6] Babatunde Olaitan Fagbayibo 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' (unpublished PhD thesis, University of Pretoria, 2010) ch 1.

[7] The Abuja treaty of 1991 (formally known as the 'Treaty establishing the African Economic Community'), set the most ambitious agenda for the establishment of a fully economically integrated continent in the OAU era. Francis Nguendi Ikome *From the Lagos Plan of Action to the New Partnership for Africa's Development: the political economy of African regional initiatives* (2007) ch 1; Samuel O Oloruntoba, *Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations* (2016) 168; *The Lagos Plan of Action*, 1979.

[8] Such as ideologies entrenched in Pan-Africanism, towards the development of an African identity, the emancipation of southern Africa and the consolidation of interests towards developing a unified political front against imperial counter-interests). Oloruntoba ibid; Ikome ibid.

[9] African Union '50th Anniversary Solemn Declaration' available online at Link Accessed on the 3rd August 2022 ;

[10] African Union 'Agenda 2063: The Africa we want' available online at Link accessed on 3rd June 2018; See also African Union 'Second continental report on the implementation of Agenda 2063' available online at Link accessed on 3rd June 2022.

[11] Ibid.

projects for effectuating the aim of continental growth, transformation and development. One of these flagship projects is the African Continental Free Trade Area (AfCFTA).[12]

The African Continental Free Trade Area (AfCFTA) is an African Union member-state driven free trade area, founded on theories of trade, and driven by Pan-African values that could offer an endogenous pathway to inclusive and sustainable development. Put simply, the AfCFTA is the trade constituent of Africa's developmental blueprint (i.e., the Agenda 2063) aimed at increasing the region's capacity to trade goods and services with itself. Two assumptions inform the inclusion of a Free Trade Area in the Agenda 2063. First is the assumption on the correlation between trade and economic development. In this regard a prominent submission of a wide range of economic theorists — is that trade has enormous advantages for parties that actively engage in it. For instance, while David Ricardo submits that specialisation and free trade always yielded positive outcomes for states,[13] African development scholar, Adedeji, highlights the importance of endogenous trade (via the integration of markets) for the emancipation of Africa from the throes of underdevelopment.[14] The idea is that if international trade is theoretically advantageous for those participating in it then, by increasing continental trade, Africa could positively alter its development paradigm. The second assumption builds on the first and relates to the low intra-African trade indices. On this note it was suggested that the negligible level of intra-African trade is one fundamental reason why the continent is unable to address its developmental challenges. At the time that the Agenda 2063 was launched, intra-African trade fluctuated between 15 and 20 per cent.[15] Compared to the other regions of the world such as 67 per cent within the European Union, 58 per cent in Asia, 48 per cent in the North American Free Trade Area and 20 per cent in Latin America, the low levels of intra-African trade seem to indicate reluctance in the drive for regional trade.[16]

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[12] Ibid.

[13] David Ricardo *Principles of political economy and taxation* (2004) ch 7, 85. More on this is discussed in Chapter 2

[14] Adedeji Adebayo and Jeggan Colley Senghor *Towards a Dynamic African Economy: Selected Speeches and Lectures 1975-1986* (2014)

[15] E W Bond, Riezman R G and Syropoulos C 'A strategic and welfare theoretic analysis of free trade areas' (2013) *International Trade Agreements and Political Economy* 101-127; African Development Bank 'Intra-African trade is key to sustainable development - African Economic Outlook' available at *https://www.afdb.org/en/news-and-events/intra-african-trade-is-key-to-sustainable-development-african-economic-outlook-17022/* accessed on 27 July 2019.

[16] Trade law Centre 'African Trade Report 2018- Boosting Intra African Trade: The Implications for the African Continental Free Trade Agreement' available *at https://www.tralac.org/ documents/news/2042-african-trade-report-2018-afreximbank/file.html*, accessed on 3 May 2019.

However, it has been submitted that deeper issues undermine intra-African trade; these include regulatory, institutional and infrastructure constraints which interfere with the ability to create larger markets, link landlocked countries, and boost intra-African trade.[17] Other issues include inefficient regional policy implementation, severe deficiencies in hard and soft infrastructure for trade facilitation, and low financing capacity. Furthermore, overly technical and unharmonized border management and procedures interfere with transit management and contribute to non-tariff barriers.[18] These hindering factors underscore the need to differently advance the trade liberalisation goals of the continent's regional initiatives, such as Agenda 2063.

The AfCFTA agreement (signed in March 2018)[19] essentially has the effect of integrating the continent for the first time under a regime of liberalisation that covers goods, services, intellectual property, investment, competition, and digital trade, among others.[20] This comprehensive coverage is one of the reasons why the AfCFTA has been regarded as ambitious.[21] Other reasons include its size — it is one of the largest single markets in the world, as it binds the largest number of parties to a pact of tariff liberalisation since the Marrakesh Agreement which led to the formation of the WTO.[22] Another reason is the nature of the state parties involved, nearly all of which are either developing countries or least developed countries (LDCs). The AfCFTA represents a significant effort by a bloc of states comprised of the greatest number of developing countries to dare the odds by cooperating towards proffering solutions to their developmental issues.[23]

The idea of integrating the continent on the scale envisaged by the AfCFTA could be justified for political and economic reasons. Politically, integration via the AfCFTA could

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[17] African Development Bank 'Results Measurement Framework 2016–2025'. (2017) at 38, available at *https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Final_-_RMF_-__Rev.2_Final_.pdf,* accessed on 29 April 2019.

[18] Bond et al op cit note 15 at 101-127; African Development Bank. ibid 34.

[19] It became operational in July 2019, upon attaining the requisite number of ratifications. See Africa Union 'State-Parties: Ratification Status List' available at Link accessed on 25th April 2021

[20] On the 21st March 2018, representatives of 44 of the 55 African Union (AU) member states attended the signing ceremony of the Agreement. Notably absent was the Nigerian president, Muhammadu Buhari, who stated that Nigeria had chosen to abstain for reasons of 'broader consultations. See Programme for Infrastructural Development in Africa '2018 Progress Report: Summary Update', available at *https://www.tralac.org/documents/resources/african-union/2509-2018-pida-progress-report-summaryupdate/file.html,* accessed on 3rd May 2019.

[21] Faizel Ismail *The African Continental Free Trade Area (AfCFTA) and Developmental Regionalism* (2021) 1.

[22] Brendan Vickers *Handbook on Regional Integration in Africa- Towards Agenda 2063* (2017) ch 3; N N Okechukwu and Chikata I 'The African Union Continental Free Trade Area: Challenges and Prospects' (2018) 4 *International Journal of Sustainable Development Research* 36-43.

[23] The Economist 'The Unlucky Continent: How Africa's riches has brought it only misery' available at *https://www.economist.com/books-and-arts/2014/09/06/the-unlucky-continent* accessed 22 April 2019.

help deepen intergovernmental co-operation.[24] After independence, the continent, under the auspices of the newly formed Organisation of African Unity, committed itself to dealing with the intricate dynamics of statehood collectively: the AfCFTA is somewhat of a renewal of that agreement on co-operation for growth, but this time in the era of the African Union.[25] This level of cooperation could aid the consolidation of less mature democracies and lead to a harmonisation of policies.[26] The economic rationale appears to be the more pronounced consideration for the AfCFTA.

The AfCFTA could enable the region to collectively engage with economic growth challenges. Increasing commercial activity through trade policies could lead to improved economic welfare and then sustainable development.[27] This approach of utilising a regional trade agreement to boost commercial activity has been reinforced by empirical models like the gravity model of international trade. The gravity model which is used to analyse bilateral trade flows as well as the efficiency of regional trade agreements (RTAs),[28] proposes that more substantial trade flows between two countries are significantly attributable to the size of their GDPs and geographic proximity and negated by the distance between them. It shows up to a three-fold impact on trade upon the creation of a single market.[29] More specifically, the model shows (from the historical experience of countries joining regional trade areas or RTAs) that the countries that join an RTA experience an average of 45 per cent increase in

[24] Vickers op cit note 22 at 11-35.

[25] Co-operation within the context of the initiative includes all forms of collaboration between countries on ventures ranging from the execution of joint projects to technical sectors partnership and even policy harmonisation as well as the joint development of shared natural resources on the continent. See Margaret Lee 'Regionalism in Africa: A part of the problem or a part of Solution' (2002) 9 *Polis / R.C.S.P. / C.P.S.R.* 3; See Preamble, *Agreement establishing the African Continental Free Trade Area'* 2018; See also Part IV, Protocol on Trade in goods ibid.

[26] See Liu, Xuepeng, and Emanuel Ornelas 'Free trade agreements and the consolidation of democracy' (2014) 6 *American Economic Journal of Macroeconomics* 29-70; Jeffrey H Bergstrand *The African Continental Free Trade Agreement: Gains, Challenges, and the Rationale* (2019) paper presented at School of Economics, University of Cape Town 8.

[27] Jagdish Bhagwati *Termites in the trading system: how preferential agreements undermine free trade* (2008); See also Paul Krugman 'The move towards Free trade zones' (1991) *Economic Review* 5 – 27; Robert M Stern (ed) 'Comparative Advantage, Growth, and the Gains from Trade and Globalization. A Festschrift in Honor of Alan V Deardorff.' (2011); Woolcock Stephen '*The European Union Policy towards Free Trade Agreements'* (2007) ECIPE Working Paper 03/2007; Bond et al op cit note 15 at 101-127.

[28] Head Keith, and Thierry Mayer 'Gravity equations: Workhorse, toolkit, cookbook' (2013) 4 *Handbook of International Economics*; Warin T, Wunnava P V, Tengia, O and Wandschneider K 'Southern African Economic Integration: Evidence from an Augmented Gravity Model', (2009) 4316 *IZA Discussion Paper*; Anderson J E and Van Wincoop E 'Gravity with Gravitas: A Solution to the Border Puzzle' (2003) 93 *American Economic Review* 170–192; Bergstrand, J H 'The Gravity Equation in International Trade: Some Microeconomic Foundations and Empirical Evidence' (1985) *The Review of Economic and Statistics* 474–481.

[29] See Gnimassoun, Blaise 'Regional integration: Do intra-African trade and migration improve income in Africa?' (2018) 43 *International Regional Science* 587-631; See also D A Irwin and M Terviö 'Does trade raise income? Evidence from the twentieth century' (2002) 58 *Journal of International Economics* 1–18; Frankel J A, Romer D 'Does trade cause growth?' (1999) *American Economic Review* 89, 379-399; Head, Keith et al Ibid.

trade flow.[30] This increase in trade flows increases per-capita incomes and reduces the (administrative and political) costs associated with tariffs. The gravity model confirms that intra-African trade remains significantly low relative to its potential.[31] In this regard, AfCFTA represents an attempt to use trade policy to influence some of the variables that have long interfered with intra-African trade creation for the purpose of development.

It is suggested, nevertheless, that trade alone may not provide enough stimuli for holistic development. Development scholars like Chang, Stiglitz, Davies, and Ismail, while challenging the mainstream view (that asserts the existence of parallels between trade and development) argue that advancing development through trade (especially in the context of Global South countries) would equally require coherent 'development interventions' of various kinds. For example, while Chang (using South Korea and other Asian countries as reference points) advances the effectiveness of industrial policies and selective protectionism rather than only free trade and deregulation,[32] Lopes notes the importance of structural transformation and the indispensable role of the states in its regard for development.[33] Similarly, Davies, for his part, advocates for both macro and micro co-ordination in a multi-sectoral programme that embraces production, infrastructure and trade.[34] Ismail submits that trade liberalisation must be effected using a development integration approach, complemented with cooperation on industrialisation, infrastructure and governance.[35]

In agreeing with the logic in the arguments advanced by the development scholars highlighted above, this research submits that Africa's ambitious trade agenda (the AfCFTA) will simply by its design alone neither guarantee development nor the creation of economies strong enough to compete in an increasingly dynamic international trading system. The AfCFTA is a means to an end, not an end in itself, and will thus require the strategic

[30] Ethan McCormac, Aaron Tam and Dan Aylward-Mills 'What Africa stands to gain from the AfCFTA' WP vivid economics (2019) 3 available at *https://www.vivideconomics.com/wp-content/uploads/2019/08/AfCFTA-Impacts-Working-Paper-1.pdf* accessed on 10th June 2020.

[31] Edris Seid 'Regional Integration and Trade in Sub-Saharan Africa, 1993–2010: An Augmented Gravity Model' in Ncube, Mthuli, et al (eds) *Regional Integration and Trade in Africa* (2014) 91.

[32] Haa-Joon Chang and Andreoni A 'Industrial policy in a changing world: basic principles, neglected issues and new challenges' (2016) *Cambridge Journal of Economics 40*; Haa-Joon Chang, Andreoni, A and Kuan, M L, International industrial policy experiences and the lessons for the UK (2013); Haa-Joon Chang *The East Asian development experience: the miracle, the crisis and the future* (2006); See also Ha-Joon Chang Kicking Away the Ladder: Development Strategy in Historical Perspective (2003) 3; Haa Joon Chang 'It's Time to Reject the Washington Consensus' The Guardian 9 November 2010 available at http://www.guardian.co.uk/commentisfree/2010/nov/09/time-to-rejectwashington-seoul-g20, accessed on 29 September 2022.

[33] Carlos Lopes *Africa in transformation: Economic development in the age of doubt* (2018) 79

[34] Rob Davies, *The Politics of Trade in the Era of Hyper-Globalisation: A Southern African Perspective* (2019); Robert Davies, Promoting Regional Integration in Africa: An Analyses of Prospects and Problems from a South African Perspective' (1996) 5 African Security Review

[35] These arguments are elaborated on in chapter 2.

identification of priorities by member states, and a developmental implementation of strategies, otherwise its aim of development may be elusive. It is in this regard that the imperatives of building regulatory and institutional capacity and (where necessary) reforming the trade governance processes in the state parties to ensure they are AfCFTA trade ready cannot be overemphasised.

A body of literature from a legal perspective has developed to support the idea that efforts geared towards development will need to be complemented by the necessary legal regimes and institutions. For instance, Lee's general theory of law and development provides some insights in this regard by, *inter alia* arguing that law and development are not mutually exclusive and do not always proceed in a linear sequence. Rather, how a law is implemented is crucial to its developmental effectiveness. Implementation is this regard (Lee argues), is significantly determined by the structures in place for monitoring and enforcement. Where states are unresponsive to legal objectives or cannot enforce and implement laws it adversely affects the developmental yield of those laws. It is in this light that the research probes into the implementation of the AfCFTA in the context of select case studies.

The study argues and concludes that a developmental implementation of the AfCFTA would require responses ranging from a shift in development thinking and the creation of value-driven trade policy frameworks to more pragmatic steps such as the creation of institutional mechanisms for cohesive trade policy formulation and governance, the strengthening of existing institutions, and the institutionalisation of collaboration for a more inclusive trade policy governance. Ultimately, the study advances projections on how regional integration initiatives could yield development outcomes in domestic settings in the context of African states, thereby affirming the influence of trade as an agent for modernisation and the positive alteration of governance processes.

1.3. Justification and scope of the research

The research may be justified on several grounds. The first of these is the importance of the AfCFTA initiative to Africa. The research will contribute a new body of knowledge on Africa's most important trade agreement.[36] The AfCFTA is the first free trade agreement with an African coverage.[37] Since the AfCFTA became operational in June 2019, only a few

[36] Important because it is the first trade initiative that covers the entire region. More on its importance is discussed in chapter 3.

[37] All AU member states are state parties to the AfCFTA (except Eritrea). More on this is reflected on in Chapter 3.

scholarly materials have appraised it in the depth that this study proposes.[38] This neglect is due to the fact that trade under the regime is yet to begin and that many of the state parties are yet to unfold their implementation plans of the AfCFTA Agreement and its protocols.

A second justification is the imperative of creating knowledge and insights into the extent to which trade and integration could stimulate and enable institutional reforms in the context of African states. While there have been studies on many integration arrangements in Africa, little research has been done using comparative methods to evaluate how trade governance processes across different African regions respond to mega-trade initiatives like this. Thirdly, the three case studies undertaken in this study — Nigeria, Kenya, and Ethiopia – each contribute to the academic literature on the challenges of implementation of the AfCFTA at a national level. The relevance of each case study is explained below:

Nigeria is an important case study for two main reasons, the first being that it has the largest population and GDP of all the AfCFTA State Parties. Despite this, the country has development conditions that are like many of the Least Developed State Parties to the AfCFTA. This not only makes Nigeria a peculiar AfCFTA state party, but it also enables some generalisations to be made (from Nigeria's engagement with the AfCFTA process) on the likely impact of the AfCFTA on the different categories of large developing and least developed countries on the continent. Secondly, Nigeria's status as a regional hegemon within the Economic Community of West African States (ECOWAS) makes it an equally interesting research subject.[39] Because this hegemony enables it to act as a swing state (especially in influencing integration), a study of how Nigeria adjusts its economy to the AfCFTA objectives could help inform generalisations (albeit cautiously) as well as flag important country to region dynamics which other state parties to the AfCFTA may have to engage.[40] The inclusion of Kenya in this study is justified for two reasons. First, is its

[38] Few articles have been published in peer-reviewed journals on the dynamics of integration under the regime of the African Continental Free Trade Agreement and even fewer substantive books have been written. Most materials on the AfCFTA are briefs and handbooks by institutions such as the United Nations and the African Union. An example is Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area by the Economic Commission for Africa. See Economic Commission for Africa 'Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area' available at *https://www.uneca.org/sites/default/files/PublicationFiles/aria5_print_uneca_fin_20_july_1.pdf;* Trade Law Centre 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at *https://www.tralac.org/resources/by-region/cfta.html#legal-texts* accessed on 16 July 2019.

[39] 'Hegemony' within this context refers to the relatively more significant diplomatic weight it wields in driving trade and regional integration programs not just in the Economic Community of West African States (ECOWAS) Regional Economic Community (REC) but also beyond it.

[40] McNamee, T 'Harnessing the power of Africa's swing states. The catalytic role of Nigeria, Kenya and South Africa (2016) *The Brenthurst Foundation* 1; See also Vanheukelom J and Bertelsmann-Scott T 'The political

approach to trade governance which has been generally understudied and, secondly, its strategic role in the East African Community (EAC) which has been argued to be the most advanced regional economic community (REC) of the eight recognised by the AU. As one of the earliest states to ratify the AfCFTA Agreement,[41] Kenya continues to play a leading role in advancing the interests of the EAC.[42] Therefore, like Nigeria in the ECOWAS region, Kenya's hegemony in its REC could allow for some generalisations (albeit cautious ones) to be made on the likely behaviour of the other countries in the region. The final case-study — Ethiopia — is noteworthy for three reasons: its relatively little engagement with foreign trade, its developmental categorisation (i.e., it is a Land Locked Developing Country (LLDC)); and its remarkable growth rates. First, while the idea of regional integration is not new to Ethiopia,[43] the one of engaging with (i.e., negotiating, signing and ratifying) multilateral trade agreements is. Ethiopia is one of the only AfCFTA state parties that has never been a party to any regional or multilateral trade agreement.[44] Its relative inexperience in negotiating trade agreements makes it an interesting case study. Secondly, Ethiopia is a land-locked developing country (LLDC).[45] Like the other sixteen AfCFTA state parties that are land-locked, their geographical nature imposes relatively unique burdens,[46] especially in their ability to engage meaningfully in international trade. This requires domestic policy considerations, innovations, and adjustments worth evaluating in a comparative sense.

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economy of regional integration in Africa - The Southern African Development Community (SADC)' (2016) *ECDPM.*

[41] Kenya signed and ratified the AfCFTA Agreement on 21st March and 6th May, 2018 respectively. See Africa Union 'State-Parties: Ratification Status List' available at *Link,* accessed on 25th April 2021.

[42] See African Union Commission 'Africa Regional Integration Index – EAC Member' Scores and Rankings' available at *Link,* accessed on 25th April 2021; See also Mugambi, L M *Hegemony and regional stability in Africa: a critical analysis of Kenya, Nigeria and South Africa as regional hegemons* (unpublished Doctoral thesis, University of Nairobi, 2015); Elowson Camilla, and Adriana Lins de Albuquerque 'Challenges to Peace and Security in Eastern Africa: The role of IGAD, EAC and EASF' (2016) 5634 *Studies in African Security*; Mathieson Craig 'The political economy of regional integration in Africa' (2016) *The East African Community Report. European Centre for Development policy Management.*

[43] Ethiopia was a founding member of the OAU and is a member of two African RECs - the IGAD and COMESA.

[44] This unique position makes Ethiopia an intriguing case study, as it is a passive member of intergovernmental associations, participating in membership but not actively engaging in trade liberalization programs. Other countries that have not been a party to African Trade Agreements include Morocco, Tunisia, and Mauritania. Note however, that Morocco and Tunisia signed trade agreements which could be described as existing outside the context of Africa's REC framework such as the Pan-Arab Free Trade Area (PAFTA) and the *Agadir* Agreement – see United Nations Economic Commission for Africa 'Assessing Regional Integration in Africa - ARIA IX (2019) 12 available at *Link* accessed 15th May 2022.

[45] Ethiopia is one of the continent's 16 Landlocked developing countries - United Nations Conference for Trade and development op cit note 45 available online at *Link,* Accessed on the 23rd September 2021; Also see United Nations Economic Commission for Africa - ARIA IX' ibid at 25 – 26

[46] Compared to the other two state parties explored in chapters 4 (Nigeria) and 5 (Kenya).

Thirdly, Ethiopia's ability to maintain remarkably high growth rates despite its geographical disadvantage and low engagement with international trade presents an interesting paradox worth examining. Ethiopia could, therefore, lend insights into some innovations for other LLDCs. Furthermore, an examination of how the country engages with its first trade agreement (the AfCFTA) could enrich international trade and development studies. This could be an interesting paradigm as to the extent to which international trade agreements aid in institution building, modernisation, and development.

In conclusion, this study will contribute to the academic literature on the trade governance processes of at least three significant African countries (that belong to five of the eight regional economic communities recognised by the African Union). This research would contribute knowledge on the various ways in which the regional economic communities that these countries belong to influence their trade governance architectures (if at all they do).

1.4. Problem statement and objectives of the research

The problem that is investigated in this study is whether the selected case studies (all being State Parties to the AfCFTA) are prepared for a developmental implementation of the Agreement. Also examined is the legal and institutional governance architecture in place for the AfCFTA to achieve development therein. The objectives of this study are as follows:

i. To draw from the theories of international trade, law and development studies, and regional integration in creating an analytical framework for reflecting on the processes through which development may be mainstreamed in domestic laws and institutions in the context of trade integration initiatives between African states.
ii. To examine the ways in which different selected legal and political processes have influenced and shaped economic integration on the continent leading up to the AfCFTA and show through a historical lens, how the AfCFTA initiative compares to other attempts at African development.
iii. To appraise the AfCFTA initiative and its legal text, recounting some of the factors that prompted its creation, and some risks and challenges projected to inhibit its objectives.
iv. To evaluate the case studies and shed light on the extent and limits to which the AfCFTA could yield developmental outcomes, drawing from factors impacting their regulatory frameworks for trade.

v. To reflect on some of the important supply-related constraints to industrialization in the case studies that could constrain their developmental gains of the AfCFTA.

1.5. Research methodology

The research combined doctrinal research with empirical research for a deeper engagement with the research problem. Primary and secondary sources were relied on for the doctrinal aspect of the research. While primary sources included the legal text of the African Continental Free Trade Area Agreement, domestic legislation, case law, official records of governmental institutions, policy documents related to trade governance, white papers, and diagnostic studies, the secondary sources used consisted of books, journals, publications, and conference papers. In this regard, the research drew from multi-disciplinary academic literature in international trade, economics, and development studies to provide a critical understanding of the many interweaving processes relevant to advancing trade integration initiatives like the AfCFTA.

A qualitative approach is employed in the empirical research on which this study is largely based. This approach was used to scope the legal and regulatory environments of the case studies (Ethiopia, Kenya and Nigeria) to highlight conditions around the legal frameworks and institutions for the operationalisation of the AfCFTA as well as the reforms being made in the context of the same. It was also used to gain insights into some of the economic and political tensions, stakeholder sentiments and consultation processes (if any) that were prompted by the decision of the case-study governments to negotiate and ratify the AfCFTA.

Semi-structured interviews were conducted with sixteen participants from the case studies. For each case study, the participants interviewed belonged to one of two categories of AfCFTA stakeholders. In the first category were public officials. Senior personnel in governmental ministries of trade and industry (or its equivalent) and other related agencies/parastatals in the three countries studied are included in this category, some of whom had participated in AfCFTA negotiating rounds, or were members of national AfCFTA implementation committees, and retired public officials who — though present during the negotiation —possessed knowledge of the trade governance architecture of some of the case studies. These participants were interviewed for their insights on the themes like the motivations for participating in the AfCFTA, the state of the trade governance

architecture, institutional reforms, and perceived risks and constraints with respect to the case- study.

The second category consisted of participants from civil society organisations and especially the major private sector interest coalitions from the case studies. Because they are the primary recipients of the initiative shown by the member states, their insights were useful in balancing out those provided by the public officials. In this regard, only executive members of civil society interest groups were interviewed. They shared insights on consultation processes, efforts towards securing stakeholder buy-ins, and other implementation related issues. Overall, the interview data was directed towards supporting the literature and evaluating the institutional processes that existed before the initiative, those created during its formation, and those that remain uncreated.

1.6. Limitations of the study

A key limitation of this research is the still unfolding nature of the AfCFTA initiative. Even though an agreement creating the African Continental Free Trade Area (along with protocols on trade in goods, trade in services, and dispute settlements) has been signed and ratified by the requisite number of State Parties to make it operational, negotiations on tariff offers, competition policy, intellectual property rights, movement of business persons and other trade-related matters are still ongoing.[47] However, the engagement with domestic responses to existing legal obligations should enable a contextualised entry into the discussion of the legal issues invoked by the AfCFTA.

The COVID-19 pandemic also impacted the research. Specifically, the empirical phase of the research was affected by the COVID-induced travel restriction imposed by African governments (like most around the world), which then resulted in the closure of nearly all the institutions within which valuable trade governance-related data were stored. This led the study to adopt remote or online technologies (such as Zoom and WhatsApp) for the data-gathering process (semi-structured interviews) in the case studies. In this regard, the research on the third case study, Ethiopia, was more significantly affected. To remedy the limitation,

[47] Article 23(1) of the Agreement establishing the African Continental Free trade area provides that the agreement (as well as its protocols on goods, services and dispute settlement) shall enter into force 30 days after the 22nd instrument of ratification is deposited at the depositary (the African Union Commission). On the 29th April, instruments of ratification of Sahrawi Republic (and also Sierra Leone) were deposited at the depositary and in accordance with Article 23 of the Agreement the Free trade area entered into force on the 30th May 2019; Article 23, Agreement establishing the African Continental Free Trade Area, 2018; Trade Law Centre 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at *https://www.tralac.org/resources/by-region/cfta.html* accessed on 19 June 2019; D Luke & Z Mabuza 'State of Play in the Tripartite Free Trade Area Negotiations', in Ismail op cit note 21 at 25.

however, the conclusions on Ethiopia were drawn by combining insights from recent diagnostic trade integration studies led by developmental institutions including United Nations Conference on Trade and Development (UNCTAD) and those sourced from the participants interviewed.

Lastly the absence of jurisprudence on the AfCFTA was also a limitation. This was largely because the dispute settlement mechanism created by the dispute settlement protocol was yet to be fully constituted. Where necessary, the study inferred cautiously from relevant WTO jurisprudence as well as the customary rules of interpretation of public international law.

1.7. Chapter outline

The work consists of seven chapters. In chapter one the research is introduced, its structure set out and its background, justifications, and objectives established. Furthermore, the chapter outlines the central questions through which the research is founded.

A theoretical context for the study is provided in chapter two by appraising key postulations and insights on the concept of development, international trade, and regional integration. An attempt is made in the chapter to show how the AfCFTA tests the traditional understanding of those theories. Furthermore, in the chapter norms from law and development studies are evaluated, using which an analytical tool to guide this research is put forward.[48] The central question the chapter is guided by is: what are the theoretical ideas and approaches to development in the context of free trade, integration, and law, and how can they enable an understanding of the AfCFTA? Some vital theoretical ideas explored include comparative advantage, the Heckscher-Ohlin-Samuelson (HOS) theory, the infant industry argument, and the development integration theory. The ideas explored enable an understanding of the AfCFTA by providing foundational frameworks for analysing it and explaining some potential benefits and strategies advanced.

The AfCFTA initiative is focused on in chapter three which builds on the research. This is done by first situating it in the theoretical discussion on African integration and highlighting some other initiatives through which the continent attempted to engage with development. After this, attention is paid to the AfCFTA and highlighted are the ways in which the initiative is a very different expression (in history, ideology, and design) of the concept of integration. Also examined is the legal text that gives life to the AfCFTA initiative

[48] Barry White *Mapping Your Thesis: The Comprehensive Manual of Theory and Techniques for Masters and Doctoral Research* (2011) Ch 3.

and in this regard, the structure and key development enabling provisions of the agreement creating the AfCFTA considered. The chapter concludes by appraising some risks and challenges projected to inhibit its objectives. A synthesis of the issues discussed in this chapter are framed around the following questions; first, how have African countries previously collaborated for development purposes, secondly, what can AfCFTA State Parties learn from the history of the continent's attempts to engage development using regional integration and collaboration? And lastly, how does the AfCFTA hope to engage development differently? In answering the first question, reflections are made on cooperation frameworks in the OAU era (such as the Lagos Plan of Action (LPA), and Abuja Treaty) and initiatives of the AU era, such as the New Partnership for African Development (NEPAD) and the agenda 2063 development. A key takeaway from this exploration is that well-intentioned development and cooperation initiatives may not achieve their goal of enhancing human freedoms and improving lives if the internal and external barriers to their effectiveness (such as the absence of institutional capacity and physical infrastructure, among others) are not addressed (refer to 3.2.2). On the question of how the AfCFTA initiative diverges in its approach to development, Section 3.3.3 highlights some unique ways. One such example is its explicit endorsement and incorporation of certain development integration principles within specific sections of the Agreement.

How the developmental objectives of the AfCFTA initiative can be achieved in Nigeria is examined in chapter four. This is done in three parts, with the context for the analysis (i.e., by appraising key themes or factors that impact on the design of Nigeria's regulatory frameworks for trade) being set in the first part. The second part reflects Nigeria's trade policy implementation architecture and the reforms that have been made to it to make it AfCFTA-ready. In the last part the measures by Nigeria to address the 'real constraints' that could prevent the AfCFTA from yielding development outcomes are examined. The Chapter demonstrates, among other things, that while Nigeria's dynamic, large, and youthful economy (as well as its experience in international trade) may make it an ideal State Party for trade under the AfCFTA, its gains may be hampered by factors such as its uncertain outlook for development, its ambivalent attitude toward trade inclusivity, and the extent to which its largest revenue — crude oil — influences trade policy formulation.

Chapter five examines themes or factors around Kenya's engagement with the African Continental Free Trade Agreement (AfCFTA) and the array of trade policies and institutions through which the country which has the largest economy in the East African Community (EAC) aspires to engage with the AfCFTA are examined. As with the chapter on

Nigeria, this is done in three parts. In the first section the situation in the country is contextualised by examining the factors that impact on the functionality of its legal frameworks and institutions for trade (such as development outlook and history of its trade ideology). In the second part the existing legal and institutional frameworks for moderating AfCFTA-trade are examined. The chapter is concluded by a reflection on supply-side constraints to using the AfCFTA for development. The chapter will show, among other things that Kenya's progressive outlook on development as well as its more dynamic and people-oriented trade ideology situates it in a position to make a more meaningful use of the AfCFTA for development. Furthermore, the country's well-articulated, coordinating plan/system to manage trade under the AfCFTA puts it at a relative advantage than many of the other AfCFTA state parties.

An evaluation of the changing economic and regulatory landscape of Ethiopia is found in chapter six, in which Ethiopia's domestic responses to existing regional obligations is examined. The outcome of this examination is used to enable a contextualised entry into the discussion on the legal frameworks and institutions necessary to optimise the benefits of the AfCFTA in Ethiopia. As with the other case studies, this is done in three sections: while the first section gives a general overview of Ethiopia, inter alia shedding light on themes that characterize the functioning of its developmental state economy, the second narrows down on the legal frameworks and institutions that govern and incentivizes trade. The chapter concludes by appraising two trade enabling measures Ethiopia is putting in place that could bolster its AfCFTA gains. This chapter emphasizes the significance of Ethiopia's development state model, which has led to substantial economic growth despite limited involvement in foreign trade. However, to sustain this growth and achieve institutional modernization and development, active participation in trade, including the AfCFTA and WTO ratification, is essential. Ethiopia's multi-stakeholder approach to trade governance and development planning positions it favourably for engaging in the AfCFTA. Nevertheless, the lack of adequate private sector engagement poses a disadvantage. Additionally, identified flaws in Ethiopia's trade governance structure could potentially undermine the country's benefits from the AfCFTA.

Finally, in chapter seven the thesis is summarised, and recommendations are made as to how the AfCFTA Agreement can be implemented to serve as an enabler of development. To do this the findings from the legal and regulatory landscapes of Nigeria, Kenya and Ethiopia are drawn upon. In the next chapter a review of the academic literature around the study can be found and an analytical framework for the three case studies is advanced.

2. CHAPTER TWO: THE AFCFTA AND DEVELOPMENT: THEORIES, PERSPECTIVES, AND ANALYTICAL FRAMEWORK

2.1. Introduction

Framed around a conception of development that is construed to encompass economic, political, legal and social variables, an attempt is made in this chapter to examine some of the themes in academic literature related to the subject of this study – the African Continental Free Trade Area (AfCFTA) initiative. The theoretical perspectives in international trade and regional integration are appraised and their intersections as well as impact on development evaluated. An attempt is made in this chapter to show how the AfCFTA tests the traditional understanding of those theories and to reflect on whether development could be a theoretically likely outcome. Furthermore, norms from law and development studies are examined and from this an analytical tool —the Analytical Law and Developmental Integration Model (ALDIM) —to guide this research is put forward. As will be explained in the chapter, the model is a product of the combination of law and development studies norms and regional integration norms and will be used in analysing the empirical findings set out in subsequent chapters.

The central question of this chapter is: what are the theoretical ideas and approaches to development in the context of free trade, integration, and law, and how can they enable an understanding of the AfCFTA? The chapter is divided into two sections. In the first section development as a concept is reviewed and its theories examined, including the concepts of free trade and regional integration. Perspectives in law and development studies from which an analytical framework for the study is then fashioned, are set out in the second section. The discussion that this chapter begins with will be advanced in subsequent chapters to improve our understanding of the AfCFTA and possible developmental outcomes in Nigeria, Kenya, and Ethiopia.

2.2. Theorising development

In this part of the chapter the concept of development and the theoretical approaches to achieving it are examined. This is particularly important because it establishes the terms on which the concept is to be construed throughout this study.

2.2.1. Development as a concept

There is no consensus on the definition of development. Like most concepts, it has benefitted from multidisciplinary research over the years. This research has influenced several shifts from it being viewed through prisms that emphasise economic variables (such as income rates, standard of living and growth rates) to relatively more comprehensive prisms that define it to include non-economic and other social variables (like political participation, human rights, etc.). Within the context of law and development studies, 'development' is defined as a progressive transformation of society.[49] It has also been defined as the progressive social, political, and economic change to the human condition.[50]

Within the context of this study, Amartya Sen's ideation on the concept of development is profoundly insightful. Sen defines it as 'the removal of unfreedoms'.[51] In other words, the view of development which is aspirational should expand human freedoms and facilitate the liberty of action rather than just lead to economic increases. It must be an instrument for enabling groups of people to attain the highest level of their ability or a life in which they could have reason to value.[52]

In Sen's attempt to extend the concept beyond economic variables, some insightful themes emerge that make it a more suitable conceptualisation for this study. First, his enunciation of five essential freedoms needed for development. These are political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security. [53] Secondly, Sen's idea on individual agency[54] is suggested to be crucial for enabling individuals to help themselves and, lastly, there is his suggestion that freedom is a determinant of individual initiatives and social effectiveness. While the first theme reflects the multi-dimensional nature of Sen's perspective on a development which is desirable, the second and third of these themes reflect the possibilities with respect to individuals (i.e. the smallest unit of any trading system) where the social conditions that may enable effective and meaningful engagement with opportunities are present.

Adebayo Adedeji's view on development shares similarities with Sen's and is important to this study, not only because his insights were written in the context of Africa,

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[49] Yong-Shik Lee 'General theory of law and development' (2017) 50 *Cornell International Law Journal* 428.
[50] David Trubek & Marc Galanter 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *WIS. L. REV.* 1062
[51] Amartya Sen *Development as Freedom* (1999) ch 4. Also see Amartya Sen 'Development as Freedom' in J Timmons Roberts *et al* (eds) *The Globalization and Development Reader: Perspectives on Development and Global Change* 2 ed (1999).
[52] Ibid at ch 4. See also Amartya Sen *Commodities and Capabilities* (1985).
[53] Ibid.
[54] Roberts *et al* Ibid at 190.

but also for its multidimensionality. Adebayo, while critiquing other limited and economy-centred approaches to viewing the term, argues that development must be appreciated as a complex, holistic and people-oriented process. For this reason, it should be constructed in ways that encompass social, cultural, political, environmental, and economic variables.[55] This approach provides a much deeper lens for considering ambitious integration frameworks like the AfCFTA and the domestic settings for operationalising them. The AfCFTA's objectives seem to indicate an intention to facilitate development within these lines by providing more opportunities (by creating a larger market for trade); increasing government revenue to enable the provision of social welfare schemes; and ultimately eradicating poverty. It is submitted that State Parties adopt an exhaustive view of development in formulating their AfCFTA implementation plans.

However, if this exhaustive conceptualisation of development should be the goal of any social group, a question that may be put forward is then; what are the ways in which it could be achieved? The ideas around this are examined in two theoretical rubrics; first, international trade theory which examines the role of trade in development, and law and development theory which spells out the role of law in a development context.

2.3. Theoretical approaches to development

2.3.1. International (free) trade theory and development

There seems to be a convergence in economic orthodoxy on the view that development requires some degree of international trade.[56] This section appraises the dominant ideas in this regard. In so doing, a historical approach is taken, tracing the rhetoric on free trade from the early years of mercantilism. Also, an attempt is made to reflect on some of the contradictions to the idea of free trade. Amongst other things, this part shows that the insights on free trade are not outdated. Instead, they have continued to be refined by the debates and interrogations of scholars and policymakers. These interrogations have enabled the evolution and fostered a better understanding of the concept over the years. Importantly, the theory of free trade provides foundational insights on the ideas around which the AfCFTA is advanced.

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[55] In this light, Adedeji questions the idea of conflating economic growth (and the easily quantifiable indicators of same) with the other the less-easily measurable (i.e. continuously evolving) process of development. See Asante op cit note 1 at 6; See Also Simon op cit note 1 at 4.

[56] Krugman, Obstfeld, Melitz International Economics: Theory & Policy 10 ed (2014) ch 1 ch 2; Van den Bossche op cit note 56 at ch 1; Jagdish N Bhagwati *Free Trade Today* (2003) ch 1.

2.3.2. Mercantilism and the balance of trade argument

The journey with regard to the evolution of international trade theory as an area of economic thought as it is known today historically proceeded along multiple pathways.[57] One of the first prevalent thoughts on international trade was Mercantilism. Mercantilism argued that the aim of foreign trade was achieving a favourable balance of trade,[58] and championed for Governments to regulate trade to prevent the value of imports from exceeding the value of exports. It was argued that if international trade was successfully regulated in this manner, precious metals and treasure was guaranteed to be added to a country's stock.[59]

Five essential propositions summarise mercantilist thought: first, nationalist interests or advantages must define the terms of trade of any country. Secondly, all considerations on trade policy must be weighed against the 'national stock' of precious metals. Thirdly, attaining a favourable balance of trade becomes a priority for augmenting 'national stock' in the absence of precious metals. Fourthly, the favourable balance of trade sought is achieved through export promotion and import restriction devices and, finally, foreign policy measures must be predicated on the principles of 'power' and 'plenty'.[60] In driving this highly interventionist agenda, manufactured goods were considered to be a more favourable export commodity over raw materials because manufactured commodities provided better employment opportunities due to their nature of requiring processing and an addition of value.[61] This balance of trade argument on trade policy in the mercantilist era faced significant criticisms, primarily for being illogical and a poor indicator of national wealth. Furthermore, it was criticised for its argument in favour of manufacturing over other economic activities, as some writers argued that international trade is a positive-sum game capable of delivering all-round gains.[62] These writers argued that trade was intrinsically free and self-directing and, therefore, any laws to restrict or direct it were against public interest.[63] A lesson (for this study) from mercantilism is the importance of economic ideas which are

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[57] Razeen Sally *Trade Policy, New Century: WTO, FTA and Asia Rising* (2008) 28; Jacob Viner *Studies in the theory of international trade* (2017) ch. 1, ch. 2; Douglas A Irwin *Free trade Under Fire* 5 ed (2015) 59–74; Douglas A Irwin *Against the Tide: An Intellectual History of Free Trade* (1996) ch. 1; Cordell Hull 'The true nature of trade*'* in Cordell Hull (ed) *The Memoirs of Cordell Hull* (1948) 81.

[58] Douglas A Irwin 'A Brief History of International Trade Policy', Available at *https://www.econlib.org/library/Columns/Irwintrade.html* accessed on 26 January 2020; Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1952) 82- 83.

[59] Irwin op cit note 57 at ch. 1; Viner op cit note 57 at 6-10. Nassau William Senior *Political Economy* (1855) Ch 4; See also Jacob Viner, Douglas Irwin (ed). *Essays on the intellectual History of economics* (1991) 46-48

[60] Viner & Irwin ibid at 263; Viner op cit note 57 at 6-10; Lionel Robbins, Steven Medema. & Warren Samuels *A History of Economic Thought: The LSE Lectures* (2000) 52.

[61] Viner and Irwin ibid at 263.

[62] Sally op cit note 57 at 32.

[63] Charles Davenant *An Essay on the East-India trade* (1696). Also see Viner op cit note 57 at 99.

based on dispassionate analytic reasoning. The experience is instructive of how, when initiatives are created, even with the best of intentions, on flawed or oversimplified economic views of how economics should function, the results can be disappointing. Therefore, this emphasises the place of proper analysis by the African states in creating domestic frameworks for engaging with the AfCFTA.

2.3.3. Classical foundations and assumptions on free trade

One of the most severe criticisms of mercantilism (earlier in history) is found in *Smith's Inquiry into the Nature and Causes of the Wealth of Nations*. Smith offers two significant pushbacks to mercantilism.[64] First, he suggests that it was an agenda that benefited organised interests within states and thus against public welfare. Secondly, he suggests that it was arbitrary and not transparent. Smith's criticism of mercantilism is provided within the context of his free-trade prepositions.

A) Smith's theory of absolute advantage

Drawing on existing economic research, Smith's insights are that, contrary to mercantilist arguments, unhindered (free) trade could lead to more wealth to a nation.[65] His analysis was incisive and saw through the arbitrary analysis of the self-interested advocates of mercantilism of the time.[66] He suggests that economic growth was dependent on specialisation and the division of labour and the effectiveness of the latter (i.e. specialisation and division of labour) were dependent on the size of a market. Therefore, while restricting trade will result in shrinking a market and consequently lead to economic distortions, free trade will result in the opposite effect.[67]

Free trade theoretically allows for the replacement of costly domestic production, thereby ensuring that domestic resources could be redirected to cheaper and more productive uses, that is, free trade provided an absolute cost advantage.[68] Therefore, the wealth of nations is not obtained by employing restrictive policies in closing markets, but rather in free markets where trade was unhindered and profits maximised through specialisation and division of labour. What is noteworthy about Smith's conception of free trade is his governing principle of 'natural liberty' and that the existence of an appropriate framework of

[64] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1952) Book IV, ch 1.
[65] Ibid at Book IV.
[66] Ibid at Book IV, ch. 2, ch. 3.
[67] Ibid at Book I, ch. 3
[68] Ibid at Book I ch. 3, Book 4 ch. 2 ch. 3.

rules to ensure trade is done under a framework of equality and justice. This remains a relevant theme in the curation of trade policy implementation strategies.

In summary, when compared to unrestrained or free trade, mercantilism appears to be an unwise, imprudent, and wasteful diversion of resources. David Ricardo pushed the frontiers on trade theory, postulating what is known as the comparative advantage theory.

B) Ricardo's theory of comparative advantage

Ricardo is regarded to have provided the most significant attempt at theorising on the concept of free trade in the classical era.[69] Like Smith, Ricardo argues that countries were always better off when they engaged in trade with one another.[70] He suggests that trade patterns should be examined against the backdrop of the comparative cost of production in a country rather than comparing the absolute cost of production between countries.[71] A country will optimise its gains from international trade if it focused its resources on producing commodities in which it had a relative cost advantage.[72] Giving hypothetical examples using England and Portugal, Ricardo suggests that a country will be better off if it concentrated in the economic activity in which its disadvantage is less.[73] The theory also suggested that the comparative efficiency of a country in a particular economic activity over other countries was an insufficient justification for specialising in international trade therein.[74]

In essence (rather than the absolute cost contention of Smith), international trade provided more gains if considered in terms of the opportunity costs of production. In other words, it could be advantageous for a country to import goods, rather than produce those goods inefficiently. It was efficient in producing domestically if it were less efficient in producing that import domestically compared to other goods. A country will gain if it is rather specialised in exporting goods with a lower opportunity cost or a productive advantage compared with other goods produced. For example, a country which is the most efficient in producing both corn and textiles will gain more benefits from trade if it specialises in exporting that commodity (of the two) in which there was a higher margin of producing advantage (and a relatively lower opportunity cost) and imported the other. Comparative

[69] Faizel Ismail *Transformative Industrialization and Trade in the Context of the CFTA: Opportunities and Challenges* (2018) at 48.
[70] Ricardo op cit note 13 at ch 7, 85.
[71] Ibid.
[72] William J Baumol & Alan S Blinder *Economics: Principles and Policy* 11 ed (2009) 50.
[73] Ricardo op cit note 13 at 86-87.
[74] Douglas Irwin *Op cit* note at 34.

advantage theory suggests that if two countries trade with each other along these lines, their welfare will be maximised.

Even though some of these ideas have been criticised on conceptual,[75] historical,[76] and ethical or moral grounds, [77] the classical theory of free trade is important to the study because, it confirms the positive relationship between trade and development.

C) Neoclassical theories on free trade: the Heckscher-Ohlin-Samuelson (HOS) theory

Ricardo's comparative advantage theory was further advanced by neoclassical economists, most notably Eli Heckscher, Bertil Ohlin and Paul Samuelson. While the theory is now known as the Heckscher-Ohlin-Samuelson (HOS) theory, it was primarily developed by Eli Heckscher, after which extensions to it were made by his student, Bertil Ohlin, and much later by Paul Samuelson in a series of writings between 1949 and 1955.[78]

The Heckscher-Ohlin-Samuelson (HOS) built on the Ricardian model to predict production and trade patterns based on regional factor endowments.[79] While in the classical version the source of their comparative advantage is in differences in productive capabilities, in the HOS version there is one best practice technology (determined in terms of a balanced combination of capital and labour) all countries are assumed to have the same production capabilities.[80] The source of comparative advantage is therefore in the differences in factor endowments such as capital and labour, between countries. For instance, this version suggests that a country like the Democratic Republic of Congo (DRC) which has a lot of labour and less capital will not have a comparative advantage in the production of an aircraft (for instance) even though it may be capable of producing it. This is because such a highly capital intensive specialisation will make the country comparatively worse off due to an insufficiency of capital and notwithstanding the country's large labour force.[81]

[75] Joseph E Stiglitz and Andrew Charlton *Fair Trade For All: How Trade Can Promote Development* (2005).
[76] Chang (2003) op cit note 32.
[77] Erik Reinert *How Rich Countries Got Rich … and Why Poor Countries Stay Poor* (2007) ch 2.
[78] Richard E Ckr'Bertil Ohlin's Contribution to Economics' (1978) 80 *The Scandinavian Journal of Economics* 86-99; Kenneth Rogoff 'Paul Samuelson's Contributions to International Economics' available at *https://scholar.harvard.edu/files/rogoff/files/samuelson.pdf* accessed on 3 February 2020.
[79] Blaug Mark *The Methodology of Economics: Or, How Economists Explain* 2 ed (1992) 190.
[80] United Nations Economic Commission for Africa 'Transformative Industrial Policy for Africa' April 2016 at 36 available at *https://www.uneca.org/publications/transformative-industrial-policy-africa* accessed on 16th February 2020; See also Ismail op cit note 69 at 48.
[81] Ibid.

2.3.4. The debate on the impacts of free trade on development

While the contributions of Smith, and Ricardo provided the foundational insights on free trade as a theory, debates on how the theory impacts development came subsequently as economics as a discipline evolved and as the idea of globalisation became more entrenched. For analytical purposes the advantages submitted in support of free trade may be categorised into four groups. First are the direct economic advantages of free trade, secondly are the indirect or dynamic advantages, thirdly is the moral and intellectual argument of trade and lastly is the modernising argument.[82]

While the direct economic advantages of free trade are the static gains related to specialisation and higher national incomes resulting from more efficient use of limited domestic resources), the indirect or dynamic benefits relate to the tendency of international trade to improve the processes of production. These are considered as benefits of a higher order.[83] The third category of benefits is what is described as the intellectual and moral benefits. Mill explained this to be the rate of human flourishing as well as the improvements in the human condition due to placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar.[84] Nobel laureate Paul Krugman pushes this idea further, suggesting that the gains to be much broader than its opponents imagine.[85]

It is suggested that in addition to the division of labour, specialisation, and greater efficiencies in large-scale production,[86] free trade is a powerful force for transformation and wealth creation. This accounts for one of the invisible appeals of the theory. By encouraging international migration (which represents a trade of labour for goods) and various forms of collaboration (including international borrowing and lending,[87] the facilitation of exchange of risky assets, and the diversification of wealth),[88] free trade enables transformation of societies, the fostering of cooperation and the creation of newer streams of wealth. This study

[82] Stephen Nathanson and John Stuart Mill *Principles of Political Economy with some of their Applications to Social Philosophy* (2004) 172 – 175.
[83] Nathanson and Mill op cit note 82 at 174.
[84] Ibid at 174.
[85] He also suggests that arguments that international trade is harmful if there are large disparities between the productivity or wages rates of countries are misconceived. while the argument against international trade in developed countries (with higher wage rates) is that international trade will lead to an outward flow of opportunities towards countries low wages, in developing countries the argument against free trade is that opening up their economies will lead to the collapse of domestic industries. See Krugman et al op cit note 56 at 3-4.
[86] Ibid at ch 4.
[87] Ibid at 160-169.
[88] Ibid at ch 21.

submits that this further encourages countries to adopt laws, policies and business approaches that are often efficient and meaningful for socio-economic development (i.e., to modernise for economic growth and development). This modernising appeal of trade liberalisation is more pronounced in least developed countries (LDCs) and, for instance, was demonstrated in the success story of Southeast Asia, which utilised trade liberalisation strategically.[89]

Regardless of these arguments, the concept of free trade has been noted to pose some contradictions in respect to its ability to yield developmental outcomes. This is now considered.

2.3.5. Contradictions to the theory of free trade

The second half of the nineteenth century marked the golden age of free trade. A summary of the conclusions in this regard were, first, that irrespective of the condition of development of a country, there were no means 'more efficient' of allocating resources and increasing national welfare than international trade. Secondly, the fact that any interference to such trade will equally result in the interference with gains from it and, in the process, harm the economy. However, in the twentieth century, as globalisation became more widespread, the idea of free trade faced scrutiny and the debates on it raged intensely. This was due to the rising inequalities it caused and its failure to ultimately yield developmental outcomes, especially in developing countries. Accordingly conceptual,[90] historical,[91] and ethical or moral criticisms to the concept were offered.[92] The infant industry argument encapsulates these criticisms.

2.3.6. Protectionism and the infant industry argument

The infant industry protection argument was first presented by the United States Treasury Secretary Alexander Hamilton to Congress in a 1791 'Report on the subject of

[89] The example of Southeast Asian countries is in this paragraph is only used as a means to highlight the potential benefits of opening up to trade, especially for countries that lack institutional and legal capacity. This point should not be construed as implying or attributing the success of the Southeast Asian economies solely to free trade. Factors such as labour force growth and capital investment played a significant role in their achievements. By engaging in trade and interacting with external actors, these countries can gain valuable experience and knowledge, ultimately enhancing their institutional and legal capacities. Therefore, the inclusion of the Southeast Asian success story serves to underscore the potential for trade to facilitate capacity-building in nations facing such challenges. Krugman et al op cit note 56 at 267 - 272; see also Paul Krugman 'The Myth of Asia's Miracle.' (1994) 73 *Foreign Affairs* 62–78.

[90] Prominent among the critics were Joseph Stiglitz and Andrew Charlton. See Stiglitz and Charlton op cit note 75.

[91] Chang op cit note 32 at 56.

[92] Reinert op cit note 77 at 21.

manufactures'.[93] Hamilton's argument was a reiteration of an idea initially advanced by Friedrich List, who submitted that 'in the presence of more developed countries, backward countries cannot develop new industries without state intervention, especially tariff protection'.[94] In other words, to enable producers in developing countries to compete fairly with more firmly-established producers internationally, governments must intervene by supporting the former until they grow. Economic and trade policy devices such as import quotas or tariffs may be used to provide support in this regard.[95]

The most significant insight on the infant industry argument is that firms in developing economies with inferior production capability will never be able to compete with those in developed economies, therefore deliberate attempts at improving productive capability should be made over time.[96] The fact that most of today's developed economies were only able to industrialise by protecting fragile infant industries gives credence to the infant industry protection argument. For instance, while Japan extensively utilised import controls for industrialising in the 1970s, the United States protected these heavily by using tariffs on manufacturing, and thus remained the most protected economy up until — and after — the mid-twentieth century.[97]

In other words, the history of the development in the Global North contradicts the arguments of unhindered international trade put forward by scholars from there. It is based on this historical contradiction that Ha-Joon Chang, in spelling out free-trade myths, argues for supporting fragile infant industries by Global South economies.[98]

The infant industry argument is not, however, without limitations. On a first note, the argument fails to properly substantiate how or why foreign firms pose a greater risk to infant firms than do domestic firms. The argument assumes that only foreign firms with superior productive abilities threaten domestic producers, ignoring the fact that domestic firms with conventional productive capabilities equally pose a similar risk. Secondly, the argument ignores the risk of politicisation involved in industrial policy formulation and implementation, especially in developing economies. In other words, it assumes that the government will be able to choose the industries to be protected and determine the patterns of

[93] Krugman et al op cit note 56 at 267 – 272.
[94] Chang op cit note 32 at 56.
[95] Krugman et al op cit note 56 at 267 – 272.
[96] United Nations Economic Commission for Africa op cit note 80 at 38.
[97] Krugman et al op cit note 56 at 277; See also Richard Jolly, Louis Emmerij, Dharam Ghai, & Frederic Lapeyre *UN Contributions to Development Thinking and Practice* (2004) 24; See also Ismail op cit note 69 at 50.
[98] Chang op cit note 32 at 3.

protection based on unbiased economic analysis and disregards the enormous influence of rent-seeking elites in developing economies that often distort the efficiency of industrial growth strategies.

Thirdly, there is the risk that the infant industry protection which is ideally only to be imposed temporarily may become permanent as governments may, in the process of withdrawing protection, be likely to face a backlash from the industries which would have grown and developed the political might to interfere with the withdrawal. Lastly, a limitation lies in the capability of governments in developing countries. Successful intervention for the protection of domestic industries requires efficient institutional frameworks for implementation, all of which are mostly lacking in developing countries.[99]

Overall, these foundational ideas on trade theory are important because they provide context for understanding the subject of the study, the AfCFTA. The contradictions on free trade appraised are also important for a nuanced understanding on how the AfCFTA can lead to unexpected outcomes, especially for the least developing countries (LDCs) within it.

2.4. Regional integration and development

One of the realities that became apparent at the end of the Second World War was that states were inadequate in discharging their functions in isolation.[100] Responding to this reality, these states turned to forming alliances and formalising some by creating rules-based systems and institutions.[101] They often also ceded and centralised their authority to more significant and relevant structures which were dedicated to delivering on security, economic, or trade objectives. This act of ceding authority encapsulated the concept of integration. Integration was therefore (as Ernst Hass suggests) an institutionalised procedure through which governments coped with their interdependence.[102]

The concept of integration, benefitting from years of research and perspectives, has since evolved. Now the practice is viewed as a process that expresses the desire amongst

[99] Arvind Panagariya 'A Re-examination of the Infant Industry Argument for Protection' (2011) 5 *The Journal of Applied Economic Research* 15 - 18.
[100] Carlos Closa, Lorenzo Casini & Omri Sender *Comparative Regional Integration: Governance and Legal Models* (2016) xxi.
[101] Sabino Cassese 'Relations between International Organizations and National Administrations, International Institute of Administrative Sciences' *Proceedings of the XIXth International Congress of Administrative Sciences* (1983). See also Ann-Marie Slaughter *A New World Order* (2005); Amitav Acharya 'The Emerging Regional Architecture of World Politics' (2007) 59 *World Politics* 629–652.
[102] Ernst Haas 'The study of regional integration: Reflections on the joy and anguish of pretheorizing' (1970) 24 *International Organization* 607–646. See also Hannah Muzee & Andrew Osehi Enaifoghe 'Towards an inclusive model of African regional integration: How effective has the linear model been so Far?' (2019) 11 *Journal of Economics and Behavioral Studies* 55–65.

states to establish economically preferential links among themselves or (as Davis notes) merge national economies or markets into larger regional units.[103] Unlike other forms of interstate cooperation, it is a profound expression of the will to create and sustain the relationship between states, in ways that result in the establishment of socio-economic development links and networks.

However, the extent to which the concept has yielded development outcomes has varied from region to region even though development as a concept has been the stated aim of many integration initiatives. For example, while regional integration initiatives like the Southern Common Market (Mercosur)[104] has been noted to increase international trade levels between the State Parties to it, it has also led to a reduction in trade welfare due to diversion[105] and increased inequality, and ultimately not yielding any tangible developmental outcomes.[106] Equally, the European Union, perhaps the most successful manifestation of the concept, has been noted to have led to more trade and inequality rather than a commensurate level in development outcomes.[107] The question that this then poses is how can regional integration be utilised for development? This issue has been a subject of multidisciplinary research and will be considered subsequently.[108] The next section examines some of the general theories that the concept of integration has elicited and tries to explain how they link to development.

2.4.1. Theories on regional integration

The study of regional integration as a concept is not lacking theoretical suppositions. Most of the theories initially emerged as a means for assisting their propounding scholars in weighing the influence of different social and political factors on the post-Second World War inter-state relations in Europe.[109] Three interesting themes that may be discernible from the theories on integration are, first, that they share Eurocentric foundations; secondly, they differ

[103] J Corrie 'A report on regional cooperation in the ACP countries: Part B: explanatory statement AACP-EU2484/B/99/fin (A Report); See also Davis op cit note 34.
[104] A South American trade bloc established by the Treaty of Asuncion in 1991 between Argentina, Brazil, Paraguay, and Uruguay.
[105] Nobel laureate Krugman notes the extents of trade diversion (a situation in which trade is diverted from a more efficient exporter towards a less efficient one by the formation of a free trade agreement or a customs union) in Mercosur in the years following its coming into effect. See Krugman, Obstfeld, Melitz *International Economics: Theory & Policy* 11 ed (2018) 302. Also see M Dai , YV Yotov, and T Zylkin 'On the trade-diversion effects of free trade agreements' (2014) 122 *Economics Letters* 321–325.
[106] Michael Mecham 'Mercosur: A failing development project?' (2003) 79 *International Affairs* 369–387; Krugman et al op cit note 105 at 302.
[107] Joseph E Stiglitz *The Euro and its Threat to the Future of Europe* (2016).
[108] Fagbayibo op cit note 6 at 15.
[109] Ben op cit note 4.

based on the nature of the change in the dynamics of interstate relations at the time each was conceived; and, thirdly, their propositions vary in terms of their conception of development and how it may be mainstreamed in the context of interstate relations.[110] As regards this third theme, the insights from the economics discipline are most relevant to this study and are thus appraised below.

2.4.2. Economic theories on integration

In economics, integration is perceived to be driven by a states' need to create larger markets.[111] This perspective on integration emphasises the conditions precedent for amalgamating economic interests for development. The notion of integration here emphasises the consolidation of national efforts towards the formation of economic alliances at varying levels such as preferential trading areas, free-trade areas, customs unions, common markets to increase competition, economies of scale, and market efficiency.[112]

Here integration may be considered against the backdrop of two things. First, the transitions occurring in the liberalised trade network from free trade area to customs union, to common market and to economic union. Secondly, the economic impacts of the enlargement process of the liberalised trade network as new members are introduced.[113] A significant body of literature in economics emerged to marshal the increased importance of integration from the Second World War to date.

Even though modern assessments of the concept of integration in economics remain largely influenced by classical theories like the comparative advantage theory and Viner's customs union theory, its understanding has broadened. Integration is now construed along the lines of globalisation and the extent to which markets for factors of production can be perfectly integrated between specific countries in relation to the multilateral trade system.[114] The role and the interplay between international economic institutions in this process are now

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[110] Samuel O Oloruntoba & Mammo Muchie (eds) *Innovation, Regional Integration, and Development in Africa: Rethinking Theories, Institutions, and Policies* (2019) 32.
[111] Ibid.
[112] A J Venables 'International trade; regional economic integration' (2000) 1 *International Encyclopaedia of Social and Behavioural Sciences* 1.
[113] Uwe Walz *The Dynamics of Regional integration* (1999) 3.
[114] Dani Rodrik 'The Globalisation Paradox: Democracy and the Future of the World Economy (2011)' in J Timmons Roberts *et al* (eds) *The Globalization and Development Reader: Perspectives on Development and Global Change* 2 ed (2015) 33; See also Dani Rodrik 'How Far will International Economic Integration Go?' (2000) 14 *Journal of Economic Perspectives* 177-186 uses the term international economic integration interchangeably with globalisation. Recent surveys of the economics of preferential trade agreements include Richard Baldwin & Anthony 'Regional Economic Integration*'* in G Grossman and K Rogoff (eds) *Handbook of International Economics (1995)* 1597–1644.

more significant. For instance, the role of the World Bank and the International Monetary Fund (IMF) in integration processes across the Global South is increasingly studied and subjected to economic commentary within the context integration.[115]

There are different models of economic integration, however, the most patronised (and more relevant to this study) are the market integration and the development integration models.

A) Market integration model

The market integration model integration envisages a linear progression of trade liberalisation from a free trade area to a monetary union.[116] This linear progression involves more complex transitions, with each step requiring a deeper level of commitment by states to the integration project towards an economic union.[117] The steps are slated to begin from preferential trade arrangements, to a free trade association, to a customs union, to the formation of common markets, and, ultimately, to the creation of an economic union.[118]

Classical trade economist, Jacob Viner, is considered to be the father of the market integration model. Viner's seminal work – the customs union issue – pioneered the static analysis of RTAs and provided profound insights on their welfare-enhancing effects.[119] Viner hypothesised that integration could impact an economy by either creating or diverting trade.[120] Therefore adopting a model of integration (i.e. the market integration model) which is more trade creating than trade diverting will result in more welfare gains generally to the countries within the liberalised trade network. While trade creation results from the replacement of high-cost domestic production by a lower-cost option from another member, trade diversion, on the other hand, represented a reduction in a region's external trade due to the diversion of a country's demand from the rest of the world.[121]

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[115] Bhagwati op cit note 27.
[116] Bua Balassa 'The theory of economic integration' in Amr Sadek Hosny '*Theory of Economic Integration: A Survey of the Economic and Political Literature*' (2013) 2 *IJEMSS* 133-155.
[117] Richard Gibb 'Regional Integration and Africa's Development Trajectory: Meta-theories, expectations and reality' (2009) 30 *Third World Quarterly* 701-721.
[118] Ismail op cit note 69 at 36.

[119] It should be stated, however, that Viner's work was primarily concerned with Free Trade Areas and hypothetical cases in which two states within an FTA liberalised trade barriers without creating a common external tariff (or CET). See Jacob Viner & Paul Oslington (ed) *Customs Union* (2014) xiii. See also Bhagwati *27 at* 17.
[120] Ibid.
[121] T Ostergaard 'Classical Models of Regional Integration: What relevance for Southern Africa?' (1993) 30 *Southern Africa After Apartheid: Regional Integration and External Resources* at 34.

Even though the market integration model has gained appeal for its successful application in Europe, it has faced some criticism for its non-commensurate level of success in developing regions. Accordingly, while Pascal Lamy, argues that a 'Vinerian approach' has the shortcoming of ignoring the diversity of the world's economies (and the peculiarities therein).[122] Similarly, Rob Davies notes more plainly that the model is inadequate for Africa's socio-economic peculiarities.[123] This is because the conditions that justify the formation of customs unions (CU), which are often referred to in the Vinerian theory, are not present throughout the African region. The conditions for a CU might be absent for the even distribution of benefits. Furthermore, the unique economic, social, and developmental challenges faced by the African region (and the global south generally) might make it difficult for them to fully benefit from systems built on those principles. It is also argued that because the model emphasises a stage by stage sequence it often leads to a misguided and baseless prioritisation of form over real economic substance. Thus, states in regional economic communities often push for the move to higher levels of integration prematurely regardless of whether there is a developmental basis for same.[124] States in this regard insufficiently consider how meaningful developmental outcomes may be obtained from the existing level of integration. It is in response to this important question that the development integration model has been proffered.

B) Development integration model: Mainstreaming development in integration

An important approach for mainstreaming development in integration frameworks is suggested to be by utilising the development integration model. This model emerged as a practical response to criticisms levied against the market integration model which allegedly did not provide adequate responses to the challenges faced by developing countries. The development integration was argued to be more adequate because it was cognizant of the real economic constraints to regional trade amongst developing economies.[125] Some insights from this model are relevant for the analytical framework considered below.

As with the market integration model, the development integration model advances a sequential approach to trade integration. However, this (sequential approach) is put forward as a part of a broader and more holistic integration strategy which also includes cooperation

[122] Pascal Lamy 'Regional Integration in Africa: ambitions and vicissitudes' available at Link, accessed on 20 August 2022. See also Ismail op cit note 69 at 35.
[123] Davis op cit note 34 at 6. See also Ismail op cit at 35.
[124] Davies op cit note 34 at 60–62.
[125] Fagbayibo op cit note 67 at ch 2; Davies op cit note 34 at 63.

to promote economic diversification and industrial development.[126] It is defined as cooperation among states in an array of sectors other than trade, and includes investment, research, and development, as well as policies aimed at accelerating regional industrial development and regional infrastructure provision, such as the building of better networks of roads and railway.[127]The model also advances the need for cooperation to overcome constraints associated with infrastructure backlogs which have an enormous impact on trade (and economic growth consequently). It is argued that the absence of infrastructure has a more profound effect on trade than other regulatory barriers. In examining the impact of infrastructure (or the absence of) to trade, Simeon Djankov, Caroline Freund and Cong S Pham note that each day a delay is caused due to the absence of transport infrastructure, trade is reduced by one per cent. Therefore, if it takes an average of 48 days to get an intermodal container of goods from a factory in Kigali (for instance) to be loaded onto a ship in Mombasa, but reducing ten days off that process will have a more significant impact on trade than any reduction in tariff barriers.[128]

In light of this, the model emphasises the importance of macro and micro coordination in a multi-sectoral programme that encapsulates production, infrastructure and trade.[129] It advocates for a shift from a model concentrated on tariff barriers to one centred on production capacity, trade infrastructure, planning, and cooperation for development.[130] Development Integration is also characterised by the conscious intervention by the regional partners to promote cooperation and interdependence by assuring the equitable distribution of the gains from integration, using compensatory and corrective and compensatory mechanisms.[131]

Development integration consequently requires institutional capacity, coherently articulated regional development strategies and the assurance of peace and security. Ismail identifies a variant of the development integration approach called 'developmental regionalism' to be the best suited for Africa. The features of the Ismail variant include asymmetrical trade integration (to cater for the uneven development of African states), cooperation on cross-border infrastructure investment (as well as trade facilitation), the

[126] Davies op cit note 34 at 63.
[127] Ismail op cit note 69 at 37.
[128] See also Simeon Djankov, Caroline Freund & Cong S Pham 'Trading on time' (2010) 92 *Review of Economics and Statistics* 166−73. See also Douglas A Irwin op cit note 3 at 23.
[129] Ismail op cit note 69 at 36.
[130] Yakubu Nagu & Ray Nkannebe 'The African Continental Free Trade Area (AfCFTA): A bold attempt at trade liberalization in Africa' (2018) 2 *APBLJ* 202.
[131] Ibid.

creation of regional value chains, transformative industrialisation, cooperation to promote democracy, good governance and peace and security.[132]

The development regionalism model is important to this research because it provides a more comprehensive means of engaging development in integration. The fact that it shifts from the traditional market-led regionalist perspective previously dominant in African RTAs enables us to highlight the flaws in those previous models of African integration and enables the theoretical appreciation of new possibilities on economic cooperation in Africa. Insights from Faizel Ismail's developmental regionalism are reflected on in the context of the Analytical Law and Developmental Integration Model (ALDIM) below.

2.4.3. The intersections between regional integration and free trade (multilateral)

One way the concepts of integration and free trade intersect is within the context of how regional trade agreements (RTAs) may serve the interests of global free trade. Today the global agenda for free trade is expressed in the mandate of the World Trade Organization (WTO). WTO rules are founded on theoretical welfare-maximising economic principles (such as the classical theory of comparative advantage) as has been spelt out in the preceding section of this chapter. Although these economic principles form an important basis of multilateral trade, states within the system are largely driven by the need (and imperative) to formulate policies that provide the best chance for development and practically translate to the improved economic well-being of their citizens.[133] In appreciation of this reality, WTO law permits members to derogate from multilateral free trade obligations as spelt out in the WTO laws in certain instances. One of these instances is in the interest of regional integration, for example, for the formation of free trade areas and customs unions.[134] Accordingly, many states choose to achieve economic and international trade objectives of integration through regional trade agreements (RTAs).

Article XXIV:4 of the General Agreement on Tariffs and Trade (GATT) 1994, is an exception to the Most Favourable Nation (MFN) principle, and provides for the creation of RTAs, because it affords states the freedom to forge closer alliances in the interest of free

[132] Ismail op cit note 69 at 37.

[133] An example is developing countries when the theoretical arguments for free trade were unable to justify the low level of economic development in the 70s and 80s they were forced into negotiating various regional free trade frameworks. Sam KB Asante *Regionalism and Africa's Development: Expectations, Reality, and Challenges* (1997) 26-30.

[134] See Art XXIV:8(*a*) & XXIV:8(b) of the General Agreement on Tariffs and Trade 1994 as well as Art V of the General Agreement on Trade in Services; See also Art XXIV General Agreement on Tariffs and Trade 1994; See Art. V General Agreement on Trade in Services 1994.

trade. Peter van den Bossche explains that this exception is present because WTO law recognises that faster liberalisation in the multilateral trading system could be achieved through regional integration arrangements.[135] In other words, regional trade liberalisation could be a stepping stone for multilateral trade liberalisation.[136] This argument becomes even more persuasive because the economies most likely to form RTAs are those which share similarities in terms of political history, economic structure and geographic proximity (making them natural or historical trading partners). These similarities, more especially, present greater chances for economic growth and an improvement in the overall economic well-being of developing regions than multilateral free trade.[137]

The Article XXIV exception has, over the years, led to a proliferation of regional trade agreements and, as at January 2022, 353 of such agreements were in force with many more (including the AfCFTA) being negotiated.[138] This proliferation has led to concerns about the dangers of RTAs and their proneness to be stumbling blocks to multilateral free trade (rather than stepping stones). In this regard, Bhagwati describes RTAs as 'poxes on' or 'termites to' the world trading system.[139] He explains that the ambition and nature of concessions being repeatedly negotiated in the process of creating RTAs have collectively turned world trade into a chaotic mess of 'crisscrossing PTAs… if one only mapped the phenomenon, it would remind one of a child scrawling a number of chaotic lines on a sketch pad… [or a] spaghetti bowl'.[140] This only diverts the attention of diplomats and negotiators from multilateral trade negotiations that would otherwise have been beneficial (such as the Doha development agenda negotiations which have now collapsed).[141]

In a bid to address concerns around the proliferation of RTAs, the WTO attempted to set up an RTA transparency mechanism to ensure members are aware of new RTAs. This mechanism sets out notification requirements to ensure the multilateral trading system

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[135] Van den Bossche op cit note 56 at 650-651.

[136] The Consultative Board *'The Future of the WTO: Addressing Institutional Challenges in the New Millennium' (2004)* available at, *https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf,* accessed on 8 August 2020. Van den Bossche Ibid at 650-651.

[137] Countries are sometimes called natural trading partners when they trade more intensively with each other due to the factors spelt above. Developing on Viner's hypothesis in *the customs union*, Wonnacott and Lutz explain that Trade creation is likely to be great and trade diversion small if the prospective members of an FTA are natural trading partners. See Paul Wonnacott & Mark Lutz 'Is there a case for free trade areas?' in Jeffrey Schott (ed) *Free Trade Areas and U.S. Trade Policy* (1989). See Bhagwati op cit note *27.*

[138] World Trade Organisation *Regional Trade Agreements Database,* available at *https://www.wto.org/english/tratop_e/region_e/region_e.htm*, accessed on 17January 2020.

[139] See Bhagwati op cit note 27 at ch 3.

[140] Ibid at 61.

[141] See Wonnacott & Lutz in Schott (ed) op cit note 137. See Bhagwati op cit note *27*.

continues to have a clearer picture of the rapidly growing 'spaghetti bowl' of RTAs.[142] Some writers argue that regardless of the criticisms levied, regional integration agreements remain a better alternative to multilateral free trade and in instances where the gains of multilateral trade seem to be unattainable by the 'smaller players' in the system, RTAs are not just an alternative but are imperative.

The examination of the ideas related to integration is essential to this study because it shows how the idea on free trade can be stretched in a different context and in the process, reflects possibilities around how development can be achieved. Also, by appraising the theoretical boundaries of integration as a concept, the study facilitates and enriches the understanding of the AfCFTA initiative (which is one expression of same).

As the ambitions of the AfCFTA initiative will test the traditional understanding of the concepts and perspectives appraised above, a pertinent consideration could be whether these ideas can lead to the progressive transformation of the state parties to it,[143] and enable the social, political and economic change to the human condition therein?[144] If yes, how may the extents to which this is possible be tested and analysed? In the next section the way in which laws can be useful in this regard is put forward. It relies on law and development literature and development regionalism in expanding the basis for analysing the domestic strategies of AfCFTA state parties (three of which are examined in this study, namely, Nigeria, Kenya and Ethiopia).

2.5. Law and development studies as a useful rubric for a theoretical framework

The section puts forward an analytical tool for this research. To do this it utilises themes in law and development studies as well as development regionalism. The section begins by clarifying the concept of law and appraising some of the contributions of African scholars on same, after which the analytical model for the study is evaluated. However, a subtle reflection on law and development studies is apt before this is done. This reflection will serve as an entry point for understanding the more modern perspectives on the law's role in development, which is discussed subsequently.

The conceptual relationship between law and development has been a subject of interdisciplinary studies. Some of the most profound perspectives in this regard have been in law and development studies which continues to evolve. The phases of this evolution have

[142] Van den Bossche op cit note 56 at 650–651.
[143] Lee op cit note 49 at 428.
[144] Trubek op cit note 50 at 1062.

been generally referred to as 'moments' in the literature.[145] Three moments in the study of law and development are identified.

The first moment emerged in the aftermath of the Second World War, with a view of law as a valuable tool for economic intervention by the state.[146] It was influenced by the modernisation theory which emphasised the use of domestic laws to drive economic growth and induce a change in the prevailing social dynamics in the Third World.[147] The second moment of law and development experienced a shift in emphasis by neoliberal scholars from the role of law as an instrument of state power towards its role as a foundation for markets and as an instrument for integrating Third World markets to the global economy.[148] Even though the second movement was more significant than the first, it resulted in mixed outcomes across developing countries, primarily because it could not account for how law could impact on the development process.[149] The third moment responded aptly to this criticism. In it, the law is perceived as complementary to the market and impacts the market by functioning as a regulator. An unresolved issue with the three moments evaluated above relates to their usefulness in terms of engaging the real socio-political and economic development issues of the Global South.[150] It is in this regard that other interventions on the utility of law in development were made. These interventions often began by conceptualising law, as is done below.

2.5.1. Conceptualising law in the context of development

Law in the context of this study refers to a body of policies, strategies, rules of action or conduct prescribed by a controlling authority.[151] It also includes legislative statutes,

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[145] Trubek and Santos define 'moments' as periods in the study of law and development in which the doctrine 'crystallized into an orthodoxy that is relatively comprehensive and widely accepted'. D M Trubek & A Santos *The New Law and Economic Development: A Critical Appraisal* (2006) 2; W Vandenhole 'Towards a Fourth Moment in Law and Development?' (2019) 12 *Law and development review* 2; Lee op cit note 49 at 415–471.

[146] D M Trubek 'Law and development 50 years on' (2012) *International Encyclopaedia of Social and Behavioural Sciences* 3.

[147] The modernisation theory argued socio-economic transformation was a prerequisite of strong or modern states and that development in the third world via the diffusion of values, institutions and capital from the first world the modern states at the time; C Thomas 'Max Weber, Talcott Parsons and the sociology of legal reform: A reassessment with implications for law and development' (2006) 15 *Minn. J. Int'l L.* 383-425; K E Davis and Trebilcock M J 'The relationship between law and development: optimists versus sceptics' (2008) 56 *The American Journal of Comparative Law* 902–5.

[148] Trubek and Santos op cit note 145 at 2 – 3.

[149] Lee op cit note 49 at 415–471.

[150] Olabisi D Akinkugbe 'Theorizing developmental regionalism in narratives of African Regional Trade Agreement' *African Journal of International Economic Law* 306.

[151] Henry Black *Law Dictionary* 11 ed (2019) 884; See Lee op cit note 49 at 423-424.

regulations, ordinances, and the institutions they create. The proposition that law is a powerful instrument for economic and social progress is not novel. For instance, David Trubek and Alvaro Santos (prominent law and development scholars) who contributed to the third moment of law and development submit this as they chart the shifting ideas of the relationship between laws and economic/social progress.[152] Smith, in his seminal work (*An Inquiry into the Nature and Causes of the Wealth of Nations*), situates 'an appropriate framework of rules', as important to ensuring that trade is made with equality and justice.[153] Trubek and Santos stretch this idea in their *Lectures on Jurisprudence* by further arguing that where those frameworks of rules were imperfect and uncertain in their application, commerce could be 'retarded'.[154] Similarly, African development expert, Carlos Lopes reinforces this proposition by explaining in his treatise on African transformation that coherent policies and development strategies are powerful tools for shifting the narratives on Africa, structural transformation, and yielding development.[155]

Law and development have a symbiotic relationship. While laws are used as vehicles for advancing development aims, development impacts the method and approaches to law enforcement.[156] Paul and Dias highlight six ways through which laws and state-managed development programs interact. These are first, through development programme design and enactment; secondly, through institutional creation; thirdly, via the appointment of personnel of institutions; fourthly, by the definition of institutional powers and processes; fifthly, by defining the review structures within institutions; and lastly, through establishing the framework for securing the transparency of those institutions.[157] Though laws advance development aims through the equitable reallocation of resources or in promoting self-reliance, they often result in the opposite effect of widening inequality and perpetuating the cycle of poverty, exploitation and exclusion.[158] This has resulted with the encouragement of more nuanced perspective's on law and development, with institutions like the United

[152] David M Trubek & Alvaro Santos 'The third moment in law and Development - Theory and the emergence of a new critical practice' in Trubek and Santos op cit note 145 at 1–18.
[153] Smith op cit note 64 at Book I ch. 3, Book 4 ch. 2 ch. 3.
[154] Trubek and Santos op cit note 145 at 1–18. See also Lee op cit note 49 at 420.
[155] Lopes op cit note 33 at 65.
[156] BG Ramcharan 'The role of the development concept in the UN Declaration on the Right to Development and in the UN Covenant' in P De Waart, P Peters and E Denters (eds) *International Law and Development* (1988) 295; AO Ordor 'The Non-Profit Sector in the Context of Law in Development in *Africa' Journal of African Law* (2014) 45-70.
[157] L C N Paul & C J Dias 'Alternative development: A legal prospectus' in Anthony Carty (ed) *Law and Development* (1992) at 279-92.
[158] James C N Paul and Clarence J Dias 'State-Managed Development: A Legal Critique' *Third World Legal Studies* (1982) 35. See also A Ordor 'Tracking the law and development continuum through multiple intersections' *Law and Development Review* (2015) 333-360.

Nations (UN) (for instance) refining its parameters for the assessment of human development. Accordingly, African contributions have arisen to enrich the conversation and have been concerned as to how law can facilitate the peculiar developmental concerns of the region.

2.5.2. African contributions to the law and development discourse

In Africa, laws are perceived to have the potential to play a functional role in its development, and several theories have been proffered around this. For instance, Badarin advances a self-reliant theory of African development which emphasises the need to engender individual and collective self-reliance within Africa through the use of domestic laws.[159] In this regard it is submitted that the absence of consciousness in the use of law has undermined its instrumentality in Africa.[160] Ayua on his part, emphasised the primacy of the legal frameworks for development, explaining however that laws have not been used for development in Africa because the legal systems within countries are conflicting, reactionary and undermined by corruption or state inefficiency.[161] Also within the African context, Chibundu argues for context in the general conceptualisation law and development in Africa. He advocates that a holistic study of law and development must concern itself with the ideological and social aspirations of a group of people and not just the physical necessities.[162]A people-centred approach is vital to understand the symbiosis between law and development in Africa. In this regard, ideas seem to converge in theories like the Basic needs theory.

The Basic needs theory emphasises a people-centred approach to development i.e. the imperatives of balancing economic goals within the constitutional order in society.[163] This theory explains underdevelopment to be a dynamic of class relations as defined on the international capitalists' relations of production. It, however, rejects the Marxist notion that such relations are beyond change. Against this backdrop, it advances the need for changing the dynamics of these class relations for development and the reform of states for the benefit

[159] M A Baderin ‘Law and Development in Africa: Towards a New Approach' (2011) 1 *NIALS Journal of Law and Development* 33.
[160] Ibid at 11.
[161] I Ayua ‘Law and Development in Africa' (1986) 3 *International Journal on World Peace* 71-81.
[162] M O Chibundu ‘Law in development: on tapping, gourding, and serving palm-wine' (1997) 29 *Case W. Res. J. Int'l* 25.
[163] P T Muchlinski ‘Basic Needs' Theory and 'Development Law’ in Francis Snyder & Peter Slinn (eds) *International Law of Development: Comparative Perspectives* (1987) 239.

of the poor through politically transparent, accountability and decentralisation of powers.[164] Under this theory, development policy is formulated by first considering the nature of the underprivileged or poor class of society, and the reasons which explain their conditions. This results in a more localised planning process that is appropriately situated in the local community, "involving local problems and answering local problems".[165]

In a way, the development integration approach to economic integration, which is advocated for the AfCFTA shares similarities with the basic need's theory. This is because it localises the conversation on integration, by considering the peculiarities of the continent in deciding on the practical impediments to trade between states.

In summary, while these perspectives are important because they provide lenses for framing the relationship between Africa's diverse economic policy directions and institutions, on one hand, and their development impacting cultures or norms, on the other, [166] they are ambiguous in their scope. In other words, they are disadvantaged by their inadequacy to give clear parameters for testing the efficacy of specific laws in yielding specific developmental outcomes on the continent. Akinkugbe enunciates on this gap in the African scholarship on law and development in the context of African RTAs, noting that there is an absence of scholarship that theoretically utilises insights from law and development (L&D) scholarship in analysing the linkages and overlaps of different manifestations of integration.[167]

It is submitted that a more beneficial African contribution to law and development studies could be a model which can be more analytical than descriptive. One of these, whilst being cognisant of the socio-economic and developmental difference of the stakeholders in African development initiative, proffers clear parameters through which the relationships between law and regional development initiatives may be assessed. In the next section an attempt is made to enrich law and development studies by setting forward an analytical model that does this. The analytical model will be useful for considering in a comparative sense the empirical work conducted as a part of this research and reflected in chapters 4, 5 and 6.

[164] Ibid.
[165] Ibid at 238.
[166] Lee loc cit 415–471.
[167] Akinkugbe op cit note at 150 at 293.

2.6. Analytical framework

The framework put forward for this research is the Analytical Law and Developmental Integration Model (ALDIM). It draws vital insights from the general theory of law and development (general theory) and the developmental regionalism model. A combination of insights from both theories is necessary for two reasons. First, the general theory of law and development (while immensely instrumental) will be an inadequate analytical tool for this study when used alone. This is because it was designed to be (and is more suitably) used for analysing the impact of domestic laws and institutions rather than regional initiatives.[168] Secondly, the developmental regionalism model provides relevant strategies on how development may be mainstreamed in the context of African integration initiatives. The ALDIM thus fills the gap that exists in the absence of an analytical tool for testing the impacts of regional development initiatives in domestic settings and in the process enables a reflection into the extent to which development can be mainstreamed through laws, in the context of the AfCFTA. The next section briefly gives context to the ALDIM by examining its theoretical foundations, which are the general theory of law and development and the theory of developmental regionalism.

2.6.1. The general theory of law and development (general theory) as an analytical tool.

The general theory was developed by law and development scholar, Yong-Shik Lee, to explain the development processes in South Korea, the United States and South Africa. It has also been applied to other developing countries. For instance, Sara Ghebremusse, when applying the theory to explain how Botswana's state-led development-facilitating policy was effective,[169] found that the use of mechanisms such as legislation, formal state law and customary practices into its bureaucratic setup enabled its government to gain the needed legitimacy to support the country's democratic institutions.[170] Furthermore, the general theory was utilised in showing how Botswana's introduction of autonomous bureaucratic institutions to marshal the government's development plans proved to be helpful in the

[168] An appraisal of the general theory of law and development (i.e. its proponent, history and key insights) is done below.
[169] Sara Ghebremusse 'Application of YS Lee's general theory of law and development to Botswana' (2019) 1 *Law and Development Review* 12.
[170] Ibid at 406.

country's development trajectory.[171] Lee himself applied the theory to explain how the institutions created inside and outside the Korean government were used to implement development-facilitating laws within a flexible legal framework effectively. [172]

The general theory argues that laws impact development through Regulatory Impact Mechanisms (RIMs).[173] These are made up of three conceptually distinct but interrelated indicators: regulatory design; regulatory compliance; and quality of implementation. The first element of the general theory's RIM (regulatory design) examines the structure and character of law towards meeting perceived development outcomes. The second element (regulatory compliance) analyses the impact of law in engendering general and specific compliance. The last RIM (quality of implementation) assesses the extent to which a state meets its development objectives.

This study pulls two useful insights from Lee's model. First, there is a positive correlation between law and development. To understand the development dimensions of laws in this regard, one must consider the anticipated outcome of those laws;[174] how the legal frameworks and institutions for implementing them are structured;[175] and whether the laws are responsive to socio-economic or environmental considerations.[176] Secondly, law and development are not mutually exclusive and do not always proceed in a linear sequence. Rather, how a law is implemented is crucial to its developmental effectiveness.[177] Implementation is this regard (Lee argues) is measured by the extent to which a state meets the requirements set forth by the terms of law and the structures in place for monitoring and enforcement. Where states are unresponsive to legal objectives or cannot enforce and implement laws, it adversely affects the developmental yield of those laws. While attempts have been made at using Lees' model to explain legal reform projects;[178] financial assistance within neoliberal development initiatives such as those spearheaded by the World Bank and IMF; and the efficiency of state institutions,[179] the model is yet to be applied in studying economic integration frameworks or regional development initiatives like the AfCFTA. In this regard, insights from development integration could be a useful complement.

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[171] Ibid at 412-418.
[172] Lee op cit note 49 at 456-467. Available at Link accessed on 25 March 2020.
[173] Ghebremusse op cit note 169 at 12.
[174] Lee op cit note 49 at 436.
[175] Ibid at 441.
[176] Ibid at 444.
[177] Ibid at 450.
[178] Thomas Carothers 'The rule of law revival' (1998) 77 *Foreign Affairs* 95. See also Lee op cit note 25.
[179] Lee op cit *note 25* at 30.

2.6.2. Developmental regionalism as an analytical paradigm

The development integration approach (considered earlier) provides a practical response to mainstreaming development in Global South integration.[180] It is valuable for its provision of more holistic strategies that acknowledge (as African development scholars note) some of the real issues confronting integration in the region.[181] The approach prescribes the prioritisation of issues that are argued to have more pernicious effects on development than regulatory barriers. These include transformation, economic diversification, industrialisation,[182] and infrastructure growth. The approach equally emphasises other supply-side constraints like production capacity, hard and soft infrastructure, financing, and cooperation for development.[183]

There have been different articulations on development integration. For instance, Jonathan Rudahindwa Bashi's ideation on the theory puts forward a conceptual framework known as regional developmentalism through law. The model is inspired by the 'new development state paradigm',[184]and it reflects on the combined effects of trade liberalisation, regional economic integration, legal cooperation and capacity-building towards improved human well-being.[185] Akinkugbe, on the other hand, (whilst criticising Bashi's ideation as rather too Eurocentric) explains that, the inclusion of regional value chains and digital trade as emerging frontiers of development-oriented regionalism, could provide a more hopeful account of rethinking about economic cooperation in Africa. He also notes that many articulations on development integration suffer from incoherence. This is because they lack a clear and consistent understanding of what the concept means and how it should be achieved. This then leads to divergent articulations of priorities by the different actors and institutions involved in regional integration efforts, leading to conflicting goals and strategies.

This study submits that Ismail's intellectual intervention on development integration (called developmental regionalism), escapes Akinkugbe's incoherency criticism. The model reflects on some development-oriented indicators that include; asymmetrical trade

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[180] Fagbayibo op cit note 67 at ch 2; Davies op cit note 34 at 63.
[181] FA Ismail 'Advancing Regional Integration in Africa through the Continental Free Trade Area (CFTA)' (2017) 10 *Law and Development Review* 119-146; Lopes op cit note 33 at 65.
[182] Davies op cit note 34 at 63.
[183] Jonathan R Bashi. *Regional Developmentalism through International Law: Establishing an Africa Economic Community* (2018); Nagu & Nkannebe op cit note 130 at 202.
[184] Bashi Rudahindwa argues that this new developmental state paradigm highlights the need for development policies to be adapted to the circumstances of different countries, rejecting inter alia the one-size-fits-all strategies originating from the belief of the existence of universal models and concepts of development. See Bashi ibid at 28. Also see F C Sherman 'Law and development today: The new developmentalism' (2009) 10 *German Law Journal* 1257.
[185] See Bashi op cit note 183 at 28.

integration, cooperation on cross-border infrastructure investment (as well as trade facilitation), the creation of regional value chains, transformative industrialisation, cooperation to promote democracy, good governance and peace and security.[186] A relevant point from Ismail's developmental regionalism model is that for the regional integration initiatives to benefit all countries, coherent strategies to boost productive capacity and transformative industrialisation are important.[187] It suggests that more attention be paid towards the inhibitors to transformation, industrialisation and productivity (i.e. supply-side constraints). This will enable increased social and economic development in Africa rather than lead to only more trade.

2.6.3. Analytical Law and Developmental Integration Model (ALDIM)

In light of the above, this study puts forward the Analytical Law and Developmental Integration Model (ALDIM) – a prudent combination of insights from Yong-Shik Lee's general theory of law and development and Ismail's developmental regionalism model. The application of Lee's general theory is more appropriate for analyzing legal reform and development projects within domestic contexts rather than regional ones. This theory has not been extensively utilized in studying economic integration frameworks or regional development initiatives involving many sovereign states, such as the AfCFTA. Therefore, incorporating insights from Ismail's development integration could serve as a valuable complement. Ismail's approach focuses on practical strategies for integrating development in global South integration efforts. A comprehensive analysis can be conducted by combining the insights from Lee's general theory and Ismail's developmental regionalism. Lee's theory can be employed to examine domestic legal frameworks and institutions, while Ismail's insights provide a lens for understanding how these legal frameworks can be effectively utilized within the context of the AfCFTA to address supply-side constraints. In summary, leveraging both Lee's general theory and Ismail's development integration framework allows for a more comprehensive examination of the AfCFTA, integrating perspectives on domestic legal frameworks, institutions, and the practical implementation of development strategies within the regional integration process.

The ALDIM model therefore submits that to analyse the developmental potential of an integration initiative in an African state, the domestic regulatory setting for the initiative must

[186] This has been reflected on above. Ismail op cit note 69 at 142.
[187] Ismail Ibid at 142.

be organised in ways that are development enabling. The legal frameworks and institutions for the implementation of the integration initiative must not only be existent but also endowed with the necessary capacity to make it efficient, and factors that traditionally inhibit productivity must be engaged with. Put succinctly, the ALDIM suggests that three factors for reflecting on the extents to which a regional integration initiative (like the AfCFTA) may yield development outcomes are; the design or outline of the domestic setting within which the initiative is to be deployed, the legal frameworks and institutions for its governance and measure to address productivity (or supply side) constraints. The three factors are evaluated below.

A) Outline/design of domestic setting

The domestic setting is the first consideration for assessing the potential impact of regional integration initiatives in state-parties. This is because the way the domestic setting for operationalising a developmental initiative (in the context of this study – the AfCFTA) is organised is as important to its success as the development initiative itself.[188] It is against this notion that African law and development scholars like MO Chibundu argue for a consideration of the ideological and social conditions and aspirations of a group of people in the conceptualisation of development issues.[189]

In this regard, several indicators or factors give an idea of the domestic setting of a state. However, in the context of the AfCFTA and the aims it sets out to achieve (i.e. increase trade and African development) the primary consideration under this rubric should include: the domestic outlook on development, trade and economic ideology, the nature of its engagements in foreign and regional trade partners, and the lastly environmental considerations.

While on the first note the outlook on development is useful for showing the development priorities or values within which the AfCFTA initiative is to be set,[190] on the second note highlighting the trade/economic ideology would not only show dominant trade policy thinking under which the AfCFTA may be implemented domestically but also hint at the existence of ideological clarity on trade issues as well as coherence of trade priorities with development priorities. On the third note the nature of the country's engagement with foreign

[188] Lee op cit note 49 at 420.
[189] Chibundu op cit note 162 at 25.

[190] In this regard the policy texts, legislations and other official documents in which the development ambitions of state parties are be expressed may be considered.

trade would lend insights on the political economy of international trade in the country as well as the regional interests that impact its domestic attitude on trade issues. Lastly environmental considerations that could lend useful insights on domestic settings may also be considered. This includes relevant themes related to its, economic profile, population and demographic transitions, trade in goods and services profile and economic inclusion. Economic inclusion is vital because it would enable reflection on the extent to which key interest groups benefit from the development initiatives.

B) Law governance or implementation

A crucial submission of Lee's general theory is that legal effectiveness is a function of implementation.[191] Implementation in the context of this study is the extent to which a state can meet the overall outcome set forth by a development initiative (i.e. to operationalise). It is submitted that to operationalise a development initiative like the AfCFTA, a state must have the capacity to implement or govern it, be politically willing, and secure the buy-in of key stakeholders. Accordingly, to assess law governance or implementation three elements are to be considered: capacity, political will and stakeholder buy-in.

A state deemed to possess capacity is one that has in place the crucial laws and institutions to operationalise the AfCFTA (going by the objectives of its agreement). State Capacity in the context of this study, therefore, may be inferred from the presence of core institutions to marshal the AfCFTA and the design of the laws that impact on the AfCFTA (i.e. those in place to accomplish the core goals set forward).[192] This includes laws and institutions for trade policy formulation, and for those governing the exigencies of essential trade issues like competition, trade remedies, standards, customs and trade facilitation, investment, intellectual property and digital trade. Political will, on the other hand, engages the commitment levels of the state to the development initiative. In this regard, the reforms that have been made to attune the state-party to the AfCFTA (if any) are good indications of political will. Furthermore, the existence of novel mechanisms for communication and monitoring could be useful indicators. Lastly, stakeholder buy-in examines the existence of consultation and sensitisation measures. Shaffer suggests that an efficient way for meaningfully engaging with discrete trade policy issues is governance through public-private networks.[193] Stakeholder buy-in thus examines the means for cultivating collaborative

[191] Lee op cit note 49 at 450.
[192] Ibid at 442.
[193] Gregory C Shaffer *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003) 17.

networks between public and private actors and for creating a sense of ownership of development initiatives. Stakeholders refer to governmental and non-governmental Civil-Society Organisations (CSOs). The term 'CSO' is used in this thesis as an umbrella term encompassing various non-profit and for-profit organizations, advocacy groups, community-based organizations, and other actors relevant to the implementation of the trade and development initiative in the case studies. It is important to note that the aim in the regard is not to provide an exhaustive analysis of civil society in each case study, but rather to consider the relevant actors and their roles within the context of law implementation. The focus is on providing a contextualized assessment of how stakeholders are involved and engaged in the implementation process of the continental free trade initiative.

C) Developmental regionalism considerations

Development considerations examine strategies to attend to supply-side constraints and the structural inhibitors to productivity, transformation, and development. This is because coherent measures to curb supply-side constraints are as crucial, as the LFIs in place for trade liberalisation. While the study submits that there could be several interferences in this regard, some of the most pervasive across African states include the absence of electricity, inadequacy of transportation networks, the inaccessibility of finance options, and low trade capacity quotients across the board. Therefore, the indicators to be examined could include measures for improving hard and soft infrastructures (infrastructure policies), power and electrification strategies, measures for trade finance, plans for human trade capacity development and industrialisation plans and strategies.

In employing the ALDIM framework, it is important to consider that supply-side constraints may differ across case-studies, depending on their unique circumstances and priorities. The ALDIM framework aims to provide a comprehensive analysis of the developmental integration process within specific case-study contexts, taking into account the most salient supply-side issues that have a significant impact on the potential outcomes of the AfCFTA. It should be noted that not all supply-side constraints will be equally prominent or pervasive in every case study. Focus is placed on the more prominent and relevant constraints within each case-study to provide a nuanced understanding of how these issues impact the developmental outcomes of the AfCFTA. By tailoring the analysis to address the specific supply-side constraints that are most significant, the thesis aims to provide a more nuanced and context-

specific assessment of the challenges and opportunities related to the implementation of the AfCFTA in the case studies.

Overall, the ALDIM framework offers a flexible approach that allows for the identification and examination of country-specific supply-side constraints, ensuring that the analysis remains relevant and applicable to the unique circumstances of each case study. This clarification is applicable for the other two ALDIM parameters examined above (i.e. Outline/Design of domestic setting and Law governance or implementation).

S/N	Indicator	Elements
1.	Outline or design of domestic setting	Developmental outlook
		Trade and economic ideology
		The nature engagements in foreign and regional trade
		Other environmental considerations.
2.	Law implementation/governance	Political will
		Capacity constraint
		Stakeholder buy-In
3.	Developmental considerations	Supply-side constraints

Illustration: *Analytical Law and Developmental Integration Model (ALDIM) Indicators*

2.7. Conclusion

This chapter set a foundation for this research by examining the literature on free trade and integration and situated those perspectives within the context of law and development. It appraised key ideas around the theory of free trade and contradictions to it. It also examined normative ideas around integration and approaches to the concept. The chapter then put forward an analytical framework for this research, utilising themes from law and development studies as well as development regionalism. In this regard, the chapter established the Analytical Law and Developmental Integration Model (ALDIM). The model prudently combined insights from the general theory of law and development and the

developmental regionalism model. While the insight from the general theory is used to reflect on domestic legal frameworks and institutions, insights from developmental regionalism is used for analysing how those legal frameworks could be used in the context of the AfCFTA to yield outcomes that are development oriented.

The ideas put forward in this chapter will be built on in the next chapter, which puts the AfCFTA into focus by examining its historical underpinnings, ideological basis, and legal foundations.

3. CHAPTER THREE: THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA) INITIATIVE: AN ATTEMPT AT ADVANCING DEVELOPMENT THROUGH INTEGRATION

3.1. Introduction

The previous chapter was framed around the concept of development. In that regard, approaches from international trade and regional integration theory were examined, revealing some intersections between them and, in some instances, the theoretical contradictions to the same. The chapter also established that integration was one of the pathways through which Africa had previously engaged its development question and then examined some of the slants for understanding the concept in political science and economics orthodoxy. The chapter concluded by setting out an analytical framework for the thesis (i.e. the Analytical Law and Developmental Integration Model (ALDIM)) which combined law and development theory with an integration variant.

This chapter builds on the research by examining Africa's utilisation of integration for development and the African Continental Free Trade Area (AfCFTA) with more intentionality. Amongst other things, the chapter shows the ways in which the AfCFTA initiative is a much different expression (in history, ideology, and design) of the concept. A synthesis of the issues discussed in this chapter is aimed at probing into the following inquiries: first, how has Africa previously collaborated for development purposes, secondly, what can AfCFTA State Parties learn from the history of the continent's attempts to engage development using regional integration and collaboration and, lastly, how does the AfCFTA hope to engage development differently?

The chapter is structured in two parts. The first attempts to locate the theoretical discussion on the concept of African integration. This is done not only in terms of how it has been perceived by scholars but also through some of the ideologies and forms through which it has unravelled in Africa. This is followed by an overview of some initiatives through which the concept was manifested over time. In this regard, the initiatives which impacted on development are examined. The first part of the chapter intends to provide a theoretical context for the second part which is dedicated to substantively evaluating the AfCFTA (argued to be a unique embodiment of the concept of integration). The second part recounts some of the factors leading to the AfCFTA's creation and some gains. Significant attention is given to some risks and challenges projected to inhibit its objectives. These risks and

challenges are used in subsequent chapters in the context of the preparedness of African states (Nigeria, Kenya, and Ethiopia) to utilise the initiative for development.

3.2. Theoretical and normative frameworks for African integration

African integration is not deficient in theoretical assumptions.[194] As integration unfolded in Africa, the peculiarities around it became evident.[195] Thus theorists became concerned with how to study it as a unique phenomenon (from how it was understood across the world).[196] In this regard, different views have been proffered. One is the perception of the concept as a process by intergovernmental organisations in Africa of pooling resources to create a mutually beneficial and larger economic integration scheme.[197] It is also perceived as comprising all strategies aimed at policy harmonisation for boosting development by African states.[198] This understanding represents a practical construction of the term, thus viewing co-operation in Africa as an expression of the active role independent states play in pursuing economic development. However, integration in Africa does not only unfold as economic processes and towards economic aims. Early attempts at African integration also unfolded as a political and social process. African integration may equally be perceived as political, economic, and cultural high-level co-operation between independent states and their people, for mutually beneficial ends.[199] However, such an ambitious understanding of the concept is criticised as unfocused, this hence may explain the limited success of previous integration initiatives.

Another perception of African integration is that it is the terminal or resulting condition for several cooperative activities amongst states in Africa.[200] This envisages integration as a point rather than a process. If this were the case, then integration will never be attainable,

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[194] It should be noted that most of the assumptions on African integration had foundations in the theories of integration, which has been explored in the previous chapter.

[195] Peculiar in the sense that unlike the European Coal and Steel Community (precursor to the EEC and later the EU) *for example*, which emerged due to security concerns in post-WW2 Europe, the development of integration in Africa was more shaped by the ideologies through which the continent gained independence rather than concerns for development. On the emergence of the ECSC see *Treaty Establishing the European Coal and Steel Community* 18th April 1951, 261 UNTS 140. See Finn Laursen 'Theory and practice of regional integration' (2008) 8(3) *Jean Monnet/Robert Schuman Paper Series* 3.

[196] John Akokpari, Angela Ndinga-Muvumba, and Tim Murithi, *The African Union and Its Institutions* (2008) 85.

[197] Biswaro Joram Mukama *The Quest for Regional Integration in Africa, Latin America and Beyond in the Twenty-first century: Experience, Progress and Prospects: Rhetoric Versus Reality: A Comparative Study* (2011)

[198] J Akokpari 'Dilemmas of regional integration and development in Africa' in John Akokpari et al Ibid at 85.

[199] Moorosi Leshoele 'Regional integration prospects, challenges and opportunities in Africa: A case of the Tripartite Free Trade Area' in Oloruntoba et al (eds) op cit note 110 at 107-108.

[200] Scholars like Asante hold this view. Asante op cit note 133 at 21, 52.

given the complicated political issues that interplay in integration arrangements generally. However, rather than being a resulting condition, it is another point in a process that unravels in phases and which should culminate in development. A common feature of all perceptions of African integration is that it is an expression of the will (and a significant step) between states towards unifying resources for development.

Modern perceptions of African integration are more progressive and transformative.[201] It is argued that, rather than being merely frameworks for co-operation, integration should drive economic diversification and industrialisation in Africa, now more imperative with multilateralism in crisis.[202] It requires, inter alia, the fusion of economies into larger regional units which are defined by clear objectives and common African values. Here values centred in African collectivism (such as 'Ubuntu', solidarity, humanity, etc.) are projected to be crucial.[203] Values are a very legitimate concern because they sustain the efforts to create the African economic community (i.e., the statutory aim of African integration).[204]

If the aim of integration is development and (as argued in the previous chapter) the only development that should be aspirational is that which expands substantive human freedoms and enables the attainment of valuable lives, a befitting perception of integration in the context of the study is a resolve amongst African states to unify resources through the progressive, and coherent harmonisation of policies. This should be defined by common values, a progressive outlook of development and aimed at the goal of enabling the actualisation of the substantive freedoms that increase the potential of Africans to live valuable lives.[205] It is against this view that the AfCFTA (as an integration initiative), is examined in this chapter.[206]

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[201] Progressive within the context of this statement should be construed as denoting 'reform' and 'forward-minded'.

[202] Davies op cit note 34 at 60.

[203] Ismail op cit note 69 at ch 5. Also in Ismail op cit note 21 at 113.

[204] Preamble, *Treaty Establishing the African Economic Community,* 1991.

[205] This view on integration aligns with the Sen's notion of development appraised in chapter 2 and provides a much useful lens for unpacking the objectives of the AfCFTA. See Sen op cit note 52 and note 51.

[206] In other words, the efficacy of the AfCFTA will be examined vis-à-vis the extents to which the Agreement is able to utilise shared African values to progressively and coherently harmonise policies for development.

3.2.1. Engaging with development through co-operation and Integration

Africa's history is replete with regional cooperation frameworks geared towards development.[207] This section does not examine all these frameworks. It only considers five key initiatives through which the post-colonial notions of development were grappled with, leading up to the AfCFTA. This appraisal contributes to the chapter by reflecting on the patterns that regional development strategies took before the AfCFTA and reveals some criticisms.

A) The Lagos Plan of Action for the Economic Development of Africa 1980–2000: Framework for endogenous development in the OAU.

The Lagos Plan of Action (LPA) was a policy statement for mainstreaming economic development in the African integration process. It represented the first extensive attempt by the OAU to curate a strategy for continental development and was a significant milestone in the region's integration trajectory.[208] It charted the path for the incursion of economic integration, adopting the Vinerian model of regionalism.[209] The LPA was a developed by the OAU (collaborating with the Adebayo Adedeji-led Economic Commission for Africa) in reaction/response to two issues: first, the failed global development strategies of the past decade which had stagnated economic growth in Africa[210] and, secondly, the oversight in the OAU charter in providing its member states with an Africa-specific approach to economic development and proper guidance on the type of policies which could help them achieve their development goals.[211]

The LPA aimed to create a 'new international economic order'[212] by focusing the attention of African states towards diversified development options.[213] It contained

[207] Asante op cit note 133 at 91.
[208] Rene N Kouassi 'The itinerary of the African integration process: An overview of the historical landmarks' (2007) 1 *African Integration Review* 15; Also see Asante op cit note 133 at 91.
[209] Bashi op cit note 183 at 40.
[210] Preamble, *Lagos Plan of Action for the Economic Development of Africa,* 1980.
[211] Bashi op cit note 183 at 40-41; See also RJ Cummings 'A historical perspective on the Lagos Plan of Action' in JE Nyang'oro, and TM (Shaw, eds*) Beyond Structural Adjustment in Africa: The Political Economy of Sustainable and Democratic Development*, (1992) 33.
[212] Annex II on the Resolution on, *Lagos Plan* Ibid.
[213] The Plan was preceded by a series of in-depth considerations by the continent's foremost experts in economic policy culminating in the Monrovia Declaration of Commitment which spelt out guidelines and measures for national and collective self-reliance in economic and social development for the establishment of a new international economic order in July 1979 in Liberia. See A Benachenhou 'South-South Cooperation: The Lagos Plan of Action and Africa's Independence' (1983)8 *Africa Development/Afrique et Développement* 5–19.

development objectives that were set out as short, medium and long-term goals.[214] While the short-term goal is towards establishing the basic essential industries to lay the foundations for self-reliance, the medium-term goal was to strengthen the short-term goal by driving self-sustained industrialisation within 10 years towards attaining self-sufficiency" in the food, building materials, clothing and energy sectors.[215] The long-term development strategy was to achieve two per cent of the world's industrial production by the year 2000 in accordance with the 'Lima Target'.[216]

The Lagos Plan of Action was met with scepticism, however, from the international community (the Bretton Woods system). Despite its coherent articulation of goals and objectives, it was regarded as too ambitious.[217] It was also argued to be overly political and only validated by African leaders. [218] In its place, the Bretton Woods system advocated for Structural Adjustment Programs (SAPs), which weakened the ambitions of implementing the LPA.

B) Structural Adjustment Programmes (SAPs): An exogenous framework for development[219]

After their independence, many African countries were thrown into economic crises due to mismanagement and the rise and fall of commodity prices (Africa's primary exports) in the 1970s.[220] This led to external borrowing and subsequently resulted in external debt profiles that were higher than their GDPs — leaving their economies vulnerable.[221] In a bid to assist African states with their economic crises the World Bank (in the Berg Report) made some recommendations including domestic reform of macroeconomic policies which aimed mainly

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[214] Section 61 *Lagos Plan* Ibid.

[215] *Lagos Plan* Ibid.

[216] The Lima Target was a resolution at the second conference of the *United Nations Industrial Development Organization (UNIDO)* which established principles of industrialisation and which defined terms under which the international community might engage and cooperate in matters of industrial development. See UNIDO 'Lima Declaration and Plan of Action on Industrial Development and Co-operation' 12–26 March 1975 available at *Link* accessed on 26 August 2022.

[217] Daniel C Bach *Regionalism in Africa: Genealogies, Institutions and Trans-state Networks* (2016) 75–79.

[218] Bach Ibid at 75-79.

[219] Structural Adjustment Programmes (SAPs) are also examined not because they are integration initiatives as such, but because of their impacts on African integration and development. Many integration scholars tend to ignore SAPs in their reflections on the trajectory of integration in Africa. However, one that tends to highlight the correlation (which this study finds insightful) is Bashi. See Bashi op cit note 183 at 42.

[220] Bashi op cit note 183 at 42.

[221] Ibid at 41-43; Benjamin F Bobo, and Hermann Sintin-Aboagye *Neo-Liberalism, Interventionism and the Developmental State: Implementing the New Partnership for Africa's Development*, (2012).

at reducing the role of the state in the development process.[222] The set of neoliberal reforms (now known as structural adjustment programmes) significantly impacted the trajectory of regional development in Africa.

SAPs represented efforts to enable free trade and markets over governments' interventions to boost weak economies. The suitability of SAPs for Africa was theoretically justified using Ricardo's comparative advantage theory.[223] It was argued that African states had a comparative advantage in the trade of primary commodities and thus could utilise the foreign exchange obtainable from that trade in industrialisation and economic growth.[224] To enable this, a series of initiatives were encouraged which emphasised liberalisation, privatisation, deregulation, and fiscal austerity.[225]

This had the adverse effect of corroding of inward-looking (Pan-African) principles of co-operation and self-reliance garnered from independence and galvanised in development initiatives like the LPA. While regional development initiatives like the LPA emphasised the imperatives of collective self-reliance, self-sufficiency, and regional interdependence, SAPs emphasised unilateral trade reform and the need to open economies to the world at large. Under this model, regional interdependence was irrelevant, pointless and deviated from neo-liberal fundamentals which argued for the removal of tariff barriers to global trade.[226] It is also argued that the consequences or impacts of SAPs were the deindustrialisation of some African economies.[227] Also, a study subsequently conducted by the Bretton Woods system on the impact of SAPs showed that the speed of import liberalisation drove competition in countries in a way that was unsuitable for dynamic and sustained manufacturing growth. This resulted in the erosion of competitiveness in their export baskets and contributed to increased marginalisation in global trade.[228]

A defining feature of SAPs (as Oliver Saasa) notes was its emphasis on liberalisation and economic growth rather than development.[229] SAPs could have led to different outcomes if

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[222] Word Bank (1981) *Accelerated Development in Sub-Saharan Africa: An Agenda for Action*, available at *http://documents1.worldbank.org/curated/en/702471468768312009/pdf/multi-page.pdf* accessed on 23rd May 2020; Bashi op cit note 183 at 42.
[223] Bashi op cit note 183 at 42.
[224] Ibid.
[225] Ismail op cit note 69 at 35; Ismail op cit note 21 at 21; See also Davis op cit note 34 at 31.
[226] Asante op cit note 133 at 111, 129-134; see also Robert Davies 'Approaches to regional integration in the Southern African context', (1994) 24 *Africa Insight* 13.
[227] Ismail op cit note 69 at 35; Ismail op cit note 21 at 21; See also Davis op cit note 34 at 31; Bashi op cit note 183 at 41.
[228] World Bank, *Assessing World Bank Support for Trade, 1987–2004: An Independent Evaluation Group Evaluation,* (2006) p. Xvi; Ismail op cit note 69 at 35.
[229] Oliver S Saasa 'Economic Cooperation and Integration Among Developing Countries: An Overview', in Oliver S Saasa, *Joining the Future: Economic Integration and Cooperation in Africa* (1991) 7–26.

they equally emphasised coherently curated and deployed industrial policies which recognised the efficiency and developmental roles of industrial complementarity, specialisation, external economies and economies of scale.[230] In hindsight, the most relevant shortcoming of SAPs was the disregarded collective reform responses through regional and sub-regional organisations. The fact that African states had similar economic challenges meant that they had a higher chance of tackling development issues together.[231] It was in realisation of this that those African states returned to regional interdependence in handling its development issues, leading up to the AfCFTA.

C) The Abuja Treaty: Defining a new pathway to integration in Africa

Officially known as the treaty establishing the African Economic Community, the Abuja Treaty was agreed to in June 1991 and entered into force in May 1994. It was created to mobilise and coordinate the efforts and resources of the OAU towards the attainment of economic and social integration through the harmonisation and rationalisation of the activities of the various African intergovernmental organizations at all levels.[232] It can be regarded as the OAU's magnum opus for economic integration in Africa. This is because the treaty provides the legal foundations for the creation of an integrated economic community for African states for development on which the AfCFTA is built. [233]

The treaty committed members to the promotion of a peaceful environment that is amenable to successful economic development, i.e., one of accountability, respect for human rights and economic justice,[234] and was built on the principles of solidarity, collective self-reliance, equality, regional interdependence, and co-operation.[235] These principles express the adoption by African states of an endogenous development model after much insight on the poor state of governance within African countries.[236]

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[230] Asante op cit note 133 at 112.
[231] Ibid at 134.
[232] Organisation of African Unity 'Declarations and Resolutions adopted by the twenty-seventh ordinary session of the assembly of Heads of States and Government - AHG Res. 205/XXVII' Para. 4. available at *https://au.int/sites/default/files/decisions/9536-1991_ahg_res_201-205_xxvii_e.pdf* accessed on 23rd May 2020.
[233] Acknowledging its significance, the OAU's Assembly tasked a committee to review its enabling charter to align it with the treaty, following its signing in June 1991. Although several attempts were made, no agreement on this was reached until the OAU was dissolved and the AU was formed. United Nations Economic Commission for Africa *History of Africa's Regional Integration Efforts*, available at *https://www.uneca.org/oria/pages/history-africa%E2%80%99s-regional-integration-efforts,* accessed on 23 May 2020.
[234] Oloruntoba op cit note 7 at 168.
[235] Article 3, *Treaty Establishing the African Economic Community,* 1991.
[236] Asante op cit note 133 at 95.

The Abuja Treaty contained a more detailed implementation strategy for the ambitions set out in the Lagos Plan of Action (LPA).[237] The approach to integration as espoused by the Abuja Treaty was to be linearly furthered using regional economic blocs which were designated as its pillars.[238] It was, therefore, in an expression of this formula that it initially earmarked the first five years of its coming into force for the strengthening of regional economic communities.[239] The difference between the Abuja Treaty and the other treaties establishing regional groupings at the time was not only its well-defined implementation strategy, principles, or provisions on institutional and decision-making process,[240] but also its approach to development which was holistic. It constructs development in a way that links economic objectives (i.e. quantitative factors of production), and non-economic objectives (including political, social, cultural, environmental and institutional) of states. This approach to development reflects the essential elements of development which should be aspirational that is, one which expands human freedoms and facilitates liberty of action by enabling people to attain the highest level of their ability or a life in which they could have reason to value.[241]

The Abuja Treaty remains significant to the discourse because it represented a decisive shift in the thinking on the approaches to African integration and gave a new lease of life and purpose to the existing regional groupings through which the aims of regional development was to be manifest.[242] Francis Ikome notes that before the treaty was signed the existing RECs were 'weak and largely paper organisations whose elaborate treaties had nothing more than memorials of faulty development strategies' and which therefore made it needful to strengthen them to meet the demands of integration.[243] It, therefore, marked the beginning of a new wave of African integration and thinking on development.

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[237] Ismail op cit note 69 at 20–21.
[238] Asante op cit note 133 at 92; See also Sam KB Asante 'Comparative analysis of the treaties of the African Economic Community and the Economic Community of West African States', in , Jeggan Colley Senghor(ed.) *ECOWAS: Perspectives on Treaty Revision and Reform* (1999) 15–22.
[239] Gatsinzi Phillip, *Implementing the African Economic Community Treaty: The Role of Regional Economic Communities in Africa's Trade and Market Integration* (unpublished LLM thesis, University of Cape Town, 2010) 6.
[240] Asante op cit note 133 at 92; See also Asante note 238 at 15–22.
[241] See also Sen op cit note 51 at ch 4. See also Sen op cit note 52.
[242] Fagbayibo op cit note 6 at 126.
[243] Ikome op cit note 7 at ch 1.

D) New Partnership for African Development (NEPAD): Developmental integration in the era of the AU

One motivation for forming the African Union (AU) was the need to shift the focus of African states from colonial emancipation, and political stability (which defined the earlier stages of Africa's post-independence) to more pertinent issues of economic and social development.[244] NEPAD emerged as a product of the enthusiasm representing an attempt to create an alternative approach to African development after a decade lost to the effect of SAPs. The initiative was launched as the New Africa Initiative (NAI) in 2001 as a part of the economic agenda of the newly formed AU and as a product of a merger between Millennium Partnership for the African Recovery Programme (MAP) and the OMEGA Plan for Africa.[245] The African Union Heads of State and Government decided in June 2018 during their 31st Ordinary Session in Nouakchott, Mauritania, to rename the NEPAD Planning and Coordination Agency the African Union Development Agency-NEPAD (AUDA-NEPAD).[246]

The initiative's core aims were eradicating poverty, integrating Africa into the global economy, women's empowerment and the establishment of a stable environment conducive to peace, sustainable economic growth and development.[247] It was established in order to integrate Africa into the globalising world, to bridge the gap between developing and industrialised nations, boost economic growth, and alleviate poverty.[248]

NEPAD was established with a holistic and comprehensive strategy for the revival of the continent,[249] by creating and coordinating continent-wide programmes and projects, mobilising resources and engages the global community, regional economic communities

[244] There were initially slight tensions between in political-economic context and orientation of the NEPAD and the African Union plans. This tension (Adesina explains) stemmed from NEPAD's initial development by a small group of African leaders without broad consultation, leading to concerns about legitimacy and ownership. NEPAD's market-oriented economic reforms and partnerships with international financial institutions also contrasted with the more statist and pan-African approach of the African Union's predecessor. However, through negotiation and compromise, NEPAD was integrated into the African Union as a flagship program, with increased oversight and participation by member states. Also NEPAD's neo-liberal economic worldview, focused on growth and engagement with global capitalism, differed from other African Union plans, which may have had distinct economic and pan-African political priorities. Understanding these differences sheds light on the complex dynamics shaping Africa's development agenda. See Adésínà, JO 'NEPAD And The Challenge Of Africa's Development: Towards The Political Economy Of A Discourse' (2009) 4 *African Journal Of International Affairs* pp 11-15; Also see James Thuo Gathii,*African Regional Trade Agreements as Legal Regimes.* (2011) 368- 370.

[245] Ibid.

[246] AUDA-NEPAD,*About us*,available at *https://www.nepad.org/microsite/who-we-are-0#about_us*, accessed on 26 May 2021.

[247] Kouassi op cit note 208 at 15.

[248] L Signé,. *African Development, African Transformation: How Institutions Shape Development Strategy* (2018).

[249] D Malcomson, R Herbert, P Ramsamy, et al. 'Nepad' (2004) 11 *South African Journal of International Affairs* 11–136.

(RECs) and member states in the implementation of these programmes and projects.[250] It also provides for a self-monitoring protocol and arrangement — the African Peer Review Mechanism —founded in 2003 to encourage conformity in terms of its economic and corporate governance values and code.[251] NEPAD was created around philosophies of ownership, leadership and partnership for the achievement of development goals.[252] The third of those philosophies (i.e. partnership) differentiates it from the LPA and Abuja Treaty. While the Lagos Plan sought an endogenous model of development, the NEPAD Agenda adopted an outward and market-centred type of development. This model was designed to meet economic growth through external funding.[253] In other words, NEPAD seems to sacrifice the broader goals of development to market forces, though the theme of economic self-determination, self-sufficiency and collective self-reliance are not lost in it. NEPAD combines the idea of self-sufficiency and the necessity of foreign funding in its approach to development.[254] The traction set by the NEPAD framework enabled the AU in formulating its other developmental strategic frameworks, most significant of which is the Agenda 2063 blueprint.

E) The African Union Agenda 2063

The African Union's Agenda 2063 is the continent's blueprint for grappling with its development question. It is regarded as the most comprehensive development framework since the Lagos Plan.[255] A tangible embodiment of Pan-Africanism and the African Renaissance, the African Union notes it to be its strategic framework for restructuring the continent into a prospective global powerhouse and achieving sustainable development.[256] Signed during the golden jubilee celebrations of the OAU/founding AU in May 2013, Agenda 2063 is an affirmation of the African Union's commitment to supporting a new path

[250] NEPAD *NEPAD in Brief* (2013).
[251] Ibid.
[252] Ismail op cit note 69 at 105. Also in Ismail op cit note 21 at 27-34.
[253] Gathii. Op cit note 244 at 368- 370; See also James Thuo Gathii 'A critical appraisal of the NEPAD Agenda in light of Africa's place in the world trade regime in an era of market centered development' (2003) 13 *Transnat'l L. & Contemp. Probs.* 179.
[254] President Thabo Mbeki *Address of the President of South Africa to the Joint Session of the Parliament of Nambia'*(30th October 2007), available at *https://www.sahistory.org.za/archive/address-president-south-africa-thabo-mbeki-joint-session-parliament-namibia-windhoek,* 30 October 2007.
[255] Signé op cit note 248.

[256] African Union 'Second Continental Report on the implementation of Agenda 2063' available online at *Link* accessed on 3rd June 2022.

toward inclusive and sustainable development with a people-oriented approach over 50 years (i.e. from 2013 to 2063).

The Agenda 2063 is a significant detail in Africa's history of collectively engaging with development for three reasons. First, it replicates the comprehensiveness of the NEPAD framework and builds on it by including more continent-wide programmes and projects that have an impact on development. Like NEPAD, it perceives development as a multidimensional concept that transcends economic growth and incorporates aspirations with a broader social impact and those aimed at political reform.[257] On the second note — the Agenda 2063 is significant because it serves as the policy foundation for the AfCFTA and provides a means for garnering support for the other flagship projects that will be crucial for mainstreaming development when free trade is operationalised under the AfCFTA. Examples include the integrated high-speed railway, the African passport, and the movement of persons initiative.

On the last note, Agenda 2063 is important because it is a subtle acknowledgement by the AU of the reality that trade alone may be inadequate for solving Africa's complex development challenges. It was against this realisation that the AU's Assembly of Heads of States and Governments also adopted the Action Plan for Boosting Intra-African Trade. This action plan included seven clusters: trade policy, trade facilitation, productive capacity, trade-related infrastructure, trade finance, trade information and factor markets.[258] The Agenda is therefore a policy guarantee that the AfCFTA initiative will not exist in isolation but will be complemented by an array of other flagship projects.

3.2.2. Development contradictions and lessons from the history of African integration

Africa's development initiatives and institutions have been notorious for their inadequacy and for falling short of their mandates.[259] Even though these initiatives were founded on the right

[257] Such as peace, democratisation, and the rule of law. See African Union Agenda 2063: The Africa We Want Available online at Link accessed on 23rd June 2020.
[258] Ismail op cit note 21 chapter 6.

[259] In 1975, there were six economic communities, 20 inter-governmental multi-sectoral economic organisations and about 100 single-sector multinational organisations for different forms of technical and economic cooperation in the continent. By 2006, the numbers had grown and single-sector multinational institutions alone were mapped to have risen to 200, yet development was still elusive in most parts of the continent. See See Adedeji, A 'The economic evolution of developing Africa' in Micheal Crowder *The Cambridge History of Africa* . (1984) 192-250; See also Meeting of experts on the rationalisation of regional economic communities (RECs), Ouagadougou (Burkina Faso), 27–31 March 2006, Consultative Meeting of Accra and Lusaka: Consolidated Report; AU Ministerial Meeting on Rationalisation of RECs, Ouagadougou, 27-31 March 2006 –

intentions, they have not done much to facilitate access to opportunities or enable the actualisation of the human freedoms necessary for transforming lives.[260] In other words, development has not been a visible outcome of the initiatives. This contradicts the Pan-African conception of integration and provides lessons for the AfCFTA.

Adebayo Adedeji (executive secretary to the Economic Commission for Africa from 1975 to 1991), who actively midwifed several African development frameworks up to the formation of the Abuja Treaty in 1991, attributes this inadequacy of integration to two groups of reasons; the first being internally generated and the second group being externally induced.[261] The main internally generated constraint with early integration frameworks (as Adedeji explains) was capacity related. This could be further broken into two rubrics: the first being institutional and the other physical. While the absence of legal and institutional frameworks prevented a meaningful operationalisation of the development initiatives domestically, the lack of physical infrastructure (such as transportation, energy, and communication networks) to link collaborating states prevented the gains of those regional compromises from trickling down. Because these twin capacity-related issues prevented the impacts of integration from being visible, political will and commitment slowly eroded. This erosion was exacerbated by the political instability which engulfed the region. Other internal reasons include the inability to compromise on a sharing formula in respect of the gains and costs of integrations project, the question of sovereignty and the extent to which it was to be ceded, and divergences in political as well as trade ideologies.

The externally induced issues could equally be considered under two rubrics. First, the Eurocentric bias embedded in trade and economic ideologies across the region and, secondly, the crippling role of multinational capitalists. In the first instance, the economic ideology prevalent at the time (when regional development initiatives were being formulated and deployed) favoured and cultivated dependency. The orientation had been created and institutionalised by colonial interests to optimise the economic yields of their colonies.[262] After independence, the states leading the

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First Conference of African Ministers of Economic Integration (COMAI); ECA, Directory of Intergovernmental Co-operation Organizations in Africa,E/CN. 14/CEC/l, June 1972.

[260] Development as a concept is appraised in Chapter 2. See also Sen op cit note 51 at 190.

[261] A Adedeji 'The economic evolution of developing Africa' in Crowder op cit note 259 at 192–250.

[262] Manfred Bienefeld 'Dependency theory and the political economy of Africa's crisis' (1988) 15 *Review of African Political Economy* 68-87; Uche, LU 'Some reflections on the dependency theory' (1994) 8 *Africa*

integration efforts did little to dismantle that economic orientation, but instead built the African integration efforts on it. Therefore, rather than enabling and prioritising the socio-economic transformation of the region, these integration arrangements enabled and prioritised increases in the foreign trade in primary commodities. Adebayo notes that this orientation inhibited the sort of socio-economic change that could have transformed the region.[263]

In the second instance (which is ancillary to the first), multinational capitalistic interests enabled the cultivation of flawed economic orientations in ways that actively prevented more suitable ideas on development from being formed. While the need to do this is generally self-evident, Mutharika's theoretical perspective on the issue is interesting and benefits this study.[264] Mutharika argues that a more meaningful development ideology did not serve the interest of Multinational corporations for two reasons; It would have weakened their positions (or created uncertainties at least) with African governments which could then have favoured intra-African commerce over foreign, and secondly, the idea of integration threatened the overarching structures for the international distribution of products which had created vast amounts of wealth in the Global North. The survival of the existing structure for wealth creation depended on inadequate economic policy decisions/orientation in the Global South.[265]

It is for these reasons that the integration frameworks proved to be inadequate and development elusive. Adedeji comments that this situation could have been different if governments were more knowledgeable about intricacies of development in their own societies.[266] This could have enabled them to devise more endogenous and self-serving constructs for development, rather than extrapolating from the experiences of other societies that were fundamentally different from theirs and building on inherited theories.

The questions that the issues appraised in this section and are then presented in the study are: if indeed the crucial reasons for the inadequacy of regional initiatives (in terms of development outcomes) were institutional, physical capacity constraints, orientational deficiency and the crippling influence of multinational interests; to what extent does the

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Media Review, 39-55; I E J Emeh 'Dependency theory and Africa's underdevelopment: A paradigm shift from pseudo-intellectualism: The Nigerian perspective' (2013) 1 *International Journal of African and Asian Studies* 116–128.

[263] See Structural adjustment programmes appraised above. Also see A Adedeji 'The economic evolution of developing Africa' in Crowder op cit note 259 at 192-250.

[264] Mutharika Bingu 'Multinational corporations in regional integration: the African experience' (1975) 5 *African Review* 365-390.

[265] Ibid.

[266] A Adedeji 'The economic evolution of developing Africa' in Crowder op cit note 259 at 192-250.

AfCFTA and its implementation mechanisms encourage the creation of institutional frameworks domestically, the prioritisation of development enabling infrastructures, and the remodelling of the African orientation on development? Some of these issues are examined in subsequent chapters.

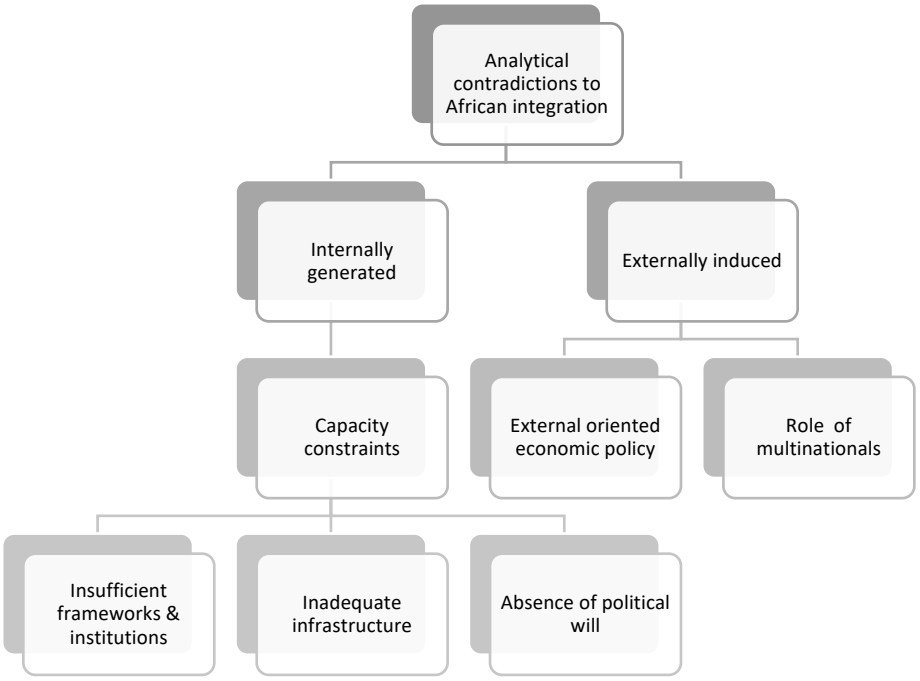

Illustration: *Analytical reasons for the failure of Africa's development initiatives*

3.3. The African Continental Free Trade Area: A new approach to integration and development

This section evaluates the African Continental Free Trade Area agreement (AfCFTA), the continent's most ambitious attempt at development through free trade.[267] The AfCFTA was formally established in March 2018 and was entered into force in May 2019 with respect to the 24 countries that had deposited their ratification instrument at the African Union's Secretariat following the Agreement.[268] The AfCFTA is intrinsically linked to the Abuja Treaty and essentially represents the third stage of its ultimate aim, namely, the establishment of the African Economic Community.[269]

[267] Ismail op cit note 21 at 2.
[268] Article 23 of the Agreement Establishing the African Continental Free Trade Area (AfCFTA), 2018.
[269] Article 4(2)(d) of the Treaty Establishing the African Economic Community, 1991.

The AfCFTA has a strong development focus.[270] Its development outlook incorporates aspects of the AU's Agenda 2063 and prioritises sustainable and inclusive social and economic development. It is also holistic in the way it connects economic growth in Africa to the United Nation's Sustainable Development Goals (SDGs).[271] The inclusion of objectives such as the need to promote industrial development through diversification and regional value chain development, agricultural development and food security, and structural transformation in the State Parties, is also a positive tribute to its development focus. However, beyond these statements, a practical approach to effecting development within AfCFTA State Parties will have to be formulated. Karin Kuhlmann and Lisa Akinyi Agutu note that this will require addressing additional areas of law beyond those being negotiated in the other phases, such as more concrete strategies on climate change, gender equality, and healthcare.[272]

Several considerations make the AfCFTA unique (in the context of international trade). These include its Pan-African ideology, its progressive and flexible framework or design, its timing, and its ambition. First, in the broad context of international trade, the AfCFTA is unique for its reflection of Pan-African ideology. The idea is that the only path to meaningful development must be endogenously generated, crafted by and from within Africa.[273] It expresses a renewal of the African commitment to regional integration as a norm of solidarity and a defence against the marginalisation of Africans in the global trading system.[274]Accordingly, this ideal guided the phases of negotiation from which the Agreement eventually emerged.[275]

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[270] Article 3 op cit note 268; Katrin Kuhlmann & Lisa Akinyi Agutu 'The African Continental Free Trade Area: Toward a new legal model for trade and development' (2020) *Georgetown Journal of International Law* 51(4).

[271] See Article 3, Protocol on Trade in Services Op cit note 268; See also African Union Commission, 2015, *Agenda 2063 Framework Document – The Africa We Want,* available at https://au.int/en/agenda2063/overview

[272] Kuhlmann & Agutu op cit note 270 at 753-808.

[273] Augustin K Fosu 'An economic theory of Pan-Africanism' (1999) 27 *Review of Black Political Economy* 7–12; See also Emmanuel Akyeampong 'African socialism; or, The search for an indigenous model of economic development?' (2018) 33 *Economic History of Developing Regions* 69–87; Franklin, Obeng-Odoom 'The African Continental Free Trade Area.' (2020) 79 *American Journal of Economics and Sociology* at 180.

[274] Luwam Dirar 'Norms of solidarity and regionalism: Theorizing state behaviour among southern African States' (2015) 24 *Mich. St. Int'l L. Rev*. 667; James Gathii Thuo 'Agreement establishing the African Continental Free Trade Area' (2019) 58 *International Legal Materials* 1028-1080; Article 5 op cit note 268.

[275] The negotiations were engaged against the backdrop of twelve principles including the most favored nation (MFN) treatment, national treatment principle, special and differential treatment, transparency and variable geometry. These principles were; (i) most favourable nation (MFN) treatment (ii.) national treatment principle (iii.) reciprocity (iv.) special and differential treatment (v.) transparency (vi.) substantial liberalisation (vii.) consensus (viii.) best practices (ix.) reservation of acquis (x) variable geometry (xi.) to be driven by AU member states, RECs and customs territories with the support of the African Union Commission, and (xii.) for the FTAs in RECs to serve as building blocks for the AfCFTA. Regional Focus and Third World Network *Africa The Continental Free Trade Area (CFTA): Process and Political Significance* April 2016, available at *https://www.tralac.org/images/docs/12458/cfta-process-and-political-significance-a-primer-by-regions-refocus-*

In terms of its unique design, the AfCFTA is modelled in a way that is cognisant of its least-developed state parties. This is embodied in the principles of flexibility and variable geometry contained in Article 5 of the Agreement,[276] and also in the its progressive negotiation, which cautiously accounted for the differences in the negotiating capacities of the parties.[277] Furthermore, the fact that the Agreement encourages periodic reviews reflects flexibility and progressiveness, both essential to enable parties to respond to opportunities and challenges.[278]

The AfCFTA's ambition is also a relevant point worth commenting on (in terms of the uniqueness point). When the AfCFTA is fully operational, it will be the most integrated and dynamic single economic space in the world. The Agreement creating it is expected to bind the highest number of State Parties (besides the WTO-regulated multilateral trading system) to mutually beneficial trade liberalising obligations. The AfCFTA initiative's ambition is best appreciated when considered against the timing in which it is coming. The rise of populism, embodied in the rhetoric of former United States President Trump, and the EU-Brexit crisis has cast uncertainty on foundational international trade principles. The breakdown of multilateral negotiations world over casts doubts on the extent to which the ambition of the AfCFTA can yield the results of development it promises.

The current research points to the AfCFTA's implementation as being the most crucial.[279] In this regard, its approach (developmental regionalism) seems suitable to the realities of development in Africa and sacrifices neoclassical approaches to implementing trade policies for one founded in non-aligned Pan-Africanism. The emphasis appears to be placed on its aim of development even though most of its objectives are designed to boost intra-African trade. Developmental regionalism as an approach recognises remarkable economic deprivations and unfreedoms and emphasises the imperatives of creating the necessary conditions for development on the continent.[280] More on this is subsequently examined along with the initiative's risks and potential challenges.

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and-twn-africa-april-2016.pdf ,accessed on 26 June 2020. See also United Nations Economic Commission for Africa ARIA IX op cit note 44 at ch 2.

[276] Kuhlmann & Agutu op cit note 270 at 5–7.

[277] Ibid.

[278] Article 8 and 23(2)(4) Article 5 op cit note 268.

[279] Ismail op cit note 69 at ch 3. Also see United Nations Economic Commission for Africa ARIA IX op cit note 44 at ch 2. Kuhlmann & Agutu op cit note 270.

[280] See chapter 2.

3.3.1. The rationale for and prospective gains of the African Continental Free Trade Area (AfCFTA)

A) The rationale for the AfCFTA

At the 50th anniversary of the formation of the Organisation of African Unity (OAU) in 2015 the African Union (the OAU's successor) initiated a 50-year vision referred to as the *The Africa We Want*, calling for an African prosperity based on inclusive growth and sustainable development.[281] The policy brief issued by the AU on this vision elaborated several aspirations towards attaining this broad goal of African prosperity, amongst which the core rationales for the AfCFTA may be gleaned, that is for the creation of an economically integrated and politically united continent based on the ideals of Pan-Africanism and the vision of Africa's Renaissance.[282] In other words, during the period which preceded the launch of the AfCFTA there was a yearning for a vehicle for boosting sustainable development on the continent in line with the Pan-African values such as solidarity and unity. Accordingly, creating a single market to increase the low level of intra-African trade served to be an appropriate mechanism for this purpose. Thus, the rationales for the AfCFTA (in which others converge) may be examined against two spectra: economic and political.

The first of these is that the idea of integrating the continent in the manner and scale envisaged by the AfCFTA is justified as essential for the deepening of political co-operation.[283] Such an ambitious scale of integration is shown to aid the consolidation of less mature democracies.[284] After many countries had achieved independence, the continent under the auspices of the newly formed Organisation of African Unity committed to deal with the intricate dynamics of statehood collectively: the AfCFTA is somewhat of a renewal of that agreement on co-operation for growth, but this time in the era of globalisation.[285]

The economic rationale appears to be the more pronounced consideration for the AfCFTA, that is, collectively engaging with the challenges associated with sustainable economic growth and development. Increasing commercial activity through trade policies

[281] Faizel Ismail 'A developmental regionalism approach to the AfCFTA ' (2018) *TIPS/WP* 5; Ismail op cit note 21 at 103
[282] Africa Union *Agenda 2063: Frame Work Document: The Africa We Want* (2015) 29.
[283] Vickers op cit note 22 at 11-35.
[284] Xuepeng et al op cit note 26 at, 29-70; Bergstrand op cit note 26 at 8.
[285] Co-operation within the context of the initiative includes all forms of collaboration between countries on ventures ranging from the execution of joint projects to technical sectors partnership and even policy harmonisation as well as the joint development of shared natural resources on the continent. See Lee op cit note 25 at 3. See Preamble, op cit note 268; See also Part IV, Protocol on Trade in goods op cit note 268.

will most likely lead to improved economic welfare and, ultimately, sustainable development.[286] The approach of utilising trade policies to boost development is not novel and has been proved empirically by using the gravity model of international trade. This model, used to study and predict the impact of bilateral trade flows as well as the efficiency of regional trade agreements,[287] proposes that more substantial trade flows between two countries are significantly attributable to the size of their GDPs and geographic proximity and negated by the distance between them. It shows that the impact on trade of the creation of a single market is more than three times larger than the reduction or removal of removal.[288] More specifically, the model shows (from the historical experience of countries joining RTAs) that those that join an RTA experience an average of 45 per cent increase in trade flow.[289] This increase in trade flows increases per-capita incomes and reduces the (administrative and political) costs associated with tariffs. The gravity model has been used to offer a more rigorous explanation for the intra-African trade performance.[290] It confirms that intra-African trade remains significantly low relative to its potential.[291] In this regard, AfCFTA represents an attempt to use trade policy to influence the variables that have long interfered with intra-African trade creation.

B) Gains of the AfCFTA

The AfCFTA has four overarching objectives within which the other objectives, it may be argued, converge.[292] The first is to create a continental market for goods and services to be facilitated by the free movement of business and investment. Its second is the expansion of intra-African trade through coordinating trade facilitation and liberalisation frameworks. The third is to attend to the 'spaghetti bowl dilemma' or the issue of multiple memberships which long impeded integration initiatives, while the last objective is to drive industrial and

[286] Bhagwati op cit note *27;* Ismail op cit note 21 at ch 1. See also Krugman op cit note 27 at 5–27; Stern op cit note 27 *at 21*; Woolcock op cit note 27 at 3; Bond et al op cit note 15 at 101-127.
[287]Head, Keith et al op cit note 28; Warin, Wunnava,et al op cit note *28 at 23*; Anderson op cit note 28 *at* 170–192; Bergstrand *op cit note 28 at* 474–481.
[288] Gnimassoun op cit note 29 at 587-631; See also Irwin and Terviö, M, op cit note 29 at 1-18; Frankel op cit note 29 at 379-399; Head, Keith et al note 28.
[289] McCormac et al op cit note 30 at 3.
[290] Désiré Avom and Mouhamed Mbouandi Njikam 'Market integration in the ECCAS sub-region' in Ncube et all op cit note 31 at 71; See also Musila, Jacob Wanjala. 'The common market for eastern and southern Africa and Kenya's export trade' (2004) 31 *International Journal of Social Economics* 67-77.
[291] Edris op cit note 31 at 91.
[292] The four objectives highlighted above are the most theoretically significant objectives of the AfCFTA initiative. They represent a convergence of the actually 15 different objectives which the agreement states and groups in two categories (general and specific). See Article 3 and 4, op cit note 268.

entrepreneurial competition via the exploitation of opportunities of scale production.[293] From each of these objectives the following gains may be expected.

Firstly, creating a wider market has at least four economic gains; increased competition, variety of product, reduction in internal efficiencies and most importantly, exploitation of economies.[294] The achievement of economies of scale is argued to be the most desirable benefit for countries in the Global South.[295] This is because production in a larger market encourages more prodigious production output while allowing for more savings. A wider market also enlarges the pool of opportunities market actors have access to, thus permitting wider circulation of business opportunities and optimising production and consumption decisions.[296] Essentially, in theory at least, it enables producers in least developing countries (LDCs) across Africa to break free from the restraint and disadvantages of their small markets.

The second objective which is to boost intra-African trade, presents a different set of gainful expectations. It has been established in theory (as examined in the previous chapter) that increasing international trade leads to economic growth, the benefits of which include higher average incomes,[297] lower debts and higher standards of living.[298] Also, neoclassical economics theory dictates that economic growth is 'set exogenously', according to the rates of population growth and technical progress.[299] Population growth and technical progress in this regard are best appreciated in terms of the impacts on knowledge capital which positively and irreversible impacts growth.[300] Following this logic, boosting intra-African trade comes not only with growth, but also with technical and knowledge spill from areas in which it is highly concentrated. This will also encourage the creation of regional supply chains as well as the upgrading of productive capacity to outputs or goods that are higher up the value chain.

On the third note, the multiple and overlapping membership conundrum is one which is a perplexing feature of African RTAs.[301] Only six African countries belong to a single

[293] Trade Law Centre '*African Continental Free trade Area (AfCFTA): A TRALAC Guide'* (2019) 1, available at *https://www.tralac.org/documents/resources/booklets/3028-afcfta-a-tralac-guide-6th-edition-november-2019/file.html* accessed on 24 July 2020.
[294] Maurice Schiff, and L Alan Winters *Regional Integration and Development* (2003) 50-51.
[295] Ibid at 50.
[296] Ibid at 50; Krugman et al op cit note 56 at 64–66.
[297] Ibid at 125; Krugman Ibid at 64–66, Pt 2.
[298] Ibid at 64-66, Pt 2.
[299] See Ibid at 125. See also Solow, Robert M 'A contribution to the theory of economic growth' (1956) 70 *The Quarterly Journal of Economics* 65-94.
[300] See Schiff op cit note 294 at 129.
[301] Barbara Kolbeck *Legal Analysis on the Relationship between the AU/AEC and RECs Africa Lost in a "Spaghetti Bowl" of Legal Relations?* (unpublished LLM thesis, University of Cape Town, 2014) 17.

RTA.[302] Though multiple memberships reflect African diversity, it has immense disadvantages, including increasing the transaction costs of integration as well as complicating trade regimes (i.e. difficulties in adhering to multiple Rules of Origin or ROOs). This diminishes the capacity and the extent to which African states can engage with the opportunities afforded by international trade objectives. The AfCFTA provides a means of harmonising and resolving the multiple membership problems, creating a less complicated terrain for trade through which states can assert their most important trading and developmental agendas. In the same vein, it also creates a consolidated platform for engagement with the multilateral trading system.[303] The promises of 'greater self-assertion' on the global stage is especially beneficial for the over 30 LDCs parties to the AfCFTA which before the Agreement we unable to assert their trade objectives due to factors such as the absence of skills (which is, in itself an incidence of their LDC status).

Finally, the AfCFTA's is expected to drive industrial and entrepreneurial competition and lead to the equitable distribution of resources. More equitable distribution of resources will directly enable parties to resist and overcome the resource curse challenge. It will also enable a transition from the reliance on unsustainable extractive industries, dependence on foreign resources and debt and instead support endogenous development and industrialisation.[304]

3.3.2. Structure of the Agreement establishing the AfCFTA

The African Continental Free Trade Area (AfCFTA) is a rule-based system created by a treaty known as the Agreement Establishing the African Continental Free Trade Area (the Agreement). The Agreement represents the overarching legal framework for trade liberalisation between African states.[305] The Agreement is supported by distinct protocols, with each having an array of annexes that hold the same legal status as the Agreement itself.[306] These protocols serve as substructures to hold the rule-based system in place. It does this by fairly balancing out rights and obligations in the newly created African trading system.

[302] Gathii op cit note 244 at 65.
[303] Obeng-Odoom, op cit note 273 at 179.
[304] Ibid at 180.
[305] Article 2 of the Agreement Establishing the African Continental Free Trade Area' 2018.
[306] Article 6 and 8 Ibid.

The Agreement may be analytically structurally considered to operate in three levels - the base level, the operative level, and the technical level.[307] The base level consists of only the Agreement Establishing the African Continental Free trade Area. It spells out broad issues on overarching design, principles, scope, objectives, and workings of the initiative.[308] This level also spells out the general institutional frameworks for the initiative's administration such as the Assembly, Council and the Secretariat,[309] and provides some transparency guidelines, relating to how the Agreement may be mediated against other trade agreements entered into by state parties.[310]

The operational level is made up of the eight protocols which serve as substructures to the AfCFTA Agreement. The protocols cover trade in goods, trade in services, rules, and procedures on the settlement of disputes, investment, competition policy, intellectual property rights, E-Commerce and on women, youth and SMEs.[311] These protocols contain substantive provisions that enable the operability of the initiative. For instance, while the Protocol on Trade in Goods contains provisions that directly impact on the liberalised market for trade in goods (including the general elimination of non-tariff barriers or NTBs, provisions on import and export duties as well as general terms on trade facilitation and customs co-operation),[312] the Protocol on Trade in Services contains provisions that generally enable the creation of a single liberalised market for service trade and so on.

The technical level consists of the schedules, annexes, and guidelines to each of the six protocols. This level represents the applied layer and contains more intricate details which are crucial to the implementation of the six protocols. For instance, while Article 17 of the Protocol on Trade in Goods provides for trade remedies like anti-dumping and countervailing measures, Annex 9 on Trade Remedies and the AfCFTA Guidelines on Implementation of Trade Remedies contain more detailed provisions on their application. Similarly, while Article 15 of the rules and procedures for dispute settlement provide for the procedures of the panel, Annex 1 of the protocol provides rules on the intricacies around its workings. In some instances, the annexes spell out ancillary institutional frameworks for the administration of the protocols as well as additional documentation. Examples are the committee on services created by the Protocol on Trade in Services and the framework document on regulatory co-

[307] United Nations Economic Commission for Africa ARIA IX op cit note 44 at 43.
[308] Op cit note 268.
[309] Article 9 Ibid.
[310] Part 4, Article 16 and 17, Ibid.
[311] The AfCFTA Agreement provides that additional legal instruments or protocols may be concluded. Ibid. See United Nations Economic Commission for Africa ARIA IX op cit note 44 at 43.
[312] Part 2, Protocol on Trade in Goods iIbid.

operation as provided in its Annex 5. The AfCFTA will not be without some challenges and risks, and because a dispassionate and well-balanced analysis of the initiative should weigh its gains fairly against its cost, the next section examines the challenges and risks to be expected with the operation of the AfCFTA.

3.3.3. Key provisions in the Agreement establishing the AfCFTA

The Agreement which establishes the AfCFTA, and its accompanying protocols reveal some developmental ambitions. One developmental provision in the AfCFTA Agreement is in its general objectives.[313] One of the more notable is the creation of a single market for goods and services, and for deepening integration, along the lines of the AU's Agenda 2063.[314] This mention of the AU's Agenda 2063 is a means through which the Agreement links back to the broader African development agenda being guided by the African Union. Through this mention of the Agenda, the Agreement endorses and legitimises the development integration principles the former embodies. Other development-related aspirations stated in the objectives clause is that of promoting industrial development through diversification and regional value chain development, agricultural development, and food security.[315] It also situates the attainment of gender equality and structural transformation as core objectives. In acknowledging some of the issues that interfere with integration on the continent, the Agreement also states the resolution of the multiple membership challenge as a general objective.

The Agreement goes on to successively mention specific objectives related to trade. These specific objectives are to begin liberalisation with trade in goods, services, investment, intellectual property and then competition policy. This successive mention epitomises linearity and sets out a priority of trade concerns. A noteworthy point in this provision is active and passive language used regarding some obligations.

> Article 4 - Specific Objectives:
> For purposes of fulfilling and realising the objectives set out in Article 3, State Parties shall:
> (a) progressively eliminate tariffs and non-tariff barriers to trade in goods;
> (b) progressively liberalise trade in services;
> (c) cooperate on investment, intellectual property rights and competition policy;

[313] Article 3, op cit note 268.

[314] Article 3 (a) Ibid.

[315] Article 3 (g) Ibid.

(d) cooperate on all trade-related areas;
(e) cooperate on customs matters and the implementation of trade facilitation measures;
(f) establish a mechanism for the settlement of disputes concerning their rights and obligations; and
(g) establish and maintain an institutional framework for the implementation and administration of the
AfCFTA.

The Agreement seems to set out active commitments in respect to the objectives (a), (b) and (f), and passive commitments in respect to the obligations (c) and (d) in which case state parties are merely to cooperate on investment, intellectual property rights and competition policy and other trade-related matters. It may be inferred from the wording that the Agreement intends to create a system in which goods, services, and a Dispute Settlement Mechanism (DSM) (traditional trade issues) are prioritised. This could present an issue with negotiating and implementing the other non-traditional trade issue with immense developmental potential.

An array of governing principles is stated in the Agreement.[316] These include principles like the preservation of acquis, variable geometry, flexibility, and Special and Differential Treatment (S&DT), which reinforce norms that have developmental implications for its state parties and the success of the initiative broadly. The preservation of acquis and variable geometry principles are good examples of this point.

The *acquis* principle, on the first hand, originates from a French term that translates to mean 'that which has been agreed'.[317] Similarly used in the context of the Tripartite Free Trade Area (TFTA) Agreement, its intention is to commit AfCFTA State Parties to negotiate in ways cognisant of the trade agreements made at regional economic communities.[318] In other words, negotiations for the AfCFTA must utilise the agreed levels of trade liberalisation at the various RECs.[319] To do otherwise will be counterintuitive. This is because the existing arrangements in the RECs result from intentional economic integration over time. This acquis principle affirms the Abuja Treaty (and RECs) as pillars of the broader African integration project. It is also an intentional approach to vindicating the AfCFTA as not just another initiative to complicate the multiple membership conundrum, but one which eases or unbundles it. On the other hand, the variable geometry principle is important because it

[316] See Article 5 Ibid.

[317] Gerhard Erasmus *AfCFTA Parallelism and the Acquis*, available online at Link, accessed on 16 March 2022.

[318] Ibid; See also Gathii Op cit note 244 on flexibility and Variable geometry principles.

[319] Erasmus Ibid.

enables particularly the less developed state parties the policy flexibility to pursue the scheduled trade commitments at slower paces. It also enables the creation of mechanisms to balance out the asymmetrical gains and losses to arise from the AfCFTA.[320] This principle is important not only because it encourages the accommodation of the less well-off state parties but also because it obviates the concerns raised about the disproportionately higher short-run economic costs of liberalisation to them.

Article 9 sets up the framework for the initiative's implementation, facilitation, and monitoring. This framework consists of the Assembly, a council of ministers, and a committee of senior trade officials, all of which are to be headquartered at the Secretariat. While the Assembly of Heads of States and Government acts as the highest decision-making body, the Council of African Ministers are responsible for trade and make primary decisions on the workings of the Agreement.[321] The Committee of Senior Trade Officials develops the programme and action plans for the running of the initiative and the Secretariat acts as the administrative body for coordinating the AfCFTA's implementation.[322] The Secretariat in itself is a hybrid institution because it is an autonomous body with an independent legal personality within the African Union. In this regard, the AfCFTA does not create a new international organisation. Its institutions work within the broader AU system and, as Akinkugbe notes, is nestled in a complex regime of sub-regional economic communities (RECs).[323]

The AfCFTA's institutional framework's intergovernmental decision-making design has been criticised. The concerns raised are that the absence of a supranational authority to marshal the AfCFTA, could perpetuate the lacklustre attitude of African states to the regional trade commitments.[324] In this respect, a fair balance between an intergovernmental decision-making approach that does not infringe on the sovereignty of member states and one that enables the AfCFTA institutions to act efficiently in operationalising the broad economic and sustainable development aspirations of the initiative is encouraged.

Existing RTAs in the various RECs serve as building blocks for the AfCFTA. The Agreement provides that its provisions are to supersede any other regional trade agreement

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[320] Gathii Op cit note 244 at 35.

[321] Article 10 op cit note 268.

[322] Article 11 op cit note 268.

[323] OD Akinkugbe 'A critical appraisal of the African Continental Free Trade Area Agreement' (2021) *Forthcoming: International Economic Law from a (South) African Perspective, Franziska Sucker and Kholofelo Kugler (eds.)(JUTA Law, South Africa*.) 2.

[324] Ibid at 2.

(RTA) in case of inconsistency.[325] Furthermore, concessions granted in any RTA are to be extended to the non-REC members at the continental level. Two things are discernible from the preceding. First, RECs are recognised as legal persons in their own right and that they have adopted legal obligations to deepen their own integration. Secondly, REC Partner States will have to take political initiatives to align their regional integration agendas with the AfCFTA and other RECs.[326] This represents another important measure in the Agreement to resolve the multiple membership challenge with regional integration.

The Agreement emphasises the member-driven nature of the initiative in Article 5 and, in the Protocols ancillary to the Agreement, set out obligations for technical cooperation.[327] Development partners are also acknowledged to be essential, and Article 29 of the Protocol on Trade in Goods gives leverage on how they may be brought in. This cooperation matrix is to be coordinated by the AfCFTA Secretariat. The express designation of member states to be active players, particularly in Article 5, could be construed as excluding vigorous participation by civil society. This may be counterintuitive, especially considering that civil society accounts for most of the cross border business activity on the continent.[328] For instance, in ECOWAS, Iheduru observes the role of civil society in the context of trade and investment policy design and implementation, in contributing to the development of industrial and investment policies and public-private partnerships in infrastructure development, strengthening value chains, and, ultimately, deepening integration.[329] Therefore, the designation of member-states as active players may interfere with the crucial role civil society activism could play in legitimising the AfCFTA.

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[325] Article 19, AfCFTA Agreement; See also Art 8(2) Protocol on Trade in Goods, AfCFTA Agreement.

[326] Erasmus op cit note 317.

[327] Article 29 – Protocol on Trade in Goods, AfCFTA Agreement; See also Article 27 Protocol on Trade in services, AfCFTA Agreement.

[328] Olabisi Akinkugbe 'Dispute settlement under the African Continental Free Trade Area Agreement: A preliminary assessment' (2020) 28 *African Journal of International and Comparative Law* 138-158. See also James Thuo Gathii 'Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement' *Afronomicslaw Blog*, April 10, 2019, available at *http://www.afronomicslaw.org/2019/04/10/evaluatingthe-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/,* accessed on 16 March 2022.

[329] Okechukwu C Iheduru 'Organized Business and Regional Integration in Africa' (2015) 22 *Review of International Political Economy* 910.

3.4. The African Continental Free Trade Area: Costs, challenges, and risks.

3.4.1. Trade adjustment and transition costs

The gains of free trade may be derived over a period of time, during which states must transition, that is reallocate factors of production.[330] Transition is the costly process of adjusting economic and political priorities and reallocating resources between and within sectors.[331] Francois at al provides structured insights on the dynamics of trade adjustment costs, highlighting two broad categories of adjustment required- private sector and public sector.[332] There are two kinds of adjustment costs to be incurred in the private sector; these are labour costs and capital costs.[333] While the labour costs include unemployment, lower wages, atrophy of skills, training costs, personal costs, the capital costs include underutilised capital, obsolescence of capital-intensive infrastructure, costs and other costs in redirecting capital.[334] Public sector costs, on the other hand, arise due to falls in government tariff revenues and translate to budget cuts which adversely affect the fulfilments of the government's economic and social commitments to the public.[335]

The cost implication of a transition usually depends on the type, scale and ambition of the Agreement on one hand and structure of national economies on the other.[336] Furthermore, where product and factor markets in an economy are inflexible, the duration of the transition may be lengthened and the long-run gains reduced.[337] This therefore imposes the imperative of government intervention in ensuring market flexibility and reducing friction.[338] Even though adjustment costs are often very high due to the often very lengthy

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[330] Meysut Saygili, Ralph Peters and Christian Knebel *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions* (2018) 82 UNCTAD Blue Papers 7-11.

[331] *Meysut,* et al Ibid at 7-11; See also Hoekman, Bernard, and Guido Porto. *Trade Adjustment Costs in Developing Countries: Impacts, Determinants And Policy Responses* (2010) 143; Chandler, Marsha, Robert Howse, and Michael Trebilcock. *Trade and Transitions: A Comparative Analysis of Adjustment Policies.* (2004).

[332] Francois J, Jansen M, and Peters R 'Trade Adjustment Costs and Assistance: The Labour Market Dynamics' in Jansen Marion, Ralf Peters, and José Manuel Salazar-Xirinachs (eds) *Trade and Employment: From Myths to Facts. International Labour Office* (2011) 213-242.

[333] Ibid.

[334] Ibid.

[335] Ibid

[336] *Meysut,* et al Ibid at 8.

[337] C Davidson & SJ Matusz 'Globalisation and labour market adjustment: How fast and at what cost?' (2000) 16 *Oxford Review of Economic Policy* 42–56.

[338] *Meysut,* et al op cit note 330 at 7-11.

transitory periods, higher output growth and the other welfare gains are usually enough to compensate for the losses incurred in the transition.[339]

Given the ambition of the AfCFTA and the inflexible nature of the domestic economy of most of the AfCFTA State Parties (most of which are LLDCs), lengthy transition periods may be expected. In this regard, the AfCFTA principles of variable geometry and flexibility are important.[340]They enables particularly the less-developed state parties the policy flexibility to pursue the scheduled trade commitments at slower paces and obviates the concerns raised about the disproportionately higher short run adjustment costs of liberalization to them. The Protocol on Trade in Goods also has provisions that encourage technical cooperation and mutual administrative assistance, and the Protocol on Trade in Services has S&DT provisions in this regard.[341]

3.4.2. Legal, institutional, and structural challenges

Concerns have been raised about the propensity of the pre-existing legal and institutional impediments that have bedevilled the existing RECs and their free trade initiatives to equally affect the AfCFTA.[342] These legal and institutional challenges must be addressed for the AfCFTA to yield meaningful gains. Some that have been identified include technical incapacity of institutions, absence of physical infrastructure, and the proliferation non-tariff barriers.[343] Two important issues that have not been given adequate attention by AfCFTA pundits are unfair trade practices (dumping and subsidies) and the insufficiency of trade remedies management regimes on one hand and anti-competitive practices and its proliferation on the other hand. These issues are considered below.

A) Unfair trade

Unfair trade presents perhaps the most considerable risk to ensuring that the gains obtainable under a multilateral trading system are fairly distributed. This is because it modifies the terms of competition to the detriment of the less skilled as well as of inadvertent parties under

[339] Francois et al in Janson et al op cit note 332.

[340] Article 5 op cit note 268.

[341] Article 14 and Article 29 of the Protocol on Trade in goods, Ibid. See S&DT provisions Article 7 and Article 27, Protocol on Trade in Services, Ibid.

[342] Akinkugbe op cit note 232.

[343] C Ajibo 'African Continental Free Trade Area Agreement: The euphoria, pitfalls and prospects' (2019) 53 *Journal of World Trade* 873.

the system. They include anti-trade and welfare-reducing practices.[344] While unfair trade may take different forms, two categories take the most distinguished place in normative trade theory, these being, first, dumping and, lastly, subsidies and discriminatory pricing (for exports promotion).[345] Dumping occurs when a product is introduced into the commerce of another country at less than its normal value. It occurs where the export price of the product is less than the comparable price for the like product when destined for consumption in the exporting country.[346] In such a case it is regarded as a predatory behaviour targeted with malicious intent at a domestic economy. Injurious dumping may be perpetuated by economically powerful firms that use their market leverage to interfere with fair competition in a domestic market to facilitate the reaping of monopoly practices.[347] Krugman notes that this interference with fair competition enables firms to set different prices in different markets, ultimately adding to trade costs and reducing net welfare.[348]

Subsidies, on the other hand, are financial contributions by a government (or public body) which confers benefit to producers in a way which causes injury to a domestic industry producing like a product.[349] Subsidies may be in the form of direct transfer of funds (e.g. grants, loans, and equity infusion),[350] government revenue (otherwise due that is foregone),[351] income or price support,[352] provisions or purchases by a government,[353] or payment to a funding mechanism.[354] Subsidies which confer benefit (i.e. makes its recipient better off than it would otherwise have been on terms favourable than others available to the recipient in the market) are adverse to the interests of members parties to a free trade agreement may be challenged.

Dumping and subsidies pose immense dangers to ensuring the fair distribution of the welfare gains of the AfCFTA. This is notwithstanding the provisions in the AfCFTA Agreement allowing remedies to unfair trade practices (i.e. using anti-dumping measures,

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[344] G Niels and A Ten Kate 'Antidumping policy in developing countries: Safety valve or obstacle to free trade?' (2006) 22 *EJPE* 618, 619.
[345] J Jackson, *The World Trading System, Law and Policy of International Economic Relations* 2 ed (1997) 247, ch 10, ch 11; Van den Bossche op cit note 56 at Ch 6 & 7; See Allwell Uwazuruike. *Unfair Competition in International Trade: An Analysis of the Effects of Antidumping Proliferation in Developing Countries* (unpublished LLM thesis, University of Central Lancashire 2013) 3.
[346] Article 2.1, Antidumping Agreement.
[347] Jackson ibid at 256.
[348] Krugman et al op cit note 56 at 188-189.
[349] Article 1.1 *Agreement on Subsidies and Countervailing Measures.*
[350] Appellate Body Report, *Japan-DRAMs (Korea)* (2007) para. 251; Appellate Body Report, *US-Large Civil Aircraft (2nd complaint)* (2012) paras. 614–15.
[351] See Appellate Body Report, *US-FSC* (2000).
[352] Article XVI GATT (1994).
[353] Appellate Body Report, *US-Softwood lumber IV* (2004).
[354] Appellate Body Report, *US-Countervailing Duty Investigation on DRAMS* (2005).

safeguards and countervailing duties). This is mainly because most Parties to the AfCFTA have little expertise in navigating the labyrinthine trade remedies processes needed for the protection of their economies.[355]

B) Anti-competitive practices and concerns

If trade under the AfCFTA is to lead to development, it must be practised fairly by firms in all State Party economies (especially SMEs). However, the ambitious nature of the single market comes with a risk of the perpetuation of several kinds of anti-competitive practices. Anti-competitive practices pose a danger to fair trade because they interfere with a fair contest amongst businesses, reduce consumer welfare and ultimately the net gains of the AfCFTA. These practices become especially dangerous when they spread across multiple countries leading to the formation of oligopolies due to power concentrations.[356] These concentrations become harmful when firms with dominant positions in the market begin to abuse their positions through conducts such as price-fixing and predatory behaviour. These practices limit the benefits of the single market created by the AfCFTA to the dominant firms, thus ultimately interfering with consumer choices.[357] The reality of the risk of anti-competitive practices is made apparent by the fact that over 60 per cent of the State Parties to the AfCFTA lack domestic frameworks and institutions for disciplining anti-competitive conducts.[358]

The AfCFTA Agreement is not silent on the above mentioned issues. While Article 17 of the AfCFTA Protocol on Goods (and Annex 9) relate to anti-dumping and countervailing measures in terms contained in its Annex 9 on the one hand, Article 12 of the protocol on services on the other contains a commitment against anti-competitive practices that restrain trade in services and encourages cooperation to ensuring their elimination when necessary. The extents to which these issues will be given the attention they require will be up to the political economy around the Agreement's implementation.

[355] United Nations Economic Commission for Africa ARIA IX op cit note 44 at 87.
[356] Ibid at ch 5.
[357] Ibid at ch 5; See also WTO 'Synthesis Paper on the Relationship of Trade and Competition Policy to development And Economic Growth' (1998), available at *https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm* , accessed on 30 July 2020; Fredic Jenny 'Globalisation, competition and trade policy: convergence, divergence and co-operation' in CA Jones, M Matsushida (eds), *Competition Policy in the Global Trading System* (2002) 301.
[358] United Nations Economic Commission for Africa ARIA IX op cit note 44 at 87.

C) Trade deflections and rules of origin

One shortcoming of a free trade area (over a customs union) is the relative difficulty of administration and its susceptibility to trade deflection. Trade deflection occurs where goods from outside an FTA enter it through the member state with the lowest tariff.[359] This results in the external tariff of the FTA members being 'set' or 'dictated' by the member with the lowest tariff. In the absence of transport costs, such a member will be the route for all goods into the FTA.[360] The effect of this is that import tariff revenue accruable from imports from non-parties states could be lost to the member with the lowest tariff.[361] Because import tariffs represent a vital trade policy instrument for its utility in revenue generation and domestic industry protection, it has to be preserved from the pernicious effects of trade deflection. The risk of trade deflection has the potential for subverting the AfCFTA. It also has the potential of leading to disputes and interfering with political solidarity needed for its overall success.[362]

It is for this reason the Rules of Origin (ROOs) are usually created to provide a workable balance between preventing trade deflection, protecting domestic industry.[363] However, ROOs that are complexly drafted may have adverse effects on the net efficiency of the Regional Trade Area.[364] This is because its complexity potentially impacts SMEs the hardest, most of which have to incur added costs in complying with the complex ROO compliance process. This interferes with productivity and erodes the competitive gains of the firms within the FTA. Article 13 of the Protocol on Trade in Goods (of the AfCFTA Agreement) provide that only Goods originating in State Parties are to be eligible for

[359] Gabriel Felbermayr, Feodora Teti & Erdal Yalcin. 'Rules of Origin and the profitability of trade deflection' (2019) 121 *Journal of International Economics* 1-4.

[360] Krishna, Kala 'Understanding Rules of Origin' (2005) *National Bureau of Economic Research*, 5.

[361] This will continue until all external tariffs become zero. Viner alludes to this in his 1950 work on the customs union, relating the Articles of Confederation period (1777–1789) vis-a-vis political aspects of the customs union between the thirteen original states in America. See J Viner *The Customs Union Issue* (1950) 121; Fiona McGillivray, and Matt Green *Trading in a Free Trade Area with No Rules of Origin: The US Under the Articles of Confederation* (2001). See also Krishna Ibid at 3-4.

[362] John Stuart *How Similar are Africa's Trade Regimes? Implications for the AfCFTA*, available at *https://www.tralac.org/blog/article/14277-how-similar-are-africa-s-trade-regimes-implications-for-the-afcfta.html*, accessed on 25th June 2020; R Sandrey 'Rules of origin–looking outside the box' *Tralac* February 2015 at 3–8, available at *https://www.tralac.org/documents/publications/working-papers/wp2015/240-us15wp032015-sandrey-rules-of-origin-looking-outside-the-box-20150210-fin/file.html* accessed on 22 June 2020; Harris, Jeremy Tyler *Measurement and determination of Rules of Origin in Preferential Trade Agreements (PTA's)* (unpublished PhD dissertation, 2007); Arthur 'Kung'u, *Some issues for consideration by the East African Community (EAC) in the Negotiations towards the Establishment of a Continental Free Trade Area (CFTA)' (2017) 8-10; Josling, Timothy E 'The Treatment of National Agricultural Policies in Free Trade Areas* (1992) available at *https://ideas.repec.org/p/ags/iatrwp/51126.html* accessed on 22 August 2020.

[363] Trudi Hartzenberg 'AfCFTA Negotiations after Kigali – Keeping an Eye on the End Game' ,available at Tralac - *https://www.tralac.org/blog/article/13119-afcfta-negotiations-after-kigali-keeping-an-eye-on-the-end-game.html,*accessed on 24th June 2020.

[364] Landry Signé, , and Colette van der Ven 'Keys to success for the AfCFTA negotiations' (2019) *Africa Growth Initiative* 7.

preferential treatment. Annex 2 of the same Protocol on Trade in Goods elaborate on the fine print in this regard, setting conditions for origin and defining what an originating product is. However, navigating the intricate implementation of ROOs to prevent trade deflection lies on the various customs authorities and may constitute a challenge to the success of the AfCFTA.

3.4.3. Political will, non-compliance, and the risk of compromise

The success of the AfCFTA will be limited to the extent to which rights are respected and obligations complied with. The context within which the notion of compliance is viewed here is the degree to which state behaviour conforms to the terms an international agreement entered by it.[365] While there are several ways in which compliance issues may manifest in undermining agreements entered into between states, two stand out as more compelling threats to the AfCFTA. This is judging from how the compliance issue has unravelled within Africa's many regional integration frameworks.[366] First, within the context of adherence to regional rules and, secondly, within the context of adherence to rulings.

In the first regard, while the ratification of regional instruments ideally expresses commitment towards respecting and complying with it in Africa's experience the opposite has been the case. Partial or no compliance seems to be very prevalent.[367] A query often arises as to why then African states bind themselves to regional agreements with dispute settlement arrangements if they have no intention of adhering to decisions handed down by the dispute settlement system. Marc Faroese gives two reasons for this; first, as merely an expression of commitment to regional agenda (at their initiation) and second as a means of hedging against the breakdown of other systems outside the region to which they are subject to (such as the WTO).[368] In the second regard, while regional courts exist in Africa's integration initiatives with extensive provisions for providing security and predictability as well as the preservation of the rights and obligations of all State Parties, they often fall short of expectation.[369] A theoretical excuse often offered for this is the compliance-based nature

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[365] Oran Young, *Compliance and Public Authority* (1979) 1-32.

[366] Jana von Stein '*Compliance with International Law,* available at *http://www.janavonstein.org/uploads/4/6/1/9/46194525/isa-compendium-update.pdf,* accessed on 15 September 2018. See also Jana von Stein 'International Law, understanding compliance and enforcement' (2010) *International Studies Compendium* 1–25.

[367] Alejandro Fuentes and Patricia Iacob 'Compliance with (Quasi-) Judicial Decisions within the Regional African Human Rights System, Challenges and Opportunities' (2017) *Raoul Wallenberg Institute of Human rights and Humanitarian Law*.

[368] Marc D Froese 'Regional Trade Agreements and the Paradox of Dispute Settlement' (2014) 11 *Manchester J. Int'l Econ. L*. 367.

[369] Joseph Sinde Warioba 'Monitoring compliance with and enforcement of binding decisions of international courts' (2001) 5 *Max Planck Yearbook of United Nations Law* 41-52.

of international laws and the impracticality of having a supreme executive take on the task of enforcing judicial decisions, often against the enforcement-based nature of domestic laws.[370] Engaging with this issue is a paramount imperative for the success of the AfCFTA.

3.5. Conclusion

The chapter has evaluated the African Continental Free Trade Area (AfCFTA) initiative. It appraised the initiative as a unique incidence of African integration, built on Pan-Africanist values and driven by the enduring ambition for the prosperity of African people. To do this, it has reflected on the normative frameworks on which the AfCFTA is built, and the legal agreement through which the same is sustained. The chapter has also recounted factors leading to its creation, potential gains it could produce, and risks and challenges projected to interfere with achieving its objectives. It is submitted that if the AfCFTA initiative is to yield developmental results, it must be implemented strategically and with a developmental purpose. The theoretical foundations provided by this chapter (and the preceding one – chapter two) is used in the next chapter to examine (in more practical terms) the legal and institutional frameworks for harnessing the opportunities provided by the AfCFTA for development in the ECOWAS hegemon — Nigeria.

[370] Jeremy Sarkin 'The role of regional systems in enforcing state HR compliance: evaluating the ACHPR and the New ACJHR with comparative lessons from the Council of Europe and the OAS' (2008) 2 *European Human Rights Law Journal* 214.

PART TWO

4. CHAPTER FOUR: THE AfCFTA INITIATIVE: NIGERIAN CASE STUDY IN STRUCTURING TO OPTIMISE THE GAINS

4.1. Introduction

The previous chapter situated the AfCFTA in the African development discourse. In doing this, it has reflected on some normative prepositions and key initiatives on African integration. This reflection was done to shed light on how development issues were conceptualised before the AfCFTA initiative. That chapter then went on to appraise some of the rationales and gains of the AfCFTA initiative and the structure of the Agreement. In doing so, it elucidated some of the thought processes that shaped the AfCFTA. While acknowledging the pre-eminence of implementation to the initiative's success, some challenges that risk it were reflected on. The next three chapters shall reflect on the AfCFTA in the context of three of its State Parties. This chapter reflects on the first of the three case studies, Nigeria.

The justifications for Nigeria as a case study are two-fold: first, is its socio-economic configuration, and secondly, its hegemony. In the first instance, while Nigeria is the most populated and has the largest GDP of all the AfCFTA State Parties, the country has conditions of development similar to many of the Least Developed State Parties to the AfCFTA. This not only makes Nigeria a peculiar AfCFTA State Party, but it also enables some generalisations to be made (from Nigeria's engagement with the AfCFTA process) on the likely conducts of the different categories of large developing and least developed countries on the continent. In the second instance, Nigeria’s status as a hegemon in its region (West Africa) equally makes it an interesting research subject. 'Hegemony' within this context refers to the relatively more significant diplomatic weight it wields in driving trade and regional integration programmes, not just in the Economic Community of West African States (ECOWAS) Regional Economic Community (REC) but also beyond it. Because this weighty status enables it to act as a swing state (and especially in influencing integration), a study of how Nigeria adjusts its economy to the AfCFTA objectives could be helpful in informing generalisations (albeit cautiously) as well as for flagging important country-to-region dynamics which other State Parties to the AfCFTA may have to engage.[371]

[371] McNamee op cit note 40 at 1; See also Vanheukelom op cit note 40 at 3.

This chapter analyses Nigeria using the Analytical Law and Developmental Integration Model (ALDIM) put forward in chapter two. Amongst other things, the ALDIM submits that three factors that may determine the extents to which regional integration initiatives may yield development in an African state are the design or outline of the domestic setting within which the initiative is to be deployed, the legal frameworks and institutions for its governance and measure to address productivity (or supply-side) constraints.

Accordingly, the central question this chapter examines is: what does the ALDIM reflect on how Nigeria is positioned to optimise the AfCFTA for its development? This question thus prompts the following subsidiary questions: first, what themes or factors in Nigeria's economic environment can shed light on Nigeria's positionality vis-à-vis the AfCFTA? Secondly, how are Nigeria's legal frameworks and institutions situated to implement the AfCFTA? Thirdly, if trade is a force for modernisation —how has the AfCFTA led to the modernisation of Nigeria's institutions? And, lastly, if (as integration scholars note) real constraints to the developmental use of integration in Africa are supply-side related what are some of the ways in which Nigeria is attending to some of its supply-side impediments to productivity for the purpose of the AfCFTA?

An attempt is made in this chapter to answer these questions and, in doing so, the chapter does three things. First, it draws from important issues in its economic configuration and it shows that while Nigeria's dynamic, large and youthful economy (as well as its relatively more experience in international trade) makes it an ideal State Party for trade gains under the AfCFTA, those gains could be negatively impacted by factors such as its vague outlook to development, ambivalent attitude to inclusivity in trade, and the extents to which its largest revenue earner — crude oil — impacts on trade policy formulation. Secondly, through its reflection on Nigeria's trade architecture and the reforms being made therein, the chapter reinforces the theoretical argument regarding free trade as an agent of modernisation. Lastly, the chapter shows how Nigeria's policy responses to supply-side constraints could position it for the developmental use of the AfCFTA.

This chapter is divided into three sections. The first sets the context for the analysis. This is done by appraising key themes that impact on the design of Nigeria's regulatory frameworks for trade. These are the country's economic history, developmental outlook, and

environmental influences.[372] The section concludes by examining a socio-cultural issue – inclusivity and gender – which could impact Nigeria's yield from the AfCFTA. The second section reflects on Nigeria's trade policy implementation architecture and the reforms that have been made to it to make it AfCFTA-ready. It also reflects on important ALDIM-relevant themes like political will, capacity development, and efforts at securing the buy-in of stakeholders. The last section examines the measures adopted by Nigeria to address the 'real constraints' that could prevent the AfCFTA from yielding development outcomes.

4.2. Domestic Context: Issues relevant to understanding and situating Nigeria as state party to the AfCFTA.

4.2.1. Nigeria's economic and trade history

Nigeria's economic system has been dynamic through the years. At independence in 1960, its system was capitalistic and governmental efforts focused on promoting an enabling environment for its infant industries.[373] The dawn of its first dictatorship in 1966 marked a shift in its economic thinking to one which encouraged active government interventions through soft controls (that is, a mixed economy) which theoretically was aimed at structural transformation. From 1970, there was again a shift to the paternal state control ideological orientation. [374] This was shortly after the Nigerian Civil War, and so the military dictatorship was (as with most like it) concerned with preventing subversion. Therefore, its policies were geared towards consolidating power. However, since the country transitioned to civilian rule in 1999, its economic development ideology has been free-market-oriented, [375] and thus its private sector is prioritised.[376]

Nigeria's trade policy ideology has similarly been dynamic, and the history of its trade architecture is a useful lens for surmising on how it currently operates. Nigeria started managing its own trade policy at its independence in 1960[377] – four years after its first oil

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[372] Environmental influences in this regard are those factors that showcase how Nigeria is currently situated as an AfCFTA state-party. These include its economic system, demographic transitions within it, and the nature of Nigeria's foreign trade relations.

[373] Friedrich-Ebert-Stiftung Publications *Study Report on Industrial Policy and State of Industrialisation in Nigeria*. (2020) 15.
[374] Ibid.

[375] Paul Collier, Chukwuma C Soludo, and Catherine Pattillo *Economic Policy Options for a Prosperous Nigeria*. (2008).
[376] FES Publications *Ibid* 15; See also Collier et al Ibid 6.
[377] Even though the 1950s heralded a new age in its exercise of monetary and financial autonomy (marked notably by the establishment of the Central Bank of Nigeria in 1959), it was only post-independence (1960s)

reserves were discovered in its southern-most region.[378] From then to when it transitioned to the present socio-legal order in 1999, the country experimented with trade ideologies-primarily with the aim of harnessing those massive crude oil reserves. The trade policy ideologies that evolved were therefore shaped by that crude oil sector –its largest revenue earner. However, because the commodity export is highly sensitive to shocks which causes volatility in a country's terms of trade and export revenue/foreign exchange earnings,[379] Nigeria's trade policies grew to be reactionary, and erratic. The idea of diversification was often mooted in governmental spaces as a means of dealing with the crude oil issues. However, no results in this regard were yielded, mostly due to the absence of political will.[380] For this reason, no clear trade policy ideology evolved in Nigeria even though there were many expressions of a desire formulate one.[381]

Nigeria's economic and trade policy ideology has been mostly rather an expression of its government's reaction to rises and slumps in crude oil prices. For instance, the collapse of oil prices from US$39.5 per barrel in early 1980 to US$11.57 (DPB) in mid-1986 caused a shift in economic policy to export diversification and led to the implementation of various trade policies such as trade liberalisation, trade openness, and exchange-rate deregulation.[382] Similarly, the end of the most recent commodity super cycle in 2015 (driven by the growth of China's economy) caused crude oil price and fiscal revenue declines in Nigeria and resulted in an economic recession.[383] This recession was one of the reasons for the formulation of the Economic Recovery and Growth Plan (ERGP) within which the objective of economic diversification was stated.[384]

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that Nigeria started controlling its economy. Perhaps the most profound evidence of this was the publication of its "First National Development Plan (1962-1968)" in 1961. See H MA Onitiri,. 'Economic planning and Policy: The Nigerian experience.' (1971) 6 *Africa Spectrum* at 3.

[378] In 1956 the country's first oil reserves were discovered in Oloibiri, a fishing village located in what is today known as the Niger Delta. While at that time, the Niger Delta was designated to be under the South-eastern region of Nigeria, it is today under the South-South region. See Samson Imasogie Omofonmwan, and Lucky Osaretin Odia 'Oil exploitation and conflict in the Niger-Delta Region of Nigeria' (2009) 26 *Journal of Human Ecology* 25-30: Oghale, Agbefe and Frank Funkeye Sapele. 'Oil exploration and the sustainable development problems in Nigeria: A study of Bayelsa State.' (2019) *Conference Publications* 1.

[379] Philip Ifeakachukwu Nwosa & Oluwadamilola Tosin Fasina. 'Trade policy and export diversification in Nigeria in the years 1970–2017: A sectoral analysis' (2020) 8 *Entrepreneurial Business and Economics Review* 127–142.

[380] Collier et al op cit note 375.

[381] An example is the National Economic Empowerment and Development Strategy (NEEDS) 2004.

[382] See Nwosa Ibid 127-142.

[383] World Trade Organization (2017) *Trade Policy Review – Nigeria* WT/TPR/M/356, available at Link accessed on 1 October 2020.

[384] Ibid.

Against this background, there are three discernible features of the Nigeria's economic and trade policy. First, it is dynamic and eclectic, secondly, it has been shaped by the performances of its crude oil sector, and thirdly, trade policy has (until recently) been an underutilised tool for economic governance. One reason for this third point was the sheer absence of a coordinating system and political will. The country realised the need for reform when the AfCFTA negotiations were launched in 2015. Nigeria began trade policy reforms in 2017,[385] to position itself for the AfCFTA. This affirms the role of international trade (I.e., AfCFTA) as a powerful tool for driving policy reforms.

4.2.2. Outlook on development

The clearest expression of Nigeria's outlook on development is found in its national development plans. The most recent of these (and thus relevant) are the Economic Recovery and Growth Plan (ERGP) and its successor, the Medium-Term National Development Plan (MTNDP) (2021-2025).[386] Like the ERGP, the strategic objectives of the MTNDP are to restore growth, invest in human capital and build a globally competitive economy.[387] Development in the ERGP and the MTNDP is framed against two economic contexts – growth and transformation. Firstly, development is conceptualised as the leveraging of Nigeria's vast labour force for the creation of a knowledge-based economy and the restoration of economic growth. In this regard, Science, Technology, and Innovation (STI) are to play crucial roles. The role of the government is that of a facilitator. It is to ensure that all impediments to the innovativeness of Nigeria's Labour is reduced.[388] Secondly, development is envisioned in the context of structural transformation. It prioritises the need for the diversification of Nigeria's productive base as a means of improving welfare. In this regard, agriculture, energy, and security are argued as crucial. Under the plans, the country's key execution priorities include the stabilisation of its macroeconomic environment, ensuring food security, assuring energy efficiency, providing transport infrastructure to reduce the costs of doing business, and driving industrialisation.[389]

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[385] This is elaborated on in second section of this chapter.

[386] Federal Ministry of Budget and National Planning, *Economic Recovery and Growth Plan* (ERGP) 2017.

[387] See Federal Ministry of Information and Culture (2020) FG Inaugurates CWG For Nigeria Agenda 2050 and MTNDP 2021-2025 Accessible online at Link accessed on 1 October 2020. See also Ministry of Budget and National Planning (2021) Nigeria *Medium-Term National Development* Plan (MTNDP) - 2021-2025, available at Link, accessed on 16th May 2021.

[388] Ibid.

[389] See also Ibid

There are four core development objectives identified in Nigeria's development plans: first, the imperatives of reducing economic growth constraints, including its energy deficits, skills deficits, foreign exchange shortages, and its inefficient bureaucracy. Secondly is the need to cultivate the private sectors to be core drivers of economic growth. Thirdly is the promotion of ethnic cohesion and inclusivity at national levels.[390] Fourthly, of importance is the role of free markets in resource allocation and optimising the yield of market actors and lastly, the need for growth to be value driven and steered by the country's core norms of integrity, dignity of labour, patriotism, and self-reliance.[391]

The most apparent inadequacy with Nigeria's outlook on development is that it construes the concept in economic variables only.[392] It inadequately acknowledges the other variables (such as socio-cultural and political variables) that could impact on the expansion of human freedoms as well as the facilitation of liberty of action in Nigeria.[393] This limited view of development is not a unique feature of the ERGP. The constrained visualisation of the concept to 'economic growth and transformation' has been a recurring theme in the country's previous development plans.[394] The view is problematic not only because it falls short of more progressive conceptions of the term but also because it is founded on the assumption that economic growth (or other economic values) alone could lead to development. If (as is argued elsewhere in this study)[395] governmental policies should enable people to live a higher quality of life in all areas, then governmental plans must acknowledge the non-economic factors (like the lack of political freedoms, gender inequality, inaccessibility of health care, absence of the rule of law, the absence of proprietary rights, and other cultural issues) that equally interfere with the ability of those people to live higher qualitative lives.[396]

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[390] Inclusivity in this regard is interestingly conceived against ethnic and religious lines only. See also Federal Government of Nigeria, Ministry of Budget and National Planning (2020) Medium-Term National Development Plan (2021-2025) available at *https://nationalplanning.gov.ng/wp-content/uploads/2021/03/Nigeria-MTNP-2021-2025-Overview-of-Draft-Plan.1.pdf* accessed on 16 May 2021.

[391] Federal Ministry of Budget and National Planning, op cit note 386.

[392] Scholars such as Adedeji and Sen have pushed back against the undue emphasis on the economic constructs (and the easily quantifiable indicators of same) of development. See Asante op cit note 1 at 6; See also Simon op cit note 1 at 4.

[393] See also Sen op cit note 51 at *525*; See also Baderin,op cit note 159 at 4, 19, 27-30, 36, 39-40.

[394] Somadina Ibe-Ojiludu 'Nigeria's developmental Challenge: Conceptualising Law and Development in the Nigerian Context' (2022) 13 *Beijing Law Review* 1-22.

[395] See chapter 2 on conceptualizing development. See also Lee op cit note 49 at 429;

[396] Lee op cit note 49 at 429; See also Ibe-Ojiludu Ibid.

4.2.3. Environmental considerations influencing Nigeria's trade governance architecture.

While many factors affect Nigeria's trade environment, identified in this section are those that more directly affect the developmental implementation of the AfCFTA. These are its economic situation, demographic transitions within it, gender and social inclusivity, and lastly the nature of its foreign trade relationships.

A) Economic situation: growth performances

The state of Nigeria's economy impacts on how its regulatory frameworks for trade are designed. With a GDP of close to US$450 billion, the country is Africa's largest economy and one of its largest contributor to intra-African trade.[397] It is also Africa's leading oil exporter and possesses one of the largest reserves of crude oil within the AfCFTA.[398] Nigeria, a lower-middle-income emerging economy is made up of both state-owned and private enterprises.[399] The country's GDP doubled from US$270 in 2013 to US$510 billion in 2014 after a rebasing which, amongst other things, revealed that its economy had undergone some transitions to be more services-driven.[400]

However, around the same period, the crude oil-reliant country was severely affected by the collapse of global commodity prices which signalled the end of the commodity super cycle.[401] The decade which preceded this economic collapse was good for the Nigerian economy. Its economy recorded a 7 per cent annual growth, and export rates were higher than the country had ever experienced. However, the collapse in oil prices significantly pushed the

[397] The World Bank 'National Accounts Data and OECD National Accounts Data Files GDP (Current (US$) – Nigeria' available at *https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=NG* accessed on 22 May 2021. See also African Development Bank 'Nigerian Economic Outlook' available at *https://www.afdb.org/en/countries/west-africa/nigeria* accessed on22 May 2021. See also Tralac Nigerian Investment Promotion Commission *Nigeria Investment Guide* available at https://www.tralac.org/resources/by-country/nigeria.html#:~:text=Economic%20overview,higher%20than%201.9%25%20in%202018.&text=That%20debt%20represented%2020.1%25%20of,external%20public%20debt%20%2427.2%20billion.

[398] See Statista (2021) *Proved crude Oil reserves in Africa, by country* Link See also Statista (2021) *Proved crude Oil reserves in Africa, by country* Link

[399] Oseni, Kazeem Oluwakemi, and Kate Dingley 'Roles of E-Service in Economic Development, Case Study of Nigeria, a Lower-Middle Income Country' (2015) 7 *International Journal of Managing Information Technology* (*IJMIT)* ; See also World Trade Organization 'Trade Policy Review – Nigeria' May 2017 at 54 (section 3.3.6) available at *https://www.wto.org/english/tratop_e/tpr_e/s356_e.pdf* accessed on 23 May 2021.

[400] See also World Trade Organization (section 3.3.6) available at https://www.wto.org/english/tratop_e/tpr_e/s356_e.pdf accessed on 23 May 2021.

[401] This was caused by the collapse of oil prices, which resulted in the 60% loss of external receipts for Nigeria and adverse effects for its BOP and external reserves. See also World Trade Organization 'Trade Policy Review – Nigeria - Minutes of meeting WT/TPR/M/356', available at *Link,* accessed on May 2021 11.

country's growth rate down to 2.7 per cent in 2015 and into a recession in 2016.[402] The economic measures put in place to brave the effect of the crises witnessed the reduction of exports from imports, indicating a relatively lower significance of trade, with a trade (in goods and services) to GDP ratio of 33.1 per cent in 2015, down from 52.8 per cent in 2011; even though the shock crude oil collapse accounts for about 86 per cent of the revenue for the Nigerian government.[403]

In a bid to prevent similar effects as that of 2014 (economic downturn caused by fallen crude oil prices), Nigeria's government curated an economic growth and recovery plan (ERGP), which pursues economic diversification, amongst other things – and by which its trade policy approach in the AfCFTA era has been driven.

B) Demographic transformation, urbanisation trends and the growth of services

Nigeria's exceptionally large population size is one of its value propositions. 200 million people distributed across its six geo-political regions populate it.[404]. This is thus an important issue that impacts on the design of Nigeria's regulatory frameworks for trade. It is the most populated of all the AfCFTA State Parties and accounts for over 15 per cent of the FTA's population.[405] Like most State Parties to the AfCFTA, Nigeria has a large young population base with over 50 per cent below the age of 20 years.[406] This prominence of the working-age in Nigeria's population implies the presence of a demographic window of opportunity and thus a relatively higher potential for economic growth.[407]This has led to new trends in migration as it currently has amongst the highest rates of urbanisation in the world. [408]

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[402] See World Trade Organization op cit note 400 at 5-7.

[403] Organisation of the Petroleum Exporting Countries, *Annual Statistical Bulletin* (2020) *Nigeria Facts and Figures* Link.

[404] United Nations Population Division *World Population Prospects: 2019 Revision* (2019,) available at *https://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG* accessed on the 15 May 2021. The EGRP works with the estimate that the country's population will be 289 Million by the year 2050. See Ministry of Budget and National Planning (2017) 'Nigeria Economic Growth and Recovery Plan 2017-2020' at 110-111 available at *.tralac.org/documents/resources/by-country/nigeria/1806-nigeria-economic-recovery-and-growth-plan-2017-2020-march-2017/file.html* accessed on 16 May 2021.

[405] UNDP 'Nigeria: Sustainable Development Goals (SDGs) Indicators Baseline Report' at 2, available at *.undp.org/nigeria/publications/nigeria-sdgs-indicators-baseline-report-2016* ,accessed on 29 September 2020.

[406] National Bureau of Statistics (2020) Nigerian Living Standard Survey. 5 , available at Link, accessed on 25th May 2021.

[407] Emmanuel Jimenez, and Muhammad Ali Pate, Reaping a Demographic Dividend in Africa's Largest Country: Nigeria in Hans Growth & John F May (eds) (2017) *Africa's Population: In Search of a Demographic Dividend* at 33-51.

[408] The most extensive urban spatial expansion has been concentrated around four massive urban fields: Lagos, Abuja, Kano and Port Harcourt. R Bloch, S J Monroy et al (2015) *Urbanisation and Urban Expansion in Nigeria* (2015) 6.

This youth-led urbanisation have aided the growth of the Nigerian service sector, which now account for over 51 per cent of its GDP (compared to 26.1% accounted for by industry, and 23.4% accounted for by agriculture).[409] One of the greatest beneficiaries from this growth in services has been the telecommunications sub-sector.[410] Data shows that the sub-sector – which has gained advantages from increased competition over the years — has close to 190 million active voice subscribers (representing an 8% annual growth) and a total of 135 million active internet subscribers (representing 17% annual growth).[411] In this regard, MTN from South Africa — the second largest State Party in the AfCFTA — has the highest subscriber base (both voice and internet).[412]

Other contributors to the growth in services are the country's film, banking, and transportation sub-sectors. For instance, Nigeria's film sub-sector —colloquially known as Nollywood — is currently the 3rd largest film industry in the world, worth around US$5.1 billion and generating an average of US$600 million annually for the Nigerian economy. The sector employs over one million of the country's youth and is its largest employer after agriculture.[413] The Nigerian banking sub-sector which is the second-largest banking sub-sector in Africa, is also a vibrant contributor to its growth in services trade, even though the sector is plagued by a rising trend in non-performing loans (NPLs) and reduced creditworthiness.[414] The transportation sub-sector contributes an estimated 3 per cent to Nigeria's GDP even though it suffers from underinvestment and poor maintenance.[415]

C) Trade, gender, and social inclusion

Social inclusion is another vital theme that impacts on the design of Nigeria's regulatory frameworks for trade. This is because, a wide spectrum of individuals are still excluded. These include youth, workers in the informal economy, individuals with impairments, ethnic and linguistic minorities and (most noteworthy) women.[416]

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[409] See also World Trade Organization op cit note 401.
[410] See also World Trade Organization op cit note 400 at 84-86.

[411] Nigerian Bureau of Statistics Telecoms Sector Data Report (2020) Available at Link Accessed 16 November 2020 pp 79 -81.
[412] World Trade Organization op cit note 400 at 84-86.
[413] See Ismail op cit note 69 at 73- 75; Nigerian Bureau of Statistics Ibid.
[414] See also World Trade Organization op cit note 383 at 78.
[415] Interview with Trade Union of Nigeria and Manufacturers Association of Nigeria (MAN) Stakeholders; See also Rupa Ranganathan, & Vivien Foster *ECOWAS's Infrastructure: A Regional Perspective* (2011).

[416] See Ernst & Young 'Nigerians AfCFTA strategy and implementation plan' (2021) available online at Link 25th August 2022.

The distribution of men to women in Nigeria's population is relatively equal, with 49 per cent being female.[417] However, the accessibly of economically uplifting opportunities to women remains low. Nigeria's formal economy has consistently provided disproportionately more opportunities for males than females.[418] More women than men are concentrated in the informal sector in which they engage in smaller-scale economic activities. This concentration of women in SMEs in Nigeria contributes a higher percentage of the total share of employment creation and over 50 per cent of the nation's gross domestic product (GDP). Yet, despite the crucial role they play, they are unable to access formal channels needed to meaningfully participate in international trade. Furthermore, their involvement in trade unionism is negligible,[419] and thus the extent to which they exercise ownership over trade processes is low

Nigeria ranks (139 out of 156) amongst the lowest internationally in terms of gender parity.[420] This gender gap widens even though there are constitutional guarantees that seem to prohibit discrimination in this regard.[421] The literature suggests that a mix of factors combine to serve as barriers to access to formal trade opportunities for women. These include discriminatory laws, religious norms, and culturally regressive gender stereotypes.[422] In the context of trade, women play active roles, however, due to the factors previously highlighted they are pushed to informality.

One important reason for the disproportionate engagement of women is the gender-blind nature of laws and Nigeria's development plan. For instance, even though s. 42 of Nigeria's Constitution prohibits discrimination (i.e., 'not being subjected to any disability or restriction or privilege or advantage') on the grounds of sex, it makes no stipulation as to gender.[423] Comparatively, the South African Constitution makes a clear stipulation against discrimination on the grounds of both sex and gender. The distinction between both terms is

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[417] The population distribution by sex is relatively equal with about 51% male and 49% females See Nigerian Federal Ministry of Health '2019 Verbal and Social Autopsy Study: Main Report (2019) 24.

[418] Adeosun O T and Owolabi K E 'Gender inequality: determinants and outcomes in Nigeria' (2021) *Journal of Business and Socio-economic Development*2; See OE Akinyemi 'The myths and the realities of gender equality in Nigeria: An appraisal of the situation in South-West Nigeria' (2021) 4 *Sapientia Global Journal of Arts, Humanities and Development Studies 4*.

[419] Ogwuike Clinton & Faiza Muntaka 'Nigeria: Strengthening women's participation in trade' *Southern Voice*', available at link. accessed on 23 March 2022.

[420] World Bank 'Overall Gender Gap Index, available online at Link, accessed on 23 March 2022.

[421] Section 42, Constitution of the Federal Republic of Nigeria, 1999.

[422] Using quantitative data a study of women in Ekiti and Osun states (in Southwest Nigeria) notes that religion, culture and patriarchy are the largest impediments to access for women. See OE Akinyemi op cit note 418.

[423] op cit note 421 at Section 42.

important. This is because, while sex may denote biological differences and is very limited, gender is broader and denotes the social construct of roles.[424] Similarly, Nigeria's development plans are gender blind and do not allude to the need for gender mainstreaming.

Furthermore, efforts by the Nigerian government have paid less attention to effectuating the constitutional guarantees against discrimination based on sex and in some instances, interfered with legislations that sought to empower. For instance, in 2021 the Gender and Equal opportunities bill which contained gender empowering provisions including guarantees in respect of the rights to equal employment opportunities, equal access to education, property and land ownership, was blocked.[425]

Nigeria's AfCFTA plan seems to equally ignore this issue and contains no plan to address the same.[426] This exclusion affects Nigeria's gains from trade and is a crucial socio-cultural factor that impacts on the extent to which its developmental plans yield results. There is, therefore, the need to address the exclusion and to increase the attention paid to ensuring that the involvement of the full talent pool (rather than just a part of it in an economy) has immense implications any country's competitiveness within the AfCFTA.

C) Nigeria's foreign trade engagements

Nigeria's foreign trade engagement is another important theme that impacts on the design of its regulatory frameworks for trade. This engagement is defined by two rather uncomplicated priorities: first, the objective of securing strategic partnerships for the creation of trade opportunities and, secondly, to utilise those opportunities for boosting economic welfare,

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[424] While an argument for sex discrimination could potentially address some gender disparities, it may not capture the full range of gender-related issues and experiences faced by individuals. For example, a gender-conscious measure that could assist in inclusive development but may be restricted by the 1999 constitution of Nigeria could be the implementation of gender quotas or affirmative action policies to promote the representation of women in political offices or decision-making positions. These measures may aim to address historical imbalances and empower women to participate more actively in shaping policies that affect their lives. However, if the constitution does not explicitly allow for such gender-conscious provisions or if it only references sex without acknowledging the broader concept of gender, it could hinder the adoption and implementation of such measures. By recognizing and incorporating a gender-conscious approach in the constitution, Nigeria would be better positioned to enact policies and laws that address the specific needs and challenges faced by different genders. See Iyabode Ogunniran 'Gender issues and the Nigerian Constitution: A Ray of Light, or Twilight on the Horizon?' (2016) 3 *Gender Questions*, available at Link.

[425] Gideon Fakomogbon 'A law to empower women & girls was just rejected again in Nigeria' *Global Citizen* 16 December 2021, available online at Link,accessed on 23 March 2022.

[426] Ernst op cit note 416. *See also* Bell Ihua, Ike Muonso, O Taiwo and Sand Mbah Kalu *An Independent Study on the Potential Benefits of the African Continental Free Trade Area (AfCFTA) on Nigeria'* (2018). See also Nigerian office for Trade Negotiations *A Nigerian Policy Roadmap – Perspectives And Insights* (2019) at ch 3 & 28.

reducing poverty, and enabling development.[427] In achieving the aims, Nigeria established a trade policy programme with three objectives. These were, first, to develop an inclusive and coherent trade policy that prioritises liberalisation and recognises the benefits of multilateralism in generating economic benefits, secondly, to drive and incentivise reforms that improve the environments for doing business domestically (including measures to combat corruption and redistribute wealth), and, finally, to drive socio-economic and political continental integration. This third objective is interesting not only because Nigeria situates itself as the centrepiece to integration in Africa but because it seems to reflect an appreciation by Nigeria of the immense benefits of a Pan-African driven collaboration in its and Africa's development.[428] Examined below are the current trends of Nigeria's trade in goods and services, engagement with continental and international partners.

I. Trade in goods; Overview, interests, and priorities

Nigeria's trade-to-GDP ratio is about 20 per cent.[429] In 2019, Nigeria's world exports and imports amounted to up to US$55B and US$42.8B, respectively.[430] This represents a decline from 2011, its peak year when its world exports and imports respectively were US$143.2 billion and US$64 billion respectively.[431] Intra-African trade in 2019 constituted a mere 20 per cent and 7 per cent of its exports and imports, respectively.[432] Within Africa 60 per cent of Nigeria's trade is within the ECOWAS Regional Economic Community (REC) within which a free trade arrangement exists.[433] This validates the classical arguments on the nexus between the creation of trade agreements and the growth in trade and could mean that intra-African trade levels will similarly grow as tariff rates are liberalised under the AfCFTA.

Nigeria's merchandise exports are mainly primary products,[434] with crude oil being its major export commodity.[435] However, the share of crude oil in its total exports has been decreasing steadily due to both the structural changes in the global energy market and the

[427] Ibid.
[428] Nigerian Office for Trade Negotiations op cit note 426 at ch 3 & 28.

[429] Ibid at 29.

[430] National Office for Trade Negotiations *2017 Nigerian Annual Trade Policy Report (2017 NATPOR)* (2017) at 26.
[431] See also World Trade Organization op cit note 400 at 17–20.
[432] Trade Law Centre 'Nigeria Trade and Tariff Profile' 2019 available at Link Accessed on 12 October 2020.

[433] See National Office for Trade Negotiations op cit note 430 at 26; ECOWAS 'ECOWAS Trade Liberalization Scheme (ETLS)' Link Accessed on 12 October 2021.
[434] See also World Trade Organization op cit note 400 at 17, 91.

[435] See National Office for Trade Negotiations op cit note 430 at 26.

domestic measures for economic diversification. For example, in 2019 the share of crude oil in Nigeria's total exports was for the first time in decades reduced to under 85 per cent as its non-oil exports increased by over 100 per cent.[436] Its other merchandise exports include liquefied natural gas and other fuels, manufactures, and agricultural commodities.[437] Much of Nigeria's non-oil exports are re-exports (i.e. goods that are imported from countries and then exported to third countries).[438] This imposes the imperatives for a more well considered ROO framework under the AfCFTA. Nigeria's merchandise imports, on the other hand, are mainly refined petroleum products, agricultural commodities, and manufactured goods (including transport machineries and computers).[439]

Nigeria considers its manufacturing sector (machine tools) to be that with the highest potential to benefit from the AfCFTA tariff reduction.[440] This is followed by its agricultural sector (fishing, crop cultivation, livestock production), and cement manufacturing. Bell et al (2018) explain this to be due to the relative exports elasticity experienced in those sectors.[441]

The fact that Nigeria's trade to GDP ratio is 20 per cent and that 80 per cent of that trade is with partners outside Africa lends credence to the arguments in support of Nigeria's ratification of the AfCFTA Agreement. However, being that the bulk of the country's exports is a primary commodity (crude oil), Nigeria will have to prioritise strategic crude oil beneficiation as well as export diversification for it to increase its trade-to-GDP ratio and benefit from trading under the AfCFTA.

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[436] Nairametrics (2019) 'How Nigeria recorded its highest non-oil exports ever in 2019' Available online at Link Accessed on 12 October 2020.
[437] Nairametrics Ibid.

[438] It should be noted that these re-exports may not necessarily undermine the claim of real economic diversification due to the value-added activities associated with the re-exports, such as packaging, labelling, or minor processing, which can contribute to the development of trading and logistical services. However, there are instances in which a gradual process of beneficiation and diversification that is beginning to take place. Interview with customs/border control official.
[439] See International Monetary Fund 'Exchange Rates selected indicators (National Currency per U.S. dollar, period average)' Accessed on April 16, 2021; See also Daniel Workman (2020) Nigeria's Top 10 Exports Accessed online at Link.
[440] Ihua B et al op cit note 426 at 24.
[441] A study commissioned by the NOTN explains that among the sectors that stand to benefit from a reduction in tariffs, only two sectors, cement and machine tools, recorded positive export growth in 2016. Cement was the leading contributor to exports, recording a growth of 65% in 2016, while machine tools recorded 39% (see Table 17). The comparatively lower elasticity of cement exports is perhaps due to relatively weak impact of tariffs on cement exports due to the high growth of cement consumption globally and particularly across Sub-Saharan Africa See Ihua B et al op cit note 426 at 44.

II. Trade in services: Nigeria's interests/priorities

Trade in services represents a key contributor to Nigeria's economic growth and its plans for building the competitiveness of its industries.[442] The contribution of trade in services to the Nigerian GDP has improved exponentially and now accounts for over 50 per cent of Nigeria's GDP (compared to 26.1 per cent accounted for by industry, and 23.4 per cent accounted for by agriculture).[443] This is as a result of the productive boosts of its communications, information and communications technology (ICT) and entertainment and financial services sectors.[444] However, even though the country's GDP is now services driven, crude oil still accounts for 90% of foreign exchange.[445]

Nigeria is one of the most open services markets in Africa[446] and, along with Egypt and South Africa, is responsible for over half of the total trade in services in Africa.[447] Spurred on by favourable government policies and increased foreign direct investment, the growth in Nigeria's services sector has been consistent. This growth has been championed by services industries like retail and wholesale trade, telecommunications, banking, and the film industry ('Nollywood').[448]

Nigeria's recognition of the fact that services liberalisation occurs through domestic, regional, as well as multilateral arrangements has enabled it to make reforms to how it creates and asserts its services trade policy. It has also enabled it to champion the inclusion of these services trade reform mechanisms as well as the adoption of a progressive liberalisation approach in the regional arrangements that have direct impacts on trade in services.[449] For Nigeria, seven sectors were listed as a priority and were submitted at the AfCFTA negotiations on trade in services, namely, banking and financial services; insurance; ICT; the digital economy and e-commerce; creative industries; audio-visual services and

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[442] Mkpado, M 'Service trade and non-oil export in Nigeria.' (2013) 1 *Russian Journal of Agricultural and Socio-Economic Sciences*, 18–25.
[443] See also World Trade Organization op cit note 400 at 20-22.
[444] See also Nigerian Office For Trade Negotiations (2019) Nigerian Trade Policy Roadmap: Perspectives and Insights 38 Available at Link Accessed on 29 August 2022.
[445] Ibid. See National Bureau of Statistics 'Report 2020' available at Link Accessed 16 November 2020.
[446] See also Nigerian Investment Promotion Commission) 'Opportunities – Services' Available online at Link Accessed on; See also World Bank 'Services Trade Restrictions Index (STRI)' available online at Link Accessed on 5th March 2022.
[447] See Trade Law Centre (2015) 'Trade in Services in Africa: A Framework Report' available at HERE Accessed on 5th March 2022.
[448] Oh Erick 'Nigeria's Services Economy: The Engine for Future Growth' (2017) *Executive Briefings on Trade*; U.S. International Trade Commission (USITC), *Nigeria's Services Economy: The Engine for Future Growth Available online at* link Accessed on 15th May 2022.
[449] For example, Nigeria plays a significant role in liberalising services trade in the West African region through the ECOWAS reform agenda which of an ECOWAS service schedule. See also Nigerian Office For Trade Negotiations op cit note 444 at 38 – 39.

entertainment; retail and distribution services; transportation and logistics services; and tourism.[450] Nigeria, however. continues to work with the ECOWAS to develop a unified Schedule of Specific Commitments for Trade in Services as part of the implementation of the AfCFTA Agreement.

III. Nigeria in the World Trade Organisation

Nigeria was a founding member of the WTO and has gained some capacity on how to engage with WTO disciplines through its membership.[451] Within the WTO, Nigeria participates in activities that seek to improve the engagement of developing countries within the multilateral trading system (such as the Doha development negotiations) and other new trade issues.[452] Its engagement recently led the WTO General Council to reach a consensus on adopting Nigeria's candidate, Ngozi Okonjo Iweala, as its first director-general from a developing country.[453]

Nigeria is also active in WTO prominent coalitions (such as, the African Group, the African, Caribbean and Pacific (ACP) Group and the G90, and other cross/inter-constituency groups). It also actively negotiates in areas such as agriculture liberalisation, Non-Agriculture Market Access (NAMA), and the trade-related aspects of intellectual property rights (TRIPS). At the institutional and decision-making level of the WTO, Nigeria actively asserts itself and has done this at ministerial conferences, chairing several bodies at different times.[454]

Even though African states are not generally known to activate the WTO's dispute settlement system,[455] Nigeria represents one of the AfCFTA State Parties that have done so

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[450] Nigerian Office For Trade Negotiations op cit note 444 at 38 – 39.

[451] See also World Trade Organization op cit note 400; also Jonathan Aremu 'Nigeria in a Quandary of Trade Negotiation under Three Main Economic Integrations' (2019) *CIFILE Journal of International Law* 9-16; GATT document Let/1957, 7 December 1994.

[452] See also World Trade Organization op cit note 400 at 26 – 27.

[453] See World Trade Organization (2021) General Council *Appointment of the next Director-General* – Nigeria JOB/GC/250.

[454] Chair of Trade in Services (2009), the Chair of the Dispute Settlement Body (DSB) (2010) and the Chair of the General Council (2011). Clearly, the country is fully engaged and supportive of WTO institutions, processes and procedures. However, an issue with Nigeria's engagement with the WTO is the unclear legal status of WTO obligations and disciplines domestically due to its non-ratification of the Marrakech Agreement. This could explain the low-rate domestic stakeholder buy-in. See also World Trade Organization op cit note 400 at Pp 26 – 27.

[455] See Wilfred Golman 'Is World Trade Organisation (WTO) Dispute Settlement System underutilised? An Assessment from the WTO Members of the South Pacific Region' (2018) *Journal of South Pacific Law* 11; See also Olabisi Akinkugbe 'What the African Continental Free Trade Agreement protocol on dispute settlement says about the culture of African States to dispute resolution' (2019) *Afronomics*; See also Victor Mosoti The first decade of WTO Dispute Settlement' (2006) 9 *Journal of International Economic Law* 427-453.

the most, having appeared before the body as a third party on up to six instances.[456] The above not only reflects the fact that the country is relatively more experienced in asserting its trade objectives using multilateral trade disciplines than most AfCFTA State Parties. It is through this experience in the WTO that it has been able to enrich the integration process within the ECOWAS REC.

IV. Nigeria's regional integration and trade arrangements in Africa.

Nigeria's engagement with regional integration on the continent can be best examined through two prisms: the continental level and the sub-regional level. At the continental level, Nigeria played an active role in deepening integration not only by being a founding member of the OAU, but by also providing the momentum through which the flagship treaty which forms the basis of the AfCFTA — the treaty for the establishment of the African Economic Community (the Abuja Treaty) — was birthed.[457] Through the formation of NEPAD (in 2001 by President Obasanjo along with South African President Mbeki), Nigeria has also played roles in ensuring development is mainstreamed in the integration processes.[458]

At the sub-regional level, Nigeria is a part of two economic communities; these are the Economic Community of West African States (ECOWAS) and The Community of Sahel-Saharan States (CEN-SAD). [459] Market integration within the 15 member state ECOWAS, has since 1990 been marshalled by the ECOWAS Trade Liberalisation Scheme (ETLS), the

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[456] World Trade Organisation *Nigeria and the WTO: Disputes Involving Nigeria,* available at *https://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm* . See also disputes DS467 *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*; DS458 *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, DS441 *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, DS 435 *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, DS434 *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging;* DS58 *United States — Import Prohibition of Certain Shrimp and Shrimp Products.*

[457] Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN); See National Office for Trade Negotiations op cit note 430 at 12.

[458] The New Partnership for Africa's Development" (NEPAD) was adopted by AU Members in 2001 with the objectives to, inter alia, "halt the marginalisation of Africa in the globalisation process and enhance its full and beneficial integration into the global economy" 14. The AU/NEPAD African Action Plan (AAP) is the main framework defining priority programmes and projects. For the period 2010-15, the AAP defined projects in priority areas, including "trade, industry, market access and private-sector development". Richard Dowden *Africa: Altered States, Ordinary Miracles* (2008) at 354; See also Segun Oshewolo 'Bringing back the issues: Nigeria's Afrocentric policy under President Olusegun Obasanjo' (2019) 57 *Commonwealth & Comparative Politics*, 324-342; Jimi O Adesina 'NEPAD and the Challenge of Africa's Development: Towards the Political Economy of a Discourse' (2004) 35 *Society in Transition* 125-144.

[459] See also Trade Law Centre op cit note 432.

implementation of which Nigeria plays an important part.[460] To benefit from the ETLS, companies must be registered and register their products as meeting the rules of origin specified under the scheme. Under the ETLS the Intra-ECOWAS goods eligible for duty-free and quota-free access are unprocessed goods, traditional handicrafts, and certain industrial products of ECOWAS origin.[461] Qualifying imports from approved ECOWAS producers are imported duty free into Nigeria. The ECOWAS is also in the process of implementing the ECOWAS Common External Tariff (CET) and Nigeria applies the ECOWAS CET on imports from outside the REC.

Nigeria is also a member of CEN-SAD REC which is a rather less functional REC than the ECOWAS. In 2013 the CEN-SAD revised its Treaty and amongst other things committed to deepening integration in the REC. However, there is no active market integration project in force.

Nigeria ranks lower than expected in overall regional integration according to the African Regional Integration Index (ARII), even though it is Africa's largest country in terms of GDP.[462] The country is in the bottom tier of all the countries measured on the index, ranking 5th in the ECOWAS and 8th in the CEN-SAD. Nigeria's low overall ranking in regional integration is due to its slow ratification of the African Continental Free Trade Area (AfCFTA) agreement. Additionally, Nigeria's limited proportion of imports originating from within the region contributes to its lower integration status.

The impact of Nigeria's membership in the Economic Community of West African States (ECOWAS) on its efforts in the African Continental Free Trade Area (AfCFTA) is a relevant question to consider. This thesis acknowledges that ECOWAS membership brings both positive and negative implications for Nigeria's AfCFTA endeavours. On the positive side, ECOWAS serves as a building block by fostering regional economic cooperation and

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[460] Nigerian Office For Trade Negotiations op cit note 444 at 41 – 42; See also Hulse, M 'Regional Powers and Leadership in Regional Institutions: Nigeria in ECOWAS and South Africa in SADC' (2016) 76 *KFG Working paper* No. 76. November 2016; Also see Tanja A Borzel & Thomas Risse 'The Transformative Power of Europe' Kolleg-Forschergruppe (KFG) Freie Universität Berlin; World Trade Organisation op cit note 400 at 27 -33 | See also Trade Law Centre op cit note 432.

[461] See also Abiodun Bankole, Noah Olasehinde, and Abiodun Raheem 'ECOWAS Trade Liberalization Scheme (ETLS) and its Impact on Intra-Regional Trade' (2012) *Journal of West African Integration* 86-124; Fajana, Olufemi 'Accelerating the implementation of the ECOWAS trade liberalization scheme'(2018).*Ghana national Chamber of Commerce & Industry.*

[462] The ARII, measures the extent to which African countries fulfil their commitments under pan-African integration frameworks like Agenda 2063 and the Abuja Treaty. It assesses integration across five dimensions, including trade integration, productive integration, macroeconomic integration, infrastructural integration, and the free movement of people. See African Union et al *Africa Regional Integration Index (ARII) Report* (2019) Available online at Link accessed on 13 July 2023.

deepening integration through harmonized rules and frameworks in areas beyond the current scope of the AfCFTA. The trade policy coherence and convergence achieved within ECOWAS customs union (or soon to be common market) could provide a strong foundation for Nigeria to align with the broader objectives of the AfCFTA. Nigeria has leveraged its experience and expertise gained through ECOWAS membership to enhance its engagement and coordination with its ECOWAS partners and other African countries during the negotiations and implementation of the AfCFTA's trade in goods protocol. However, it is important to equally recognize that ECOWAS membership can also pose challenges and act as a stumbling block for Nigeria's AfCFTA efforts. The diverse interests and priorities within ECOWAS create political complexities that require careful management. Past incidents, such as trade blockades imposed on intra-ECOWAS imports under the Buhari Administration, highlight the potential obstacles arising from conflicting interests and political situations. Nigeria's strong economic ties and existing trade relationships within the ECOWAS region may give rise to concerns or conflicting interests that need to be navigated during the AfCFTA's implementation phase. Therefore, Nigeria's success in the AfCFTA relies on effectively balancing its regional commitments, aligning trade policies, and skilfully coordinating with other ECOWAS member states to maximize the benefits of both ECOWAS and the AfCFTA.

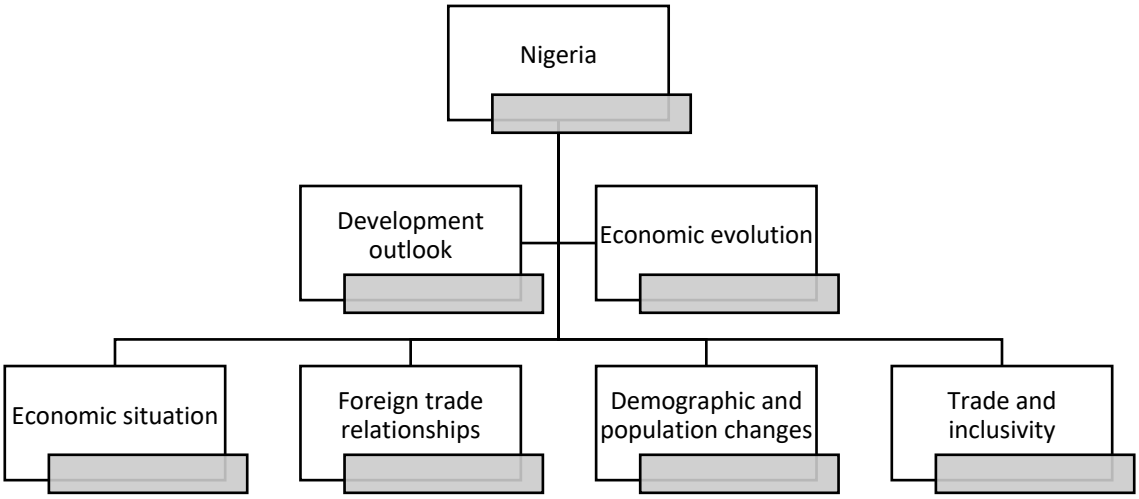

Illustration: *Key themes considered in section 4.2 (above) that summarises Nigeria's positionality as a state-party to the AfCFTA.*

4.3. Regulating or implementing trade: The legal frameworks and institutions in place for the AfCFTA in Nigeria

Before the Nigeria started reforming its trade governance architecture in 2017, four structural factors shaped the terms under which it functioned. These were the country's large economic and geographic size;[463] its similarly large population size; [464] its socio-political (i.e. regional, ethnic and religious) divisions; and, lastly (and perhaps most prominently), its vast deposits of oil and gas resources. As highlighted above, Nigeria's vast oil reserves have been very influential in how its trade policy has evolved.[465] A secondary effect of the sector's maladministration was vast levels of corruption, pervasive rent seeking and weak institutions.[466] Combined, these effects led to the cultivation of a culture of policy formulation that was interest based rather than in accordance to the dictates of economic logic.[467] Accordingly, Nigeria's trade policy architecture remained uncertain and weak.

The AfCFTA, however, prompted reforms to the trade policy governance architecture in Nigeria and in May 2017 the country's Federal Executive Council (FEC) set out a series of reform objectives.[468] These reforms will be discussed in this section. Prior to this, however, there will be a reflection on the nature of Nigeria's trade governance architecture before the coming into existence of the AfCFTA.

The reflection (of the trade governance landscape in Nigeria prior to the 2017 reforms) are justified not solely because they highlight the ineffectiveness of these previous institutions, but rather to provide a comprehensive understanding of the pre-reform trade governance landscape in Nigeria. This contextual reflection is also crucial for assessing the significance and impact of the subsequent reforms introduced after the ratification of the AfCFTA. It

[463] Nigeria is amongst the largest states in the ECOWAS in terms of Land Mass and this imposes high border management costs for it. See also Woolfrey S, Apiko P and Pharatlhatlhe K 'Nigeria and South Africa: Shaping Prospects for the African Continental Free Trade Area' (2019) 242. *ECDPM* 8 – 9; Hoffman L K and Melly P 'Nigeria's Booming Borders The Drivers and Consequences of Unrecorded Trade' *Chatham House* 7 December 2015 available at *https://www.chathamhouse.org/2015/12/nigerias-booming-borders-drivers-and-consequences-unrecorded-trade* accessed on 29 August 2022.

[464] Roy Pallavi 'Anti-Corruption in Nigeria: A political settlements analysis' July (2017) *Anti-Corruption Evidence Working Paper* at 22.

[465] Crude oil and Gold are the most volatile commodities in the world. See Eva Regnier 'Oil and energy price volatility' (2007) 29 *Energy Economics* 405-427. Kilian Lutz 'Oil Price Volatility: Origins and Effects' (2010) *WTO Staff Working Paper*.

[466] Pallavi op cit note 463 at 3.

[467] Woolfrey et al op cit note 462 at 6.

[468] Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN); Federal Executive Council Decision, 10th May 2017 EC 17 (17) 10. See also Office of the Head of Civil Service of the Federation (OHCSF) –"Establishment of the Nigerian Office for Trade Negotiations Memo - HCSF/2092/1/16 dated 7th August 2017.

should be noted that the reforms implemented in 2017 were indeed a response to the changing regional and international trade landscape, including the adoption of the AfCFTA. It reinforces the submission made of trade as a modernising force - advocated in the theoretical chapter (chapter 2).

4.3.1. Existing institutional frameworks

Before 2015 (i.e. the launch of AfCFTA negotiations), trade policy was administered loosely and by an array of executive institutions. These institutions include ministries, parastatals, agencies, and inter-ministerial groups. This created asymmetries in how trade policy was deployed. Based on the roles performed, Nigeria's trade policy system is operated by three institutional tiers; those institutions that primarily formulated the broad economic policy positions for the country, those that primarily took charge of coordination to advance those positions domestically and internationally, and, lastly, the institutions that coordinated implementation and took charge of surveillance.[469]

The institutions at the first tier are governmental ministries that supervise trade-related affairs. They are controlled by Nigerian Executive (the Presidency),[470] through the Federal Executive Council (FEC).[471] They primarily formulate economic development strategies for the country. In furtherance of this primary objective, they are empowered to make subsidiary regulations, policies, and directives that relate to trade.[472] While at different points in Nigeria's history different governments have utilised ministries by different names to serve the purpose of trade policy formulation, the dominant ones used at this level today are the Ministry of Industry, Trade, and Investment (FMITI), and the Ministry of Finance.[473]

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[469] Interview with Staff of Nigerian Office for Trade Negotiation (NOTN) and civil society organisation stakeholder/officials.

[470] Nigeria's Constitution — its primary source of law —creates three arms of government and devolves a wide range of powers between them. As far as trade policy is concerned, the executive and legislative arms bear the primary responsibility of formulating and implementing trade and economic policy. The National Assembly (the highest legislative institution in Nigeria) makes laws from the bills submitted before it.[470] A Bill officially becomes an Act after the President assents to it. This also applies to international and regional trade agreements. The Nigerian Constitution requires all international and regional trade agreements have to be ratified by a majority of its House of Assembly and then submitted for presidential assent before they could be enforced. In other words, notwithstanding Nigeria's accession to international treaties, in the absence of ratification, persons will be unable to activate its provisions in domestic courts. See op cit note 421 at section 12; O Fasan *Compliance with WTO law in Developing Countries: A Study of South Africa and Nigeria* (PhD dissertation, London School of Economics and Political Science (United Kingdom)) 78.

[471] Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN);

[472] Chigozie Nwagbara 'Delegated Legislation and Delegation of Powers in the Nigerian Administrative Law Context' (2015) 3 *International Journal of Business and Law Research* 82-87.

[473] While the FMITI serves as the lead government body, the Ministries of Finance, offers policy inputs and have some jurisdiction over certain trade and trade-related issues. For instance, the Ministry of Finance

The institutions at the second tier include many inter-ministerial committees, parastatals or agencies, and they primarily take charge of advancing specific economic and trade objectives that are directed to them by the Federal Executive Council through the ministries.[474] The proliferation of inter-ministerial committees, and agencies, by different governments, often results in a duplication of functions and — eventually —redundancy. They are also a cause of Nigeria's uncertain trade policy terrain.

The institutions at the bottom tier take charge of coordination and include bodies that play more specific roles in coordinating the flow of goods and services within Nigeria. They include the Nigerian Customs Service (i.e., Border Control Institution),[475] the Standards Organisation of Nigeria (SON), the National Agency for Food and Drug Administration and Control (NAFDAC),[476]the Central Bank of Nigeria,[477] Nigerian Export Promotion Council (NEPC), and the Federal Competition and Consumer Protection Commission (FCCPC).[478]

Over the years, these institutions have faced numerous challenges including the absence of capacity, insufficiency of accurate and reliable trade data, and corruption. Importantly these institutions did not have a clear developmental outlook.

Even though the country's conception on development was expressed in its many policy plans and papers on the subject, there exists no proof that the institutions charged with trade governance adequately considered them.[479] Where they did, they ignored the other equally important socio-cultural, and political variables that impact on expansion of human freedoms as well as the facilitation of liberty of action in Nigeria.[480]

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determines the tariff levels within its fiscal policy, and controls the Tariff Review Board, which deals with tariff petitions and review; See Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN).

[474] Fasan op cit note 469 at 78.

[475] The Nigerian Customs Service (NCS) which is tasked with the collection and management of customs revenue and facilitation of international trade. See Customs and Excise Management Act (CEMA), 2004.

[476] Which manages export and import standards, quality, product certification and technical and phytosanitary issues (i.e. TBT and SPS issues), safeguard public health and regulates Sanitary and Phytosanitary Measures (SPS) issues.

[477] created pursuant to an Act of the same name and tasked with roles which includes that of offering policy inputs on trade and trade-related issues.

[478] Interview with governmental stakeholder/staff of Nigerian Office for Trade Negotiation (NOTN).

[479] Ibid.

[480] See Sen op cit note 51. See also Baderin op cit note 159 at 4, 19, 27-30, 36, 39-40.

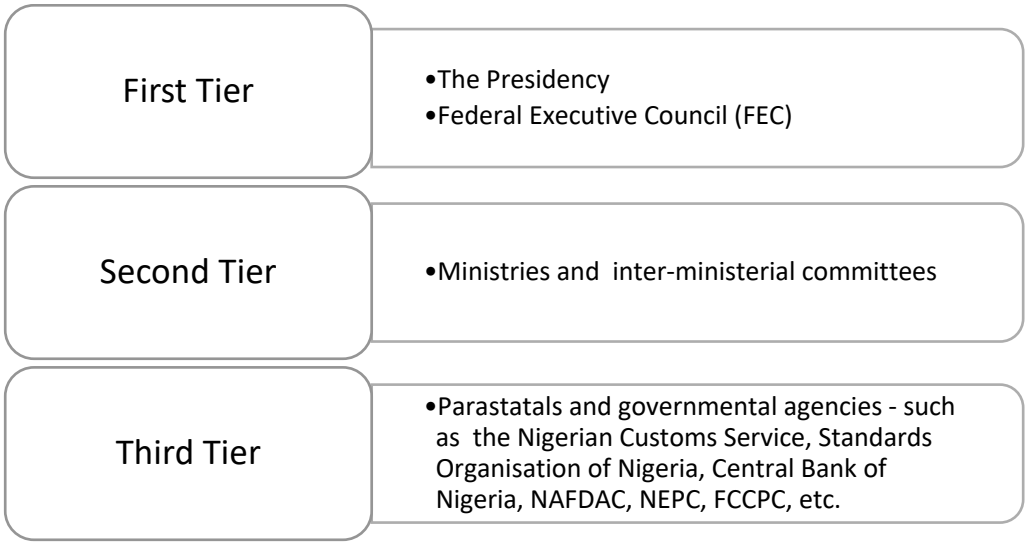

Illustration: *Core institutions governing trade in Nigeria*

4.3.2. Existing legal frameworks

For analytical purposes, the laws which frames Nigeria's engagement with the trade may be considered as operating in three levels: The primary level, the intermediate level and the tertiary level.

At the primary level are legislations with extensive effects on all structures of trade and economic policy governance in Nigeria. The only legislation that fits in this level is the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended). Created in 1999 and altered four times, Nigeria's Constitution is the most important detail in its economic policy architecture.[481] As a dualist state, no trade treaty or agreement signed by Nigeria has force of law until it has been ratified by the federal legislature.[482] Under this primary level, disputes arising related to international economic or commercial relations are placed under the jurisdiction of the Federal High Court.[483] The CFRN contains no clear definition on the concept of development. The only reference in the CFRN to what development could entail could be found in Part II, Fundamental Objectives and Directive Principles of State Policy.[484] One of its provisions states that the state must 'control the national economy in such manner as to secure the maximum welfare, freedom and happiness

[481] Ken Ukaoha & Legborsi Nwiabu; 'The Imperatives and Urgency of a Coherent Trade Policy in Nigeria' *NANTS Regional Trade Advocacy Series* at 3.
[482] Fasan op cit note 469 at 77; See op cit note 421.
[483] See op cit note 421 at Section 251.

[484] Stephen Okangla 'Why Chapter II of the Nigerian Constitution is a Greek Gift' (2021) Available at SSRN 3976196.

of every citizen on the basis of social justice and equality of status and opportunity'.[485] However, the provision falls short of explaining what exactly this entails. Furthermore, the part of the Constitution in which this provision is contained is not justiciable, as the Constitution in a separate provision prevents questions around it from being entertained by the courts.[486] Nonetheless, the CFRN remains a vital detail in Nigeria's trade architecture because as, Ismael Gwunireama aptly argues, it is the *fons et origo* from which the other laws obtain their legitimacy.[487]

At the intermediate level are a set of laws that more directly impact on Nigeria's trade and foreign policy. The most important of these include the Customs and Excise Management Act, 2004 (CEMA), the Companies and Allied Matters Act, 2020 (CAMA). The CEMA is an Act that regulates the management and collection of customs and excise revenues, and is the primary means through which Nigeria's trade is implemented.[488]Other subsidiaries and ancillary legislations have been made pursuant to the CEMA and they include Endangered Species (Control of International Trade and Traffic) Act,[489] the Export Incentives (Miscellaneous Provisions) Act,[490] the Customs and Excise (Special Panel and other Provisions) amongst others.[491] Neither the CEMA nor the aforementioned ancillary legislations contain clear outlooks on development. A likely outcome from the CEMA is the enablement of Nigerian Customs Authorities to act on the instruction of the minister to collect the different forms of excise duties.

The CAMA, is however, the main framework for doing business in the Nigerian market. Managed by the Corporate Affairs Commission, the CAMA regulates the terms under which local and foreign companies may benefit from economic initiatives of the government.[492] The role of the CAMA is also to ensure predictability in Nigeria's business environment. Its outlook on development is unclear.

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[485] op cit note 421 at Section 16.

[486] Ibid at section 6(6)(c).

[487] '*Fons et origo'* is a Latin term that translates to 'source and origin'. It is a commonly used maxim in Nigeria's legal jurisprudence to imply the pre-eminence of the Constitution over all laws and institutions; See Ishmael Gwunireama 'The Executive and independence of the Judiciary in Nigeria' (2022) 2 *Pinisi Journal of Art, Humanity and Social Studies* 57-66; Nneka S Amalu, Jack-Rabin, Y I O, Abdullahi Y and Adetu M O 'Security Sector Reform (SSR) In Nigeria: The Role of the Government, 1999-2019' (2022) 2 *Pinisi Journal of Art, Humanity and Social Studies* 67-74.

[488] 4 Customs and Excise Management Act (CEMA) of 2004 ss 4—8.
[489] Cap E9 Laws of the Federation of Nigeria, 2004.
[490] Cap 118, Laws of the Federation of Nigeria, 2004.
[491] Cap 45,Laws of the Federation of Nigeria, 2004.

[492] The Companies and Allied Matters Act (CAMA) of 2020.

These two legal frameworks at this level are complemented by an array of other trade frameworks including the Standards Organisation of Nigeria Act (which creates a body to manage the intricacies of standards setting and quality of goods management), the Federal Competition and Consumer Protection Act (FCCPA) of 2018 (though which fair competition in the Nigerian market is managed), and a cluster of IP legislations (governed by the Copyright Act, the Patent and Design Act Cap P2 LFN 2004 and the Trademarks Act). Although currently Nigeria has no trade remedies legislation, it is in the process of formulating one in the form of a Trade Remedies Act.[493] Once this is complete, the Trade Remedies Act will operate at the intermediate level to enable the deployment of various trade policy devices that will remedy the harms of unfair trade to the Nigerian market and industries.[494]

At the tertiary are hard and soft policies, guidelines and other sector specific rules that impact on foreign trade in Nigeria. This level also includes rules that enable the creation of other trade policies implementing subsidiary bodies. Examples of this include, export promotion and assistance legislation and regulations (such as the Nigerian Export Promotion Council Act,[495] Nigeria Export-Import Bank Act,[496] and the Nigeria Export Processing Zones Act[497]), an array of taxation acts (including the Companies Income Tax Act,[498] Value Added Tax Act,[499] the Stamp Duties Act,[500] and the Capital Gains Tax Act[501]), legislations that a affect doing business (such as the Labour Act,[502] and the Bankruptcy Act[503]), Investment legislations (such as Industrial Promotion Act,[504] Investment and Securities Act[505] and the Nigerian Investment Promotion Commission Act),[506] and also sector specific legislation (such as the Petroleum Industry Act,[507] the National Shipping Policy Act,[508] the Banks and Other Financial Institutions Act,[509] as well as the Communications Act). Another important

[493] Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN).
[494] Ibid.
[495] Cap 306, Laws of the Federation of Nigeria, 2004.
[496] Laws of the Federation of Nigeria, 2004.
[497] Cap No. 63, Laws of the Federation of Nigeria, 2004.
[498] Cap C21, Laws of the Federation of Nigeria, 2004 (amended in 2007 and 2011).
[499] Cap VI, Laws of the Federation of Nigeria, 2004 (amended in 2007 and 2011).
[500] Cap s8, Laws of the Federation of Nigeria, 2004.
[501] Cap C1, Laws of the Federation of Nigeria, 2004.
[502] Laws of the Federation of Nigeria, 2004.
[503] Laws of the Federation of Nigeria, 2004.
[504] Cap 181, Laws of the Federation of Nigeria, 1990.
[505] Cap. 45, Laws of the Federation of Nigeria, 2004; Investments and Securities Decree No. 34, 1999.
[506] No. 16, 1995 as amended by Act No. 32, 1998.
[507] Interview with governmental stakeholder/staff of Nigerian Office for Trade Negotiation (NOTN); See National Office for Trade Negotiations op cit note 430.
[508] Ibid.
[509] Ibid.

example of this is the ERGP and its successor, the Medium-Term National Development Plan (2021—2025) through which Nigeria embarked on its trade reforms processes.[510]

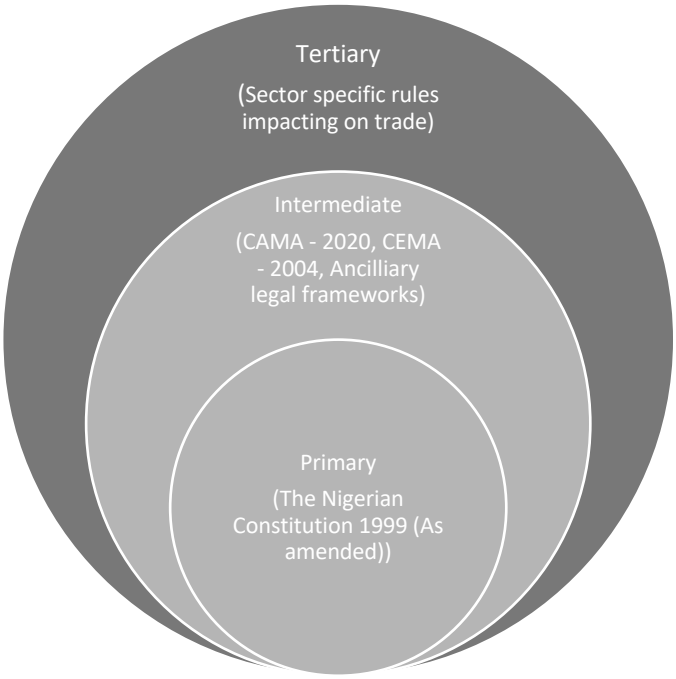

Illustration: *Diagram of the arrangement of laws that impact* on *foreign trade*

4.3.3. Trade governance: Trade policy reforms and political will

In 2017, two years after the AfCFTA negotiations began, Nigeria through a decision of its Federal Executive Council, launched a process of trade policy reform.[511] The changes introduced sought to enhance coordination, streamline processes, and promote synergy among different trade-related entities. The decision to reform is noteworthy for two reasons; first, it is an expression of political willingness and, secondly, it legitimises the AfCFTA as a corrective, transformative and modernising force for efficient trade governance.

Five mandates in the Federal Executive Council (FEC) decision were transformative. These were, first, the decision to create an institution to coherently manage Nigeria's trade governance process (Nigerian Office for Trade Negotiations' (NOTN)), secondly, the appointment of a seasoned WTO law expert as its first Chief-Negotiator (who was crucial in

[510] Federal Ministry of Budget and National Planning *Economic Growth and Recovery and Growth Plan* (EGRGP) 2017.

[511] Federal Executive Council Decision, 10 May 2017 EC 17 (17) 10. See also Office of the Head of Civil Service of the Federation (OHCSF) *Establishment of the Nigerian Office for Trade Negotiations Memo - HCSF/2092/1/16* dated 7th August, 2017.

directing the course of the AfCFTA at the regional level),[512] thirdly, the decision setting out the NOTN to be the primary trade policy negotiating and advisory team (to report directly the Economic Management Team within the Presidency) thereby reducing the bureaucratic red-tape that was previously associated with policy formulation, fourthly, the mandate for the formulation of a coherent and modern trade policy for Nigeria as well as the creation of trade safeguards infrastructures and Lastly, the mandate for the creation of a digital repository for harmonising and all the trade and investment agreements and treaties signed by Nigeria.[513]

These five key reforms as considered in this section are categorised into two analytical rubrics: the first three reforms are 'institutional reforms' because they are aimed at creating and building on the institutional capacity for trade policy governance, and the last two are termed trade policy reforms because they are aimed at impacting on trade policies to establish some form of coherence and certainty. The extent to which Nigeria has implemented these two categories of reforms are also will be reflected in this section.

A) Building institutional capacity for trade policy implementation: The establishment of the NOTN

The Nigerian Office for Trade Negotiation (NOTN) was created to rebalance Nigeria's approach to trade.[514] This move is important because it was the first real commitment to redesign the country's trade architecture and towards making a meaning of its foreign trade relationships. It also expressed a genuine commitment to providing the trade-related policy coherence which had for so long been lacking. Furthermore, the move represented a realisation that trade agreements required institutions with capacity, especially in the now hyper-globalised international trade system. Beyond this all, this institutional reform represented a realisation by Nigeria that, for the AfCFTA to yield developmental benefits, the process must be carefully monitored and coordinated (domestically) with developmental purpose.

Because the NOTN was created to establish "a tightly inter-linked growth-development bond" i.e., a coherence between trade and investment policies, industrial and competitiveness

[512] This was Dr Chiedu Osakwe, a seasoned trade policy expert with decades of Experience at the WTO and on many occasions served as Chair of the AfCFTA Negotiating Forum. Interview with governmental stakeholder/staff of Nigerian Office for Trade Negotiation (NOTN).

[513] Interview with governmental stakeholder/staff of Nigerian Office for Trade Negotiation (NOTN).

[514] See National Office for Trade Negotiations op cit note 430.

policies, technology policy, and Nigerian Foreign Policy,[515] it had to be strengthened. The first way in which strength was endowed at the onset was through its leadership.

B) Endowing and strengthening capacity in the NOTN through appropriate leadership

The NOTN is led by a Chief-Negotiator,[516] who is deputised by a Deputy Chief Trade Negotiator, and subsequently by Assistant Chief Trade Negotiators, all of whom are seasoned technocrats. Furthermore, the NOTN's leadership has had a very clear idea of its objective and commitments. More importantly and, because of its seasoned expertise, the leadership appreciated the trade-growth logic and set out to redesign the country's trade architecture, beginning by setting its trade priorities to align with those of the Economic Recovery and Growth Plan (ERGP). These priorities were stated to be the industrialisation, diversification and modernisation of the Nigerian economy towards expanding employment opportunities and taking advantage of the available demographic window of opportunity.[517]

The NOTN reports to the Presidency (the FEC) only through the Economic Management Team (EMT). This was also a transformative trade policy reform because it strengthens the trade policy institution by cutting short the tedious bureaucratic red tape associated with the reporting trade issues which often challenged trade policy coordination. The fact that it did this without compromising on the need for a supervision mechanism for the NOTN is laudable.

C) Setting up a Trade Remedy Mechanism (TRM)

Another vital institutional reform introduced to Nigeria's trade policy architecture was that of establishing safeguard mechanisms against unfair and injurious trade practices. A Trade Remedy Mechanism (TRM) was previously non-existent in Nigeria, even though the country had been the target of a lot of dumping. Nigeria's TRM was created as a section of the NOTN. To develop its capacity to adequately respond to injurious trading practices using this

[515] Interview with governmental stakeholder/staff of Nigerian Office for Trade Negotiation (NOTN). See National Office for Trade Negotiations op cit note 430 at 11–12.

[516] The first of which was Ambassador Chiedu Osakwe had served as a career diplomat within the Nigerian Foreign Service prior to joining the WTO. At the time of his appointment, Ambassador Osakwe was the most senior director at the WTO; The Current DG is Dr Fred Agah with similar credentials and WTO experience. interview with governmental stakeholder/staff of the Nigerian Office for Trade Negotiation (NOTN).

[517] Interview with governmental stakeholder/staff of the Nigerian Office for Trade Negotiation (NOTN). See National Office for Trade Negotiations op cit note 430 at 34–35. The demographic window has been enunciated on in above.

TRM, the NOTN brokered specialised technical training with development institutions such as the UNECA and WTO Secretariat.[518] This notwithstanding, the institution is yet to be fully operational. Its lack of experience in monitoring unfair trade is still one that may be a disadvantage. Other disadvantages of this TRM are the absence of formal legislation, which is needed to empower it more, and the absence of a price database for comparability in establishing dumping margins.[519]

D) Trade policy reform: Establishing coherence by creating a modern trade policy

Nigeria's legal framework for trade is spelt out in several legislations and policy documents, several of which were outdated and redundant. The last time the country's trade policy framework was reviewed was in 2002.[520] This lack of a coherent Trade Policy Framework (TRF) impacted on Nigeria's ability to articulate trade objectives and react to the demands of international trade. It broadly expresses a culture of triviality in engaging with trade policy.[521]

The two key mandates (introduced by the FEC directive) that set out to transform the Nigerian trade policy architecture were the mandate to create a coherent and modern trade policy for Nigeria, and the mandate for the establishment of a digital trade and investment agreements repository.[522] These reforms were geared at establishing some form of coherence and certainty.[523]

Before the reform, the trade policy architecture faced problems of policy incoherence. This was in part propagated by a culture of individual policymaking, which affected coordination as well as undermined the country's abilities to benefit from trade. Therefore, the most important policy priority in the AfCFTA era was (articulated by the NOTN) was that of establishing trade coherence.

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[518] Interview with governmental stakeholder/staff of the Nigerian Office for Trade Negotiation (NOTN). See National Office for Trade Negotiations op cit note 430.

[519] Interview with Governmental Stakeholder/Staff of the Nigerian Office for Trade Negotiation (NOTN); See National Office for Trade Negotiations op cit note 430 at 38.

[520] Woolfrey et al op cit note 462; interview with civil society and trade union stakeholders.

[521] Interview with trade union and other civil society organisations. See also Stephanie Adinde 'Policy inconsistency in Nigeria' *Stears Business* 4 October 2018.

[522] Interview with Governmental Stakeholder/Staff of Nigerian Office for Trade Negotiation (NOTN); See National Office for Trade Negotiations op cit note 430.

[523] Ibid.

E) Establishing a trade agreement repository

This priority of establishing coherence was therefore the overarching aim of the twin mandates of, first, creating a modern trade policy text (i.e. an overarching legal and policy framework) and, secondly, establishing a digital trade and investment agreements repository. While the first objective of creating an over-arching legal and policy framework was going to unify the country's approach to trade negotiations, the second objective of establishing a digital repository was necessary to establish a perspective on the country's trade policies. These perspectives were needed for charting the course of trade negotiations going forward. A key aspect of policy reform was creating a linkage between trade policies and the Nigerian Foreign Policy. The idea was to ensure that the countries trade and investment policies set out in the digital repository was negotiated with an eye on the country's foreign policy. Thus, in the grand scheme of things, the country's foreign policy was to rank above its trade policies. Ultimately, the levels of coherence sought to be established were at the levels in which all negotiations (bilaterally, regionally, continentally, and multilaterally) reflected the country's primary Industrial Policy and Competitiveness priorities.

In addition to these reforms, two crucial initiatives Nigeria put in place that now could impact on its gainful use of the AfCFTA are the move to ensure stakeholder buy-in and the measures to address its supply-side constraints.

4.3.4. Securing the buy-in of stakeholders

Nigeria's trade policy formulation process always struggled with garnering the buy-in of Civil Society Organisations (CSOs). This habit was a side effect of its years of military rulership under which inclusivity was sacrificed in a bid to consolidate power.[524] This lack of stakeholder buy-in often leads to hiccups in the advancement of trade objectives. In the context of the AfCFTA, the absence of buy-in from civil society groups delayed the signing and ratification of the AfCFTA by the Nigerian government.[525] The trade policy governance architecture was later reformed to be more consultative and inclusive of CSOs. The

[524] Interview with trade union and other civil society organisations. Please note that the term " Civil Society Organisations (CSO)" is introduced in this case study (and throughout this thesis) as an umbrella term encompassing various non-governmental organizations, advocacy groups, private business interest groups, community-based organizations, and other actors operating within civil society. Non-profit actors which may include organizations working on social issues, human rights, or development, are also part of the broader civil society landscape in Nigeria (albeit less visible).

[525] See Ernst op cit note 416 at 10; See also, Olalekan Adetayo 'Why Nigeria didn't sign Economic Partnership Agreement –Buhari' *Punch Newspapers* 5 April 2018, available at *https://punchng.com/why-nigeria-didnt-sign-economic-partnership-agreement-buhari,/* accessed on 29 August 2022.

cultivation of relationships by the NOTN with CSOs now enable the latter to not only asserting their rights but to also take ownership of the AfCFTA.

Two structures of the NOTN secure stakeholder buy-in: the National Committee on the African Continental Free Trade Agreement and the Enlarged National Focal Point on Trade (ENFP). Both institutions comprise most CSOs in the country and completed a total of 248 consultations and sensitisations of different configurations of stakeholders before the AfCFTA was ratified.[526] In a bid to guarantee a structured approach to those consultations, the ENFP created seven sub-committees, these being Ease of Doing Business and Trade Facilitation (led by the Nigerian Customs Service); Investment Facilitation (led by the Nigerian Investment Promotion Commission (NIPC)), Services and Digital Economy (led by the National Information Technology Development Agency), Intellectual Property (led by MOJ), Agriculture (led by Federal Ministry of Agriculture and Rural Development), ECOWAS (jointly led by MFA and NOTN); and Private Sector Development (led by the National Association of Chambers of Commerce, Industry, Mines and Agriculture). During the consultations and the sensitisation process, the Organised Private Sector (OPS), an umbrella organisation of highly influential private business entities was the most visible coalition. It represents the interest of the private sector in Nigeria,[527] and is made up of actors such as the Manufacturers Association of Nigeria (MAN); the National Association of the Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA); the National Association of Small-Scale Industrialists (NASSI); the Association of Nigerian Exporters (ANE); and banking institutions and other professional associations. The OPS lobbies and exerts pressure on the system through public workshops as well as in the local news media,[528] and their actions and activities are powered by evidence-based advocacy and from a rights-based perspective.

4.4. Addressing peculiar supply-side constraints

Nigeria realises that for it to optimise the AfCFTA, it must coherently develop strategies to address the real constraints that have stifled productivity.[529] In this regard, the country has

[526] Nigerian Office for Trade Negotiations 'AfCFTA Stakeholders Sensitization and Consultations calendar'*;* Interview with Trade Union and other Civil Society Organizations.
[527] Ukaoha and Legborsi op cit note 480 at 3.
[528] Ibid at 4.

[529] Ismail op cit note 69 at 142.

identified several areas for reform. Three of these are industrialisation, infrastructure, and energy.

4.4.1. Industrialisation and transformation strategy

Nigeria's discovery of crude oil in 1958 led to both positive and negative outcomes. While on the positive side, the commodity created revenue for the Nigerian government in proportions never experienced, on the negative side, it slowly eroded the country's industrial base. Crude oil led to the neglect of most industries in Nigeria. From the 1980s the country began to experience de-industrialisation in its formal sectors.[530] Studies on Nigeria's manufacturing sector show that it has been performing poorly in comparison with other African countries[531] The sector which between 1980–1989 contributed 9.6 per cent to Nigeria's GDP, declined to 8.4 per cent between 2010–2015.

In response to this, Nigeria created a National Industrial Revolution Plan (NIRP) in 2014. Its ambition of this is to develop the scope of its industry and accelerate the expansion of its manufacturing sector.[532] This ambition is executed through specific initiatives and interventions to improve productivity in certain target sectors.[533] The industries prioritised are in the agribusiness & agro-allied industry, the construction and light manufacturing industry, oil and gas, and the solid minerals and metals industry.[534] Furthermore, Nigeria seeks to boost competitiveness in automotive assembly, cement, and textiles and clothing. To manage this, the country coordinates industrialisation through the Ministry of Industry, Trade and Investments (FMITI).[535] The aim of this is to enable it to efficiently plug into regional and global value chains and boost private sector productivity in a coherent fashion.[536]

However, stakeholders note that the biggest threat to the implementation of the National Industrial Revolution Plan (NIRP) will be institutional. Nigeria's institutions lack the capacity to adequately engender the needed industrial discipline to direct the course of its

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[530] Friedrich-Ebert-Stiftung op cit note 373 at 15.

[531] Ibid.

[532] Federal government of Nigeria 'National Industrial Revolution Plan (NIRP)' January 2014 at 7 Available at Link accessed on 29 August 2022.

[533] Ibid.

[534] Ibid.

[535] Interview with governmental stakeholder/official.

[536] Interview with governmental stakeholder/official.

manufacturing sector.[537] Civil society groups further note that the absence of political will continues to undermine the efforts to formulate and deploy the needed industrial policies using the NIRP.

4.4.2. Infrastructure policy reform

One of the core contributors to the costs of trade in Nigeria is the absence of critical hard and soft infrastructure.[538]Nigeria's infrastructure has been noted to be notoriously inadequate for its vast economy.[539] This inadequacy is regarded as one of the most significant barriers to conducting business in the country.[540] Nigeria is placed 130th out of 141 nations in terms of infrastructure. In a survey by the Nigeria Society of Engineers (which graded core national infrastructure over 5), the state of electric power, water, healthcare and oil & gas infrastructures, the country scored 1.36, 1.29, 1.52 and 1.98 respectively.[541] Furthermore, the country's transportation infrastructure is not only deplorable, but is also inadequately maintained. This poor maintenance culture often leads to the infrastructure's degradation which then exacerbates the flow of traffic and increases trade expenses.

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[537] Interview with Private sector stakeholder/official.

[538] Eka Ikpe, and Jacopo Torriti 'A means to industrialization end? Demand Side Management in Nigeria'(2018) 115 *Energy Policy* 207-215. Ogbuabor J E, Orji A, Anumudu C N, Onwumere J U and Manasseh C O 'Quest for Industrialisation in Nigeria: The Role of the Development Bank of Nigeria' (2018) 8 *International Journal of Economics and Financial Issues,* 23. Patrick N Osakwe 'Unlocking the Potential of the Power Sector for Industrialisation and Poverty Alleviation in Nigeria' in Evelyn F wamboye & Peter J Nyaronga (eds) *The Service Sector and Economic Development in Africa*, (2018) 159; Also see Isioto N Nathaniel, Philip-kpae Friday & Dickson Rachael 'Factors Affecting Technological Growth in Nigeria and the Way Forward' (2017) 5 *International Journal of Mechanical Engineering and Applications* 269.

[539] Amadi, S N and Dave O G 'Government Infrastructure Spending On Growth Of The Nigeria Economy (1981-2019)' (2022) 30 *International Journal of Progressive Sciences and Technologies* 295-303; See Musa Kolo U, Abubakar Dayyabu,Akinmade Oluwatosin, & Shittu U Chidawa 'Transport Policies in Nigeria: A state of the Art Review' in Xueyan Liu *et al* (eds) (2021) *Green and Intelligent Technologies for Sustainable and Smart Asphalt Pavements* at 456-461; Ochada, I Matthew and Ayadi, F Sunday 'Fiscal Policy, Infrastructural Contents, and Poverty Per Headcount Rate in Nigeria' (2006) 12 *Nigerian Journal of Energy Environmental Economics* 1.

[540] Infrastructure is one of 12 pillars used by the World Economic Forum (WEF) to measure the global competitiveness of countries. Infrastructure, along with institutions, ICT uptake, and macroeconomic stability, is included in the An Enabling Environment Sub-index. Nigeria is ranked 116th out of 141 countries in terms of overall competitiveness. See Roz Price 'The Effects of Rapid Demographic Changes on Water, Energy, and Transport Infrastructure in Nigeria' (2019) *K4D Helpdesk Report*.

[541] Nigerian Society of Engineers 'The Nigeria Infrastructure Report Card 2017' (2017); See also J E Audu 'A Perspective on Sustainable Infrastructural Development in Sub-Saharan Africa' (2018) 9 *Journal of Emerging Trends in Engineering and Applied Sciences* 259-270.

Nigeria's policy response to its infrastructural issue is the National Integrated Infrastructure Master Plan (NIIMP).[542] The plan outlines Nigeria's infrastructure needs over the next 30 years and includes an ambitious additional GDP contribution of up to 7.9 per cent during a five-year period from 2014 to 2018.[543] Even though the executive has made attempts to implement the NIIMP through provisioning and appropriations, the condition of Nigeria's infrastructure remains dire. JE Audu notes that one reason for this is the absence of a clear legal and institutional framework to marshal the NIIMP's implementation.[544] Furthermore, execution strategies have been poor, and this often creates avenues for funds earmarked for infrastructure to be misappropriated.

Nonetheless, the NIIMP is important because it sets out a shared vision for the country's infrastructure, which could boost investor confidence. It represents a crucial step in addressing the infrastructural constraints that stand to undermine Nigeria's AfCFTA efforts.

4.4.3. Power, electrification, and energy issues

It is impossible to overstate the importance of electricity in the formation of new markets as well as the creation of employment opportunities for individuals to generate income and elevate themselves, their families, and their communities out of poverty. However, Nigeria has an energy deficit that is ranked to be amongst the worst in the world.[545] This has been argued to be due to issues associated with the energy value chain in Nigeria, notably generation, distribution, and decentralisation.[546] Between 2003 and 2009, Nigeria energy consumption per capita decreased from 174.6 kWh per capita to 135.2 kWh per capita.[547]Nigeria started to respond to its energy crises in 1993 through a National Energy Policy (NEP) which was reviewed in 2003. A National Energy Masterplan formulated in 2013 converted the strategies proffered in the previous NEPs into actionable programmes. The plan was reviewed once more in 2018 to meet the contemporary demands of energy

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[542] Federal Ministry of Finance, Budget and National Planning (2020) *National Integrated Infrastructure Master Plan (NIIMP)* Available at Link Accessed on 15th May 2022.

[543] Ibid.

[544] J E Audu 'A perspective on sustainable infrastructural development in sub-Saharan Africa' (2018) 9 *Journal of Emerging Trends in Engineering and Applied Sciences* 259-270.

[545] N Saifuddin, S Bello, S Fatihah,. et al 'Improving electricity supply in Nigeria-Potential for renewable energy from Biomass' (2016) 11 *International Journal of Applied Engineering Research* 8322-8339.

[546] M Ndukwu, D I Onwude and Bennamoun 'Nigeria's Energy Deficit: L, The challenges and eco-friendly approach in reducing the energy gap' (2021) 14 *International Journal of Sustainable Engineering* 442–459.

[547] E J Bala and G Y Pam *Energy Sources and Sustainable Development of the* North (2012).

generation. Nigeria's energy policy is currently encapsulated in its Revised National Energy Policy published in 2022. It covers energy demand and supply, training and manpower development, an energy databank, fossil fuels, production, processing, research and development, nuclear energy, renewable energy, environment, energy efficiency and conservation and international cooperation. The plan is driven by the goal of optimally utilising Nigeria's vast energy resources for ensuring that its industries are competitive, and for sustaining its development.

The revised plan attends to Nigeria's energy deficit by setting long-, medium and short-term targets. The country's strategy coalesces into three plans: first, the rehabilitation of existing power facilities and adherence to strict maintenance programmes. Secondly, the completion of all ongoing energy-related initiatives and acceleration of all prospective electrical projects, and thirdly the creation and implementation of long-term coordinated rural electrification programme based on distributed decentralised generation and, lastly, the creation of a long-term research and development portfolio for the Electricity Supply Industry (ESI).

4.5. Conclusion

This chapter has explored some key issues with the legal and regulatory trade frameworks by means of which Nigeria aspires to optimise the AfCFTA. It has also highlighted some reforms put in place for its implementation.

As stated in the introduction, this chapter has focused on major issues in Nigeria's trade configuration to reflect on the country's position with relation to the AfCFTA. It has demonstrated, among other things, that while Nigeria's dynamic, large, and youthful economy (as well as its experience in international trade) may make it an ideal State Party for trade under the AfCFTA, its gains may be hampered by factors such as its uncertain outlook for development, its ambivalent attitude toward trade inclusivity, and the extent to which its largest revenue — crude oil — influences trade policy formulation. The chapter further demonstrated the significance of trade in modernisation by emphasising some of the reforms suggested by the AfCFTA in Nigeria since it became a State Party to it. Finally, the chapter demonstrates how Nigeria's policy responses to supply-side constraints might position it for the AfCFTA's developmental use. In chapter 7, policy recommendations are provided on how Nigeria might better position itself for a more meaningful participation in the AfCFTA or

trade integration projects. The next chapter will look at Kenya, a hegemon in the East African Community (EAC), and its framework for maximising the benefits of the AfCFTA.

5. CHAPTER FIVE: THE AfCFTA INITIATIVE: CASE STUDY OF KENYA'S ATTEMPT AT OPTIMISING THE GAINS.

5.1. Introduction

The previous chapter explored some dominant themes or factors shaping Nigeria's engagement with the African Continental Free Trade Agreement (AfCFTA). This chapter examines factors around Kenya's engagement with the African Continental Free Trade Agreement (AfCFTA) and the array of trade policies and institutions through which the country, which has the largest economy in the East African Community (EAC), aspires to engage with the AfCFTA. Kenya is an interesting case study for two reasons: first, it has a relatively more evolved, clearer and democratic approach to trade policy governance and, second, due to its hegemony in the most advanced Regional Economic Community (REC) in Africa.[548] As one of the earliest states to ratify the AfCFTA Agreement,[549] Kenya plays a leading role in advancing the interests of the EAC.[550] As is the case with Nigeria in the ECOWAS region, Kenya's hegemony in its community could allow for some generalisations (albeit cautiously) to be made on the likely behaviour of the other countries in the region.

Kenya is analysed using the ALDIM model which has been proffered in chapter two. The ALDIM model submits that three factors that may determine the extents to which regional integration initiatives may yield development outcomes in an African state are the design or outline of the domestic setting within which the initiative is to be deployed, the legal frameworks and institutions for its governance and measure to address productivity constraints. Accordingly, the central question this chapter examines is: how can the ALDIM assist us in understanding how Kenya is situated for operationalising the AfCFTA for its development?

Three important insights are drawn from this chapter. First, Kenya's progressive outlook on development as well as its more dynamic and people-oriented trade ideology situates it in a position to make a more meaningful use of the AfCFTA for development (in comparison to the other two case-studies explored in this thesis). Secondly, the chapter demonstrates how Kenya's well-articulated, and collaborative coordinating system for

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[548] African Union Commission *Africa Regional Integration Index - Regional Economic Communities*, available at Link, accessed on 25 April 2021.
[549] Kenya signed and ratified the AfCFTA Agreement on 21 March and 6 May 2018 respectively. See Africa Union State Parties: Ratification Status List available at *Link* accessed on 25 April 2021.
[550] See African Union Commission op cit note 547. See also Mugambi op cit note 42 at 5; Elowson, op cit note 42 at 1; Mathieson op cit note 42 at 5.

managing its trade policy frameworks and institutions could be an advantage vis-à-vis the AfCFTA. Furthermore, the chapter shows some of the pragmatic steps Kenya is taking to attend to some of the real constraints that could impact on the country's gains under the AfCFTA.

This chapter is divided into three sections. The first section spotlights factors that impact on the design of Kenya's regulatory framework. This includes the history of its trade policy formulation process, developmental outlook, and relevant environmental considerations that impact on the country's ability to utilise trade for development. The second section gives an overview of the legal frameworks and institutions for the AfCFTA in Kenya. In this regard it also reflects on themes that could hint at the political intentionality in Kenya's AfCFTA strategy and impact on its developmental implementation. These includes coordination mechanisms, measures for securing stakeholder buy-in, evaluation and monitoring systems and some precarious issues. The last section examines the measures undertaken by Kenya to address some of the 'real constraints' (as African integration scholars note) that could prevent the AfCFTA from yielding development outcomes. These include trade infrastructure, trade finance, and trade capacity development.

5.2. Domestic Context: Issues relevant to understanding and situating Kenya as state party to the AfCFTA.

Since its independence in 1963, Kenya has appreciated the varied role of international trade in its development and has been active in various integration agendas at the regional and sub-regional levels. Its motivations in this regard though have always shifted. At some point in its history, its efforts at pushing integration were driven solely by Pan-Africanist ideals,[551] while in other instances its outlook and approach on trade and regional integration were shaped by rather more practical economic considerations. Through practical engagements with the concepts of trade and integration, Kenya has grown to appreciate their potential in boosting its economic growth. Its pragmatic approach to engaging with the AfCFTA initiative is a

[551] Before his disillusionment with integration in East Africa, Jomo Kenyatta (first prime minister of Kenya) engaged with the regionalism, trade and integration in terms of Pan-Africanist ideals. This was evident in the early 1960s when had foresaw that Kenya would be a pillar for economic unity and development of the region. See Kenneth O 'Nyangena 'Jomo Kenyatta: An epitome of indigenous Pan-Africanism, nationalism and intellectual production in Kenya' (2003) 6 *African Journal of International Affair*s 5–8. See also Shivji I G, *Pan-Africanism and the Challenge of EAC Integration.* 2009. Joseph Nye *Pan-Africanism and East African Integration* (2013).

modest tribute to this appreciation and has earned it the rank of being one of the most committed countries to the project.[552]

It is against this background that an overview of Kenya in relation to foreign trade and development is offered in this section. This is done in a bid to highlight the themes relevant to the design of its regulatory framework (RFD). In this regard, the ideas that shape Kenya's pragmatic approach to trade have been examined in the section; as well as some internal and external factors that define the environment under which its trade policy governance unfolds. This examination is done in the following rubrics: trade policy evolution, outlook on the concept of development, and important environmental sub-themes.

5.2.1. Kenya's trade policy: Evolution and ideological shifts

Kenya's trade policy thinking has been dynamic. Shifts in its trade policy governance approach occurred in five phases: the import substitution phase early on at its independence era; the trade liberalisation phase of its mid-post-independence era; the export promotion phase of the 1990s; the Millennium phase; [553] and the AfCFTA phase.

Throughout the independence era (196—1980), the dominant ideology on trade was on infant industry protection and import substitution.[554] This approach was first expressed in the Kenya's Sessional Paper No. 10 of 1965 on African Socialism, and its application proved to be influential in charting trade policies throughout Kenya's independence era.[555] By the end of the 1970s, the detrimental impacts of the import substitution strategy on Kenya's economy were already evident.[556] The downturn imposed an imperative for a shift and created an ideological vacuum. The Bretton Woods Institutions attempted to fill this vacuum

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[552] Michael Kattoh et al *AfCFTA year zero report - An Assessment of African Governments' Commitment and Readiness for AfCFTA Start of Trading in light of COVID-19* (2020) at 14 See also African Union Commission, Africa Regional Integration Index – EAC Member' Scores and Rankings Available at *https://www.integrate-africa.org/rankings/regional-economic-communities/eac/* accessed on 25th April 2021.

[553] See Omiti J, Waiyaki N and Fritz V 'Trade policy-making process in Kenya: The institutional arrangements and interaction of actors' (2007) *KIPPRA and ODI* available online at *https://cdn.odi.org/media/documents/1808.pdf* accessed on 15th March 2021; See also Kiuluku P and Chekwoti C 'Trade Policy-Making in East Africa' in Kenneth Heydon and Stephen Woolcock (eds) *The Ashgate Research Companion to International Trade Policy* (2012) 483; For general history of Kenya's trade and economic thought see also Socrates M K and Kimuli M D 'Pragmatic History of Economic Thought: Explaining Trade Practices and Policies in Kenya' (2020) 10 *Tanzanian Economic Review*, 123-138.

[554] Kenya Ministry of Industry, Trade and Cooperatives, State Department for Trade *National Trade Policy "Transforming Kenya into a Competitive Export-Led and Efficient Domestic Economy* (2017) 3.

[555] Government of Kenya *African Socialism and Its Application to Planning in Kenya (Sessional Paper No. 10 of 1965)* (1965).

[556] Anyang' Nyong'o P 'The Possibilities and Historical Limitations of Import-Substitution Industrialization in Kenya' in Peter E Coughlin & Gerrishon K Ikiara *Industrialization in Kenya: In Search of a Strategy* (1988) at 6; See also Meilink H A 'The Effects of Import-Substitution: The Case of Kenya's Manufacturing Sector' (1982) *Discussion paper Institute for Development Studies, University of Nairobi*.

with, inter alia, its Structural Adjustment ideologies. The Structural Adjustment Programme had stultifying effects on economic growth and development.[557] In the second phase, therefore, the dominant trade policy thinking shifted away from the protectionist thought of the previous era. Among other things, the era caused a reduction in public institutions' centralised role in trade policy regulation.[558] The second phase favoured the reduction in both tariff and non-tariff barriers and reform programmes for Export Oriented Industrialisation (EOI), stimulating private sector growth and increasing foreign direct investment.

The third phase (i.e. from the 1990s) of trade policy ideological shift –on the one hand – favoured an export promotion strategy and [559] articulated the need for creating an enabling environment for export growth (thus allowing more leverage for multilateral organisations to influence Kenya's trade policy governance).[560] The Millennium Era (i.e. from 2003), on the other hand, was shaped by free trade negotiations with RECs within the continent such as the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA).[561] Kenya's approach to trade here focused on harmonising the many forms of sector and commodity-specific strategies that were curated at the domestic level to optimise the benefits from Intra-African trade. In this era, the need for a more coherent trade policy and a more structured approach to acting on trade objectives became apparent. This began a series of changes in trade policy thinking that ushered the AfCFTA trade policy governance phase under which a coherent national trade policy was created.

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[557] The impacts of the SAPs have been notoriously reflected on by academic literature and was discussed in chapter 3; See Rono J K 'The Impact of the Structural Adjustment Programmes on Kenyan Society' 2002 17 *Journal of Social Development in Africa* 81-98; See also Heidhues F and Obare G A 'Lessons From Structural Adjustment Programmes and Their Effects in Africa' (2011) 50 *Quarterly Journal of International Agriculture*, 55-64; Githua, D W, 2013. *The impact of International Monetary Fund (IMF) and the World Bank structural adjustment programmes in developing countries, Case study of Kenya* (unpublished Master of Arts thesis, University of Nariobi, 2013).

[558] Kenya *Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth* (1986)*;* See also reflections on this in Kenya, *For The Period 1984 to 1988* available at *https://repository.kippra.or.ke/bitstream/handle/123456789/1429/DEV%20PLAN.pdf?sequence=1&isAllowed=y* accessed on 30 August 2022; See also See Omiti et al op cit note 552 at 18-20.

[559] See Kenya The Sixth Development Plan (1989-93); See Omiti et al op cit note 552 at 18-20; Socrates et al op cit note 552 at 123-138.

[560] See Omiti Ibid at 19; For general history of Kenya's trade and economic thought, see Socrates et al op cit note 552 at 123-138.

[561] This chapter will prioritize a more detailed exploration of the EAC, which is considered the primary framework shaping Kenya's regional integration efforts than the other RECs to which Kenya is a member state – i.e. COMESA (Common Market for Eastern and Southern Africa) and IGAD (Intergovernmental Authority on Development). This is because the EAC is a Customs Union which requires a deeper level of commitment and institutional harmonization between its member states. For this reason, it plays a more central role in shaping the case study's economic and trade governance architecture. Additionally, the EAC has progressed further in terms of institutional development, policy coordination, and implementation of regional initiatives compared to COMESA and IGAD. In other words, while COMESA and IGAD are also important regional integration initiatives, their relative influence on Kenya's economic and governance aspects may be comparatively less pronounced.

Presently, Kenya is ascribing its outlook on international trade to key policy documents such as the Kenya Vision 2030 blueprint and the Integrated National Export Development and Promotion Strategy (NEDPS) (2018).[562] It is, however, notable that the core trade ideologies and ambitions are well articulated in the Kenyan National Trade Policy of 2017.

Overall, five features of Kenya's trade policy governance in the AfCFTA era are noteworthy. First, it is open-oriented and appreciates the varied roles of regional and multilateral partners in economic development. Secondly, it is coherently articulated and therefore gives somewhat more assurance of commitment by successive governments.[563] Thirdly, it is inclusive and principle-driven, and this could prevent the wrong values and motives from influencing its trade approaches. Fourthly, it takes cognisance of the historical processes through which previous trade policies evolved. Fifthly, it contains objectives that align with the general and specific objectives spelt out in the agreement creating the AfCFTA,[564] thus enabling Kenya to reinforce and reiterate its commitment to the AfCFTA initiative. However, the fact that the National Trade Policy is unenforceable, could be a disadvantage.[565] Through its reformed approach to trade, Kenya could be in a better position to correct its trade in goods and services trends in a way that prioritises intra-African trade.

5.2.2. Kenya's development framework

The most profound encapsulation of Kenya's perspective on the concept of development may be found in a policy document known as 'Kenya Vision 2030'. Formulated by the Kibaki administration in 2008, the text is a long-term developmental blueprint that is expected to govern the policies of the Kenyan Government till 2030. Kenya's outlook on development is apparent from this plan —it is the transformation of the country from a low-income country to a middle-income one with high standards of living, quality of life and in a clean and secure environment. At its foundation the blueprint incorporates core economic variable/values like,

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[562] Interview with governmental stakeholder/official; See also Government of Kenya 'National AfCFTA Implementation Strategy (1st Jan. 2020 – 31st Dec. 2024)' 8.

[563] Fagbayibo notes that a reason for low commitments to regional integration initiatives in Africa is the vagueness of prescribed norms at the demand and supply side. It follows that where approaches to engaging regional agreements are absent, incoherent, or ambiguous, the tendency for commitment to be eroded will be high. See B Fagbayibo 'The legal regime of compliance with regional norms in Africa: Reframing the paradigms of engagement' (2019) 27 *African Journal of International and Comparative Law* 446-465. See also Fagbayibo. 'Exploring Legal Imperatives of Regional Integration in Africa' *Comparative and International Law Journal of Southern Africa*, 45(1)64-76.

[564] Article. 2–3 op cit note 268.

[565] More on this is reflected on subsequently in this chapter. Interview with governmental stakeholder/official; See also Government of Kenya *National AfCFTA Implementation Strategy (1st Jan. 2020 – 31st Dec. 2024)* 36.

macroeconomic stability, with non-economic variable like, the continuity of governance reforms, the importance of security, the enhancement of equity in society (regional and gender balance) and the creation of opportunities for the poor and vulnerable. It also includes priorities like infrastructure, energy, science, technology, and innovation (STI).

Kenya's development perspective escapes the criticism often directed at views on the concept (in development plans) that emphasise only economic values. This is because, in addition to the traditionally upheld economic values, Kenya's blueprint has a social and political values (or pillar). While the economic pillar addresses the impediments to economic growth (prioritising the tourism, agriculture and livestock, wholesale & retail, trade, manufacturing, financial services, business process offshoring and IT-enabled services sectors) and hopes to increase growth rates to 10 per cent per annum, the social pillar addresses the creation of a just, equitable and cohesive community with improved standards of living and social. The political pillar addresses the imperatives of engendering democratic norms. This exhaustive visualisation is more progressive than most AfCFTA state parties. The acknowledgement of non-economic variables situates the country in a way that could enable its people to live much richer, meaningful, and higher qualitative lives. Despite the relatively more exhaustive tone to its development, the implementation of this development strategy has faced many challenges. This includes inadequate and limited resource allocation, especially in carrying out development activities; political interference; an uncertain political environment; constant inflation compounded with a weak currency; corruption; and inadequate and ineffective involvement by the citizens of Kenya amongst others.

5.2.3. Other environmental considerations affecting trade and development

While many factors affect Kenya's trade environment, in this section its economic situation, demographic transitions, foreign trade relationships, and trade and gender inclusivity are spotlighted. These factors are considered because they are the most relevant points for meaningfully understanding the developmental positionality vis-a-vis the Regulatory Framework Design (RFD) of Kenya.

A) Economic profile of Kenya

The Kenyan economy is at the heart of its foreign trade agenda and development ambitions. At US$98.8 billion, its GDP is the largest in the East African Community and amongst the largest of AfCFTA state parties. The country's economy has been growing steadily at an

average of 5.6 per cent over the past decade.[566] Even though this falls short of the 10 per cent per annum target set under the Kenya Vision 2030, the economy has shown resilience. The medium-term development prospects show that the economy could grow by 7.0 per cent in 2022.[567] Inflation rates (driven by food and gasoline prices), have been relatively constant at 6.1 per cent on average between 2014 and 2022 and so have loan-deposit interest rate margins.[568] Foreign direct investment (FDI) inflows to Kenya are diversified throughout a wide range of industries, including manufacturing, ICT, tourism, and oil, real estate, energy, and mining. Kenya's FDI levels as a proportion of GDP in 2021 were 1.3 per cent.[569] Furthermore, from 2011 to 2017, Kenya was the origin of over 50 per cent of intra-EAC FDI flows. The AfCFTA Investment Protocol, which sets an investment governance framework to allow intra-African investment, should enhance the mutual advantages of investment and trade while also strengthening Kenya's position as a regional financial centre.

Despite its relatively healthy economic condition (compared to its neighbours) the country is still underdeveloped. High poverty rates exist alongside inequality and a weak private sector, while institutional inefficiency continues to expose its economy to vulnerability to internal and external shocks. In terms of fiscal balance, the country has a large deficit due to inadequate domestic resource mobilisation and rising governmental spending on infrastructure. Nominal PPG external debt at the end of 2020 amounted to 35.6 per cent of GDP, about four percentage points higher than at the end of 2019.[570] While it is expected that AfCFTA imposed liberalisation (as well as spending on trade enabling infrastructure) may exacerbate the country's budget balance, the long-term gains could be an opportunity for altering its economic fortunes.

Reforms aimed at improving the economy have been made. For instance, reforms towards revenue collection efficiency have been implemented, such as widening the tax base, expanding tax payment methods to include mobile money, and evaluating various forms of

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[566] Kenya National Bureau of Statistic, (2019) Gross Domestic Product Report; See also Government of Kenya op cit note 560 at 26.

[567] See also Government of Kenya op cit note 563 at 26 -29.

[568] Central Bank of Kenya, Inflation Rates (2022) Link; Kenya National Bureau of Statistic, (2022) Inflation rate; See also Government of Kenya op cit note 563 at 26.

[569] CEIC Data 'Kenya Foreign Direct Investment: % of GDP' (2021) available online at Link Accessed on 24th March 2022.

[570] Kenya National Treasury (2021) 'International Monetary Fund, *2021* Requests for an extended arrangement under the extended fund facility and an arrangement under the extended credit facility—debt sustainability analysis' Available online at LINK Accessed on 16 April 2022.

tax legislation. As a result of these reforms, domestic tax revenues have shifted away from import charges and toward income and value-added taxes (VAT).

B) Demographic and population changes

Demographic changes provide insights on any country's developmental and trade priorities. In regard to the AfCFTA, three instructive trends are the sheer size of the Kenyan population, its remarkable growth rate, and its youth bulge. First, with a population of over 50 million, Kenya is amongst the largest state parties to the AfCFTA.[571] This population size could be advantageous, in translating to both a large market for services and a large labour for production of goods. Secondly, even though fertility rates are declining, life expectancy has been increasing (now at a record high of 60).[572] Kenya's population growth rate is 2.9,[573] and the country's population size is expected to double to 100 million by the year 2060.[574] This population growth statistic could imply a lot of things. One implication could be that it would have an onerous food security burden as food demand could surpass supply in the absence of coherent strategies in the regard. Lastly, the country's median age is 20.1,[575] and is proof that the country has a youthful population. This population makeup could be viewed as both advantageous and disadvantageous. While an advantage of a large youth base could be – its instrumentality in driving industry, innovation and economic growth, a large youth population that is not productively channelled (or is unemployed) could place an onerous burden on security systems (and thus is a disadvantage).

This makes the single market the AfCFTA creates more important. It could enable the channelling of the innovativeness and enterprise in Kenya's youth into more productive uses, whilst providing opportunities (in terms of trade in goods and services) for the other actors in its large and growing population. It could allow for food security by enabling access to other sources in a single market. However, this will require political will, coherent policy design and skilful implementation.

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[571] Kenya National Bureau of Statistics 'Population and housing Census' (2019), available online at Link, accessed on 17 May 2022.

[572] Kenya National Bureau of Statistics op cit note 569.

[573] Kenya National Bureau of Statistics Ibid.

[574] Ibid.

[575] Ibid.

C) Foreign trade trends

I. Tariffs and trade restrictiveness

Kenya's tariffs and duties are based on the Common External Tariff (CET) of the EAC. In this regard, the average custom duty is levied at 25 per cent. The average tariff binding coverage for all products is 16.45 per cent, although for manufactured and primary products are 1.7 per cent and 58.4 per cent, respectively. Bound at 100 per cent, the EAC's most protected sector is agriculture. It has an average applied tariff on agricultural products of 20.7 per cent (in comparison, the average applied tariff on non-agricultural products is 11.7 per cent. It is, therefore, implied that the AfCFTA Trade in Goods Protocol's objective of reducing tariffs on 90 per cent of goods may have extensive benefits in price stability.[576]According to the Overall Trade Restrictiveness Index (OTRI), Kenya has low trade restrictiveness indices compared to the other large trading states on the continent, like Nigeria and Egypt.[577] The OTRI for Nigeria and Egypt are 32.0 per cent and 33.4 per cent for applied tariffs for all trade respectively whereas Kenya's OTRI is 12.2 per cent .[578]

II. Trends in trade in goods and services.

Trade data show that Kenya had increasingly favoured markets outside Africa rather than within.[579] In 2011, Kenya's exports to Africa (including COMESA and the EAC) were 48.3 pent of total exports but had declined to 35.3 per cent by 2018.[580] Between 2011 and 2018, the exports to Asia and America witnessed robust increases.[581] For these reasons, Kenya created several national policies and strategies to correct this counter-intuitive trade. Trade indicators also show that Kenya has been regressing in terms of overall export

[576] Interview with governmental stakeholder/official; See also Government of Kenya op cit note 560 at 22.
[577] OTRI is a sophisticated measure of trade restrictiveness that identifies that uniform tariff that will keep overall imports at the current level when a country has different tariffs for different goods. Hiau L Kee, Alessandro Nicita & Marcelo Olarreaga *Estimating Trade Restrictiveness Indices* (2006), available at Link 30 August 2022.
[578] Hiau Ibid.
[579] Trade Law Centre 'Kenya: 2019 Intra-Africa Trade and Tariff Profile' available at Link, accessed on 30 August 2022; See also *African Development Bank Group Kenya: Bank Group Country Strategy Paper 2019-2023 and Country Portfolio Performance Review* (2019), available at *Link,* accessed on 30 August 2022
[580] Kenya's exports to COMESA as a share of total exports declined from 35.4% in 2011 to 26.1% in 2018; Kenya's exports to the EAC as a share of total exports had also declined from 26.8% in 2011 to 21.1% in 2018. See also Government of Kenya op cit note 560 at 20. Trade Law Centre Ibid note 577; See also African Development Bank Group, Ibid.

[581] Increases for Asia (18.7% to 29.5%); See Government of Kenya op cit note 560 at 20; Trade Law Centre op cit note 577; See also African Development Bank Ibid.

competitiveness.[582] For instance, Kenya's goods trade as a share of GDP had declined from 62.7 per cent of GDP in 2011 to 36.2 per cent of GDP in 2018.[583] Also, Kenya's exports of goods as a share of GDP decreased from 23.8 per cent in 2011 to 13.2 per cent of GDP in 2018. As a share of GDP, however, Kenya's net trade balance in goods improved from -19.9 per cent in 2011 to -11.6 per cent in 2018. The net trade balance in services as a share of GDP deteriorated from 4.8 per cent in 2011 to 1.8 per cent in 2018.[584]

Despite the limited data on this, Kenya notes that it has a comparative advantage in services like education, healthcare, ICT and finance.[585] Its primary service exports have been transporting and travel services, jointly accounting for over two-thirds of its net service exports.[586] Furthermore, Kenya has had a positive net service export balance, the tourism and transportation sectors being responsible for this. International visitor arrivals increased by over 20 per cent, with over a third coming from within Africa.[587] The country, therefore, looks towards the AfCFTA for more opportunities to trade for the benefit of its economy.

D) Regional integration and preferential agreements

As a prominent participant in several regional trade initiatives, Kenya plays a leadership role in the regional initiatives it is a part of. The African Regional Integrations Index (ARII) ranks Kenya highly in this regard.[588] Kenya's leadership was reflected in its swift approach to ratifying the AfCFTA Agreement.[589] Kenya views regional integration to be a route to creating more opportunities for its young population. The most significant regional integration initiatives which Kenya is a part of include the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and the Intergovernmental Authority on Development (IGAD). While EAC is a customs union (with a common external tariff) that permits duty-free trade among its six member states, the COMESA is a 21-member Free Trade Area covering EAC states and some states in northern, central and

[582] See also Government of Kenya Op cit note 563 at 20; Trade Law Centre Ibid; See also African Development Bank Group Ibid.
[583] See also Government of Kenya op cit note 560 at 20; Trade Law Centre Ibid; See also African Development Bank Group 'Ibid.
[584] See also Government of Kenya op cit note 560 at 20; Trade Law Centre 'Trade Law Centre op cit note 577; See also African Development Bank Ibid.
[585] Interview with governmental stakeholder/official; See also Government of Kenya op cit note 560.
[586] Kenya National Bureau of Statistics Economic Survey Various Years.
[587]See also Government of Kenya op cit note 560 at 21.
[588] Kenya signed and ratified the AfCFTA Agreement on 21 March and 6t May 2018, respectively. See Africa Union State Parties: Ratification Status List available at https://au-afcfta.org/ accessed on 25th April 2021; See also Kattoh et al op cit note 551 at 14; See also See African Union Commission, Africa Regional Integration Index – EAC Member' Scores and Rankings Available at Link accessed on 25th April 2021.
[589] See also World Trade Organization '*Trade Policy Review – Kenya WT/TPR/S/171* (2017) section 2.3.2.

southern Africa. The IGAD, which is the third significant regional integration arrangement of which Kenya is a part, has no tariff liberalisation arrangement. It instead prioritises policy and programme harmonisation, peace and security, food security and sustainable development, facilitating investment, capacity building and infrastructure development.[590]

Like with the other two case studies in their Regional Economic Communities (REC), Kenya's membership in both the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) has implications for its efforts in the African Continental Free Trade Area (AfCFTA). As building blocks, both the EAC and COMESA provide Kenya with regional integration frameworks and platforms for engaging with AfCFTA trade liberalization process. The EAC has achieved significant progress in creating a customs union and a common market, facilitating the free movement of goods, services, and capital among member states. Similarly, COMESA has made strides in regional economic integration, including the establishment of a free trade area. Kenya can leverage these achievements to enhance its participation in the broader AfCFTA. The harmonized trade rules, standards, and institutions within the EAC and COMESA can contribute to streamlining trade procedures and promoting trade facilitation within the AfCFTA. This can enhance Kenya's market access and competitiveness. However, both regional bodies also present challenges that can act as stumbling blocks for Kenya's AfCFTA efforts. Within the EAC and COMESA, there are institutional and operational constraints (negative spill overs – as neo functionalists may term it), such as non-tariff barriers, diverging national interests, and overlapping memberships. These challenges may impede the seamless implementation of the AfCFTA and hinder Kenya's trade and economic integration goals. Disagreements and delays in harmonizing regulations, addressing trade barriers, and coordinating policies among member states may limit the full benefits of the AfCFTA for Kenya.

E) Trade and socio-economic inclusivity

The legal foundation for inclusive governance in Kenya is found in Articles 27 and 55 of the its 2010 Constitution. It encourages participation of the youth in national development and prohibits discrimination in all domains, including economic, social, cultural, and political. Similarly, Vision 2030 (the country's developmental roadmap) includes various flagship programmes focused specifically at empowering youth and women, by providing financial assistance, innovation and skill development, awareness creation and information sharing. In

[590] See op cit note 563.

the context of trade, Kenya's National Trade Policy recognises that effective trade and investment programmes for the country's economic and social development cannot be implemented without the full participation of women. It thus emphasises the need to remove obstacles to their participation.

Despite the policy support for inclusivity, MSMEs, women and the youth (all crucial players in the Kenyan economy) remain excluded. MSMEs (Micro, Small & Medium Enterprises),for instance, which accounted for up to 33.8 per cent of national production in 2015 and employed up to 15 million Kenyans in 2016, are inadequately catered for.[591] Despite their vital economic significance, MSMEs are challenged by unfavourable regulatory environment, a lack of capital, inadequate infrastructure, instability, and a lack of productivity enabling data or information. Similarly, even though women play active economic roles economy they experience disproportionate treatment to men.[592] Women who are concentrated in the informal sector, and account for 70 to 80 per cent of micro and informal commerce complain that they face significantly more economic exclusion and higher trade barriers. Challenges they face (due to their exclusion) include limited access to markets and information, a higher risk of abuse, and harassment at the border. The youth on the other hand are often ignored in the implementation of economic policy. They constitute 50 per cent of the entire unemployed population, in both the public and private sectors, because the official labour market has been unable to absorb the steady supply of young people looking for work in the country.

To position youth, women and MSMEs in Kenya's National AfCFTA strategy, it is critical to ensure that measures are defined and implemented to guarantee them opportunities to capitalise on the plans' designated priority sectors and markets.

[591] See Kenya National Bureau of Statistic *National MSME Survey* (2016) online at Link, accessed on 19 May 2022.

[592] See Kenyan MITC op cit note 553 at 54.

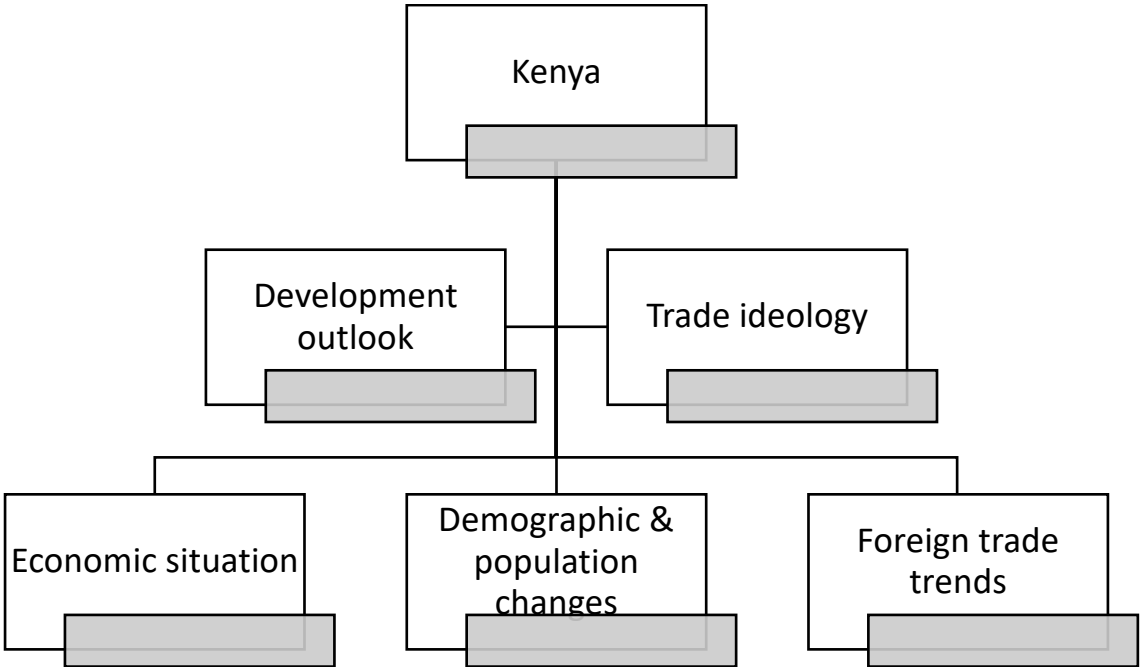

Illustration: *Key themes considered in section 5.2 (above) that summarises Kenya's positionality as a state-party to the AfCFTA.*

5.3. Regulating or implementing trade: The legal frameworks and institutions in place for the AfCFTA in Kenya

This section appraises the legal framework and the institutions through which the AfCFTA is to be coordinated in Kenya. It also highlights the approach Kenya has adopted in coordinating the implementation of the AfCFTA. In terms of the legal framework, an array of rules, regulations, policies, guidelines, and legislation govern international trade in Kenya and directs the many institutions that implement it.[593] These legal frameworks, as most rules in developing states, are greatly influenced by political considerations. The overarching aim of the legal framework is to build a rule-based system on which Kenya's comparative advantages can be honed. This could then prompt sector-specific flagship projects and assist policy makers in creating strategies for the expansion and diversification of the country's exports.

5.3.1. Legal environment for the AfCFTA in Kenya

In general terms, the Constitution is the most important legal text in Kenya. It provides the overarching basis for the operability of its economic system. The 2010 Constitution, among

[593] Kenyan MITC op cit note 553 at 56.

other things, separates powers amongst its three governmental arms — Legislative Executive and Judiciary, and keeping with the spirit of federalism, devolved governance between two governmental tiers — national and county government.[594] Legislative powers in the 2010 Constitution are vested in a bicameral Parliament, consisting of a National Assembly and the Senate.[595] This national legislative authority prevails in areas of international trade and economic policy formulation. Under the Constitution, international trade is a core government functionality under the 4th Schedule Part (1) Item No. 1, and the right to free movement of persons within and outside the borders of Kenya in pursuit of trade business is guaranteed.[596] The Constitution also provides guarantees to foreign investors for the protection of private property, capital repatriation, and the remittance of dividends and interests [597]

More specifically (as in Nigeria), the architecture for trade governance in Kenya consists of an array of laws, policies, and guidelines. These laws, policies and guidelines have varying extents of enforceability, most of which are either entirely new or recently amended. This was a direct result of the nationwide reforms that came under the current dispensation of constitutionalism and as a part of the political will to actualise its trade goals in the 2030 blueprint. The National Trade Policy is the most relevant trade-related policy within which spirit the other trade guidelines are implemented.

A) The National Trade Policy

Published in 2017, the National Trade Policy[598] pulls together (and reforms in some cases) all the policies and strategies which governed trade in Kenya's history.[599] It was formulated as an expression of one of the core goals of the Kenyan Vision 2030 blueprint[600] and cardinally aims 'to make Kenya an efficient domestic market and export-led globally competitive economy'. The Trade policy principles expressed in it are coherency (of both national and

[594] See ch 11 of the Constitution of Kenya, 2010; See also .W Mafumbo 'Misapprehension or obsession with power? Assessing a decade's attitude in the implementation of separation of powers In Kenya' (2020); F Venter 'The separation of powers in new constitutions' in Edward Elgar at el (eds) *New Challenges to the Separation of Powers* (2020) ch 8.

[595] See ch 8 The Constitution of Kenya 2010.

[596] See Article 185(2), 186(1) and 187(2), 4th Schedule Ibid.

[597] See World Trade Organization op cit note 587 at 124 (Annex 2).

[598] The Kenyan 'National Trade Policy' complements other existing sectoral policies and strategies that touch on trade issues including the agriculture and rural development policy, industrial policy, livestock policy, fisheries policy, among others'. It just is the overarching policy governing those key policies and strategies covering trade. See Kenyan MITC op cit note 553 at *xiv.*

[599] Kenyan MITC Ibid at *xiv.*

[600] Ibid at 2.

county governments); equal participation and inclusivity, trade environmental friendliness, regionalism and multilateralism, trade defence measures, efficiency, and prudent management of resources, capacity building, and effective coordination.[601]

A weakness of the National Trade Policy is its non-prescriptive nature. In other words, it is not as enforceable as other legislation duly passed by Kenya's Parliament. Against this weakness, the National Trade Policy prescribes a 'comprehensive trade development law'[602] by the National Government for its legitimisation. The thinking is that this comprehensive trade development law is to provide a relatively more enforceable framework through which the trade architecture can be coordinated (i.e., amongst and between the national and county government and concerned stakeholders). Notwithstanding this, no trade development law as stipulated has yet been enacted.[603]

B) Border management, trade remedies, competition law, and other ancillary legislation

Besides the Constitution and the National Trade Policy, the three most significant trade-related laws to impact the AfCFTA are the EAC Customs Management Act, the Trade Remedies Act 2017, and the Competition Act. As a member of the East African Community (EAC), Kenya is a part of the EAC Customs Union.[604] Accordingly, its customs procedures are harmonised with other EAC states and governed by the EAC Customs Union Management Act. The Kenyan Revenue Authority (KRA) uses this Act to govern all customs procedures (import and export), registration processes, licences, clearances, and documentation.[605] This explains why the EAC approached AfCFTA negotiations jointly.[606] The Trade Remedies Act 2017 (TRA) governs the imposition of anti-dumping and countervailing measures. Under this TRA, the power to impose remedies is vested in the cabinet secretary responsible for international trade and finance.[607] Although the Act creates the Kenyan Trade Remedies Agency (KETRA), it is yet to be fully staffed. This is troubling,

[601] Ibid at xii.
[602] Ibid at 57.
[603] Interview with governmental stakeholder/official.
[604] The Customs Union is the first regional integration milestone and critical foundation of the East African Community (EAC), which has been in force since 2005. Article 75 *Treaty for the Establishment of the East African Community.*
[605] The KRA also administers other revenue acts that impose taxes or levies on imports and exports eg the VAT Act 2013, Excise Act 2015 and miscellaneous Act 2016; Kenya Revenue Authority 'Customs and Border Control Department' 2018 available at Link accessed 29 August 2022.
[606] Trade Law Centre (2021) The African Continental Free Trade Area FAQs; Available at Link ; See also Art 8(2) of the AfCFTA Protocol on Trade in Goods.
[607] Section 23, Trade Remedies Act 2017 (No 32 of 2017).

because KETRA is tasked with important trade duties such as investigating and imposing corrective measures against unfair trade. Finally, the Competition Act 2010 (amended 2016), enforced by the Competition Authority of Kenya (CAK), addresses issues related to anti-competitive practices. The CAK acts in this regard via several measures, including investigations, advocacy and awareness campaigns, training, and guidelines. For instance, the authority issued guidelines on block exemption, search and seizure, abuse of buyer power, fining and settlements, and restrictive trade practices in 2017.[608]

Besides these basic laws, policies, and guidelines, several other laws with international trade impacting provisions exist.[609] Combined, these laws will determine the extent to which Kenya gains from the AfCFTA.

TIER 1	**THE CONSTITUTION**					
TIER 2	**NATIONAL TRADE POLICY**					
TIER 3	**EAC CUSTOMS UNION MANAGEMENT ACT**		**KENYA TRADE REMEDIES ACT**			**THE COMPETITION ACT OF KENYA**
TIER 4	**TBT & SPS Laws**	**Business Environment Related Laws**	**Investment**	**Taxation**	**Governance & Justice**	**Sector Specific Legislations**
	• Standards Act, 2012 • Health Act (No. 21 of 2017) • Alcoholic Drinks Control Act (No. 4 of 2010);amended in 2015 • Fertilizers and Animal Foodstuffs Act (Cap. 345); amended in 2015 • Kenya Plant Health Inspectorate Service (No. 54 of 2012) • Plant Protection Act, Cap 324 • Agricultural Produce (Export) Act, Cap 319 • Animal Diseases Act, Cap 364	• Private Security Regulation Act 2016 • Bribery Act 2016 • Business Registration Service Act 2015 • Companies Act 2015 • Micro and Small Enterprises Act 2012 • Land Registration Act 2012 • Competition Act, amended in 2016	• Companies Act amended 2017 • Companies and Insolvency Legislation (Consequential Amendments) Act 2015 • Insolvency Act 2015 • Special Economic Zones Act 2015 • Capital Markets (Derivative Markets) Regulations Act 2015 • Public Private Partnerships Act 2013 • Capital Markets Act 2013 • Partnerships Act 2012 • Privatization Act amended 2017	• Finance Act, 2017 • Customs and Excise Act amended in 2013 • Value Added Tax Act amended in 2016 • Tax Procedures Act 2015 • Excise Duty Act 2015 • Miscellaneous Fees and Levies Act 2016	• Public Procurement and Asset Disposal Act, (No. 33 of 2015) • The Kenyan Arbitration Act amended in 2010 • Nairobi Centre for International Arbitration Act 2013 • Tax Appeals Tribunal Act 2013 • Foreign Judgments (Reciprocal Enforcement) Act revised in 2012 • Access to Information Act 2016	• **Agriculture:** Land Act amended in 2016; Fisheries Management and Development Act 2016; Forest Conservation and Management Act 2016; Agriculture and Food Authority Act in 2013; Crops Act 2013; Kenya Agricultural and Livestock Research Act 2013; Wildlife Conservation and Management Act 2013; The Fisheries Act revised in 2012. • **Financial services** Nairobi International Financial Act, 2017; Insurance Act amended in 2017; Banking Act amended in 2016; National Payment System Act 2014; Microfinance (Amendment) Act 2013; Central Bank of Kenya Act amended in 2012. • **Mining, energy and water** Mining Act 2016; Scrap Metal Act 2015; Natural Resources (classes of transactions subject to ratification) Act 2016; Water Act 2016. • **Tourism & Transport** The Tourism Act 2011; Civil Aviation Act amended in 2016; International Interests in Aircraft Equipment Act 2013; National Transport and Safety Authority Act 2012. • **Postal, information, and communication services** Kenya Information Act amended in 2013.

Illustration: *Table showing the legal regimes for trade governance in Kenya*

5.3.2. Relevant institutions governing trade

The trade policy architecture is generally governed by the executive, legislature, judiciary, local authorities, and with influence from civil society as well as private sector interest

[608] See also World Trade Organization op cit note 587 at 3.3.4.
[609] For examples Tax Laws (amended) Bill (2018), and the Finance Act (2018), the EAC Customs Management Act.

groups. Expectedly there are a vast number of institutions and bodies interacting with one another. Through such interactions, well thought out and effective public policies are expected to materialise.[610] The institutions governing trade may be grouped into three broad categories. The first tier includes government ministries and their departments, the second tier includes the regulators and parastatals, and the third tier includes pressure and interest groups. All these institutions and the coordination systems to synergise their operations are evaluated below.

A) Tier one: The ministries

Generally, different government ministries, created by law and administered by the President,[611] implement trade policies. The ministries coordinate different sectors of the Kenyan economy (including the aspects of the sector concerning trade) and relate amongst themselves in terms of the Intergovernmental Relations Act of 2012.[612] However, the ministry that plays the officiating role is the Ministry of Industrialisation, Trade and Enterprise Development (MoITED). Over the past decade, the MoITED has gone through a series of reforms, which have resulted in vestiges of its original mandate being ceded to other ministries.[613] Nonetheless, the ministry is still primarily tasked with the responsibility of managing trade relations domestically (i.e., coordinating trade policy and managing the responses of the other ministries to trade concerns) and internationally.[614] This is done mainly through the state department for trade.

The state department for trade within the MoITED is the department that impacts AfCFTA related trade policy architecture most meaningfully. It is headed by a principal secretary, and its functions are primarily to create a trade policy, coordinate regional trade matters (along with the Ministry of EAC), coordinate trader negotiations, and enforce international trade laws, regulations, and agreements. It also contributes to the formulation of a 'buy Kenya policy', promoting markets (retail and wholesale), providing business

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[610] See Omiti et al op cit note 552 at 30; Ikiara G, Olewe-Nyunya J & Odhiambo W 'Formulation and implementation of strategic industries in Kenya' in Soludo C, Osita O, and Chang H-J (eds) *The Politics of Trade and Industrial Policy in Africa: Forced Consensus* (2004).

[611] Pursuant to powers spelt in Article 132(3)(b) of the Kenyan Constitution.

[612] The Intergovernmental Relations Act of 2012 was created pursuant to Articles 6 and 189 of the Kenyan Constitution to define a framework for consultation and co-operation between the national and county governments and amongst county governments.

[613] The current organisational structure of the Ministry was defined pursuant to Executive Order.1 of 2016. It effectively replaced executive orders No.2 of 2013 and was an attempt by the Kenyan presidency to reorganise the entire cabinet and redefine their respective scope. An example of this is KenTrade, an agency under the National Treasury, created to facilitate cross-border trade: Interview with governmental stakeholder/official;

[614] See Republic of Kenya, Organisation of the Government, Executive Orders 1 of 2018.

registration services, regulating fair trade practices, and embarking on export promotion dives.[615] The state department for trade (in the Ministry) is constitutionally mandated to act in consultation with county governments and other stakeholders, and this is done through what is known as the council of governors.[616]

Other ministries with roles in trade policy that will impact how the AfCFTA is utilised for the benefit of Kenya include the National Treasury and Planning which harmonises policymaking of other ministries and planning staff working in other ministries; the ministry of foreign affairs which, inter alia, liaises with regional and continental partners; the Ministry of the East African Community and Regional Development which liaises with sub-regional partners; and the Ministry of Agriculture.[617]

B) Tier two: Trade parastatals and regulators

The ministries that contribute to trade policy governance as evaluated above are supported by several parastatals that act as regulators. This creates a myriad of bureaucracies within the government dues to the duplication of roles, and ultimately serve as hindrances to trade. This not only makes coordination difficult but also creates trade barriers. There are three types of institutions under this rubric that are charged with implementing the AfCFTA: the exports promotion investment bodies, the quality assurance bodies, and the regulators.

The export promotion and investment bodies are the parastatals that generally aid trade policy governance to boost Kenya's export base and international profile. This is essentially done by creating a competitive market positioning that is sustainable in the long term. This set of parastatals is significant because of their roles, especially in devising strategies that promote export-led development. The four most essential parastatals here are the Export Promotion Council of Kenya whose main function is to promote the development and promotion of goods and services through market research and building capacity of exporters; the Kenya Investment Authority whose role is to promote and facilitate investments for both domestic and foreign investors[618] by coordinating investment promotion activities within the country as well as in target markets outside Kenya; the Export Processing Zone Authority whose function it is to attract attracting investment into the zones

[615] Ibid.

[616] World Trade Organization op cit note 587 at *2.*

[617] Which handles the agricultural industry in which the country's comparative advantage lies. See Trade Law Centre op cit note 577. Also see World Bank (2010-2014) *Revealed Comparative Advantage by Country and Region Product to Kenya.*

[618] Established in 2004 through the Investment Promotion Act 6 of 2004.

for easy export of goods and services; and ,lastly, the Special Economic Zones Authority (SEZA) whose function it is to attract local and foreign investors to the SEZ for exports production.

On the other hand, quality assurance parastatals have an important bearing on the extent to which Kenya reaps the dividends from the AfCFTA. This is because they are the institutions tasked with guaranteeing the standards and competitive quality of Kenya's exports and imports. Quality assurance parastatals are designed to sustain comparative advantage in goods through quality and standards setting. Furthermore, quality is integral to the growth and viability of priority sectors and the resilience of a sector is reinforced through good practices in quality. Essentially, if 'trade' is to be a vehicle for development, quality and standards are its fuel.

Considering the new opportunities created by the AfCFTA, Kenya's Integrated National Export Development and Promotion Strategy identified standards and market access as part of the enablers of the 'Big Four' agenda,[619] and a prerequisite for gainfully accessing target export markets. It is in this light that it positioned the Kenya Bureau of Standards (KEBS) to play a key role in assuring this. KEBS is created under the Standards Act[620] as the primary standards body of Kenya. KEBS monitors and creates awareness on the standardisation prerequisites for Kenyan industries. It also provides and manages Kenya's quality infrastructure for purposes of trade facilitation.[621]

Other institutions that perform roles of quality monitoring include the Kenya Plant and Health Inspectorate Service (KPHIS) that assures the quality of agricultural inputs and produce,[622] and the Directorate of Veterinary Services (DVS) that safeguards animal health; both services also regulate their resource productivity and quality to facilitate food security and domestic and international trade.[623] The Agriculture and Food Authority (AFA) also falls under this structure. [624] AFA was set up under the Ministry of Agriculture, Livestock, Fisheries and Corporative to operationalise the Crops Act (16 of 2013) and to regulate, develop and promote scheduled crops value chains for increased economic growth.

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[619] *The Big Four Agenda* or the *Big Four Action Plan* is a medium-term planning approach conceived by Kenyan President, Uhuru Kenyatta, that focuses on food security, affordable housing, manufacturing, and affordable healthcare towards accelerating the achievement of the Vision 2030. See Kenya Vision 2030 *Towards 2030*, available at Link.

[620] Standards Act, Cap. 496 of the Laws of Kenya.

[621] Ibid.

[622] Kenya Plant Health Inspectorate Service *Who We Are,* available at accessed on 29 August 2022.

[623] DVS Magazine 'A new dawn at the Directorate of Veterinary Services' at 2 available at *https://kilimo.go.ke/wp-content/uploads/2021/02/DVS-magazine-2020-A-new-dawn-at-the-directorate-of-veterinary-services.pd,f* accessed on 30 August 2022.

[624] Established by the Agriculture and Food Authority Act No 13 of 2013.

The regulatory institutions essentially police trade policies. The most important institutions in this regard are the Kenyan Revenue Authority (KRA) which controls Kenya's border points and ensures illegal goods do not infiltrate or pass through the country,[625] and the Central Bank of Kenya (CBK) which manages the financial services sector and is a repository of important trade-related data. Others include the Competition Authority of Kenya (CAK), the Kenya Industrial Property Institute (KIPI), and the Kenya Trade Network Agency (KenTrade).

C) Tier three: Non-governmental and private sector groups

Policy-making processes in Kenya are highly participatory and so civil society represents an important institutional tier of the country's trade architecture, deserving consideration in its own right. There is an institutionalised relationship of collaboration between the Kenyan government and non-governmental groups. Non-governmental and private sector groups are a part of the National Trade Technical Committee.[626] This is an advisory body that guides and coordinates policies affecting trade by other departments of the Government.[627] Through their membership, non-governmental groups take ownership of trade agreements and have their interests properly articulated.[628] For instance, they were able to influence the government to create consultative forums and several sensitisations drives before it signed the AfCFTA Agreement. Kenya's AfCFTA strategy creation was a result of consultative forums involving public and private sector actors held in Nairobi between September 2019 and January 2020.[629] Those forums assisted the interest groups in harmonising their positions and enabled the formulation of an inclusive list of 'prioritised AfCFTA sectors' to complement the sectors identified in other trade policy strategies such as the Integrated National Export Development and Promotion Strategy (NEDPS).[630]

Non-governmental and private sector groups play instrumental roles in Kenya's trade policy governance through umbrella associations such as the Kenya Association of Manufacturers (KAM), the Kenya Private Sector Alliance (KEPSA), and the Kenya National Chamber of Commerce and Industry (KNCCI). For instance, the KAM created special sensitisation initiatives such as seminars and webinars on the AfCFTA. One of these was a

[625] See Omiti et al op cit note 552 at 29.

[626] Kenyan MITC op cit note 553 at 61.
[627] More on this is discussed in the next phase (the phase on coordination).
[628] Kenyan MITC op cit note 553 at 76.

[629] Interview with governmental stakeholder/official. See also op cit note 563.
[630] Interview with governmental stakeholder/official. See also Ibid note 563 at 16.

live-show themed, financing SMEs to participate in AfCFTA.[631] Other stakeholders include government, labour and trade unions, civil society, and NGOs such as the Central Organisation of Trade Unions (COTU) also played active roles.

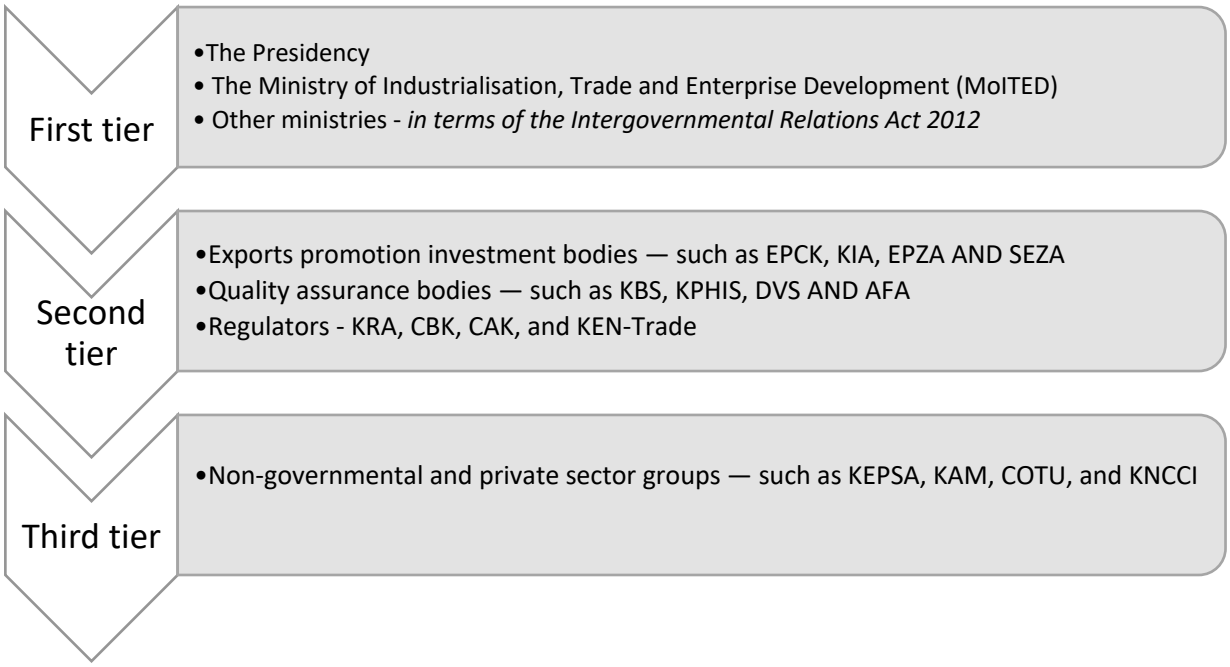

Illustration: *Core institutions governing trade in Kenya*

5.3.3. Trade policy governance: Coordinating and managing the AfCFTA

Before the present dispensation of trade policy governance,[632] Kenya's foreign trade relations were governed by its executive using an array of conflicting laws. In one study of the period, at least 80 per cent of the trade stakeholders felt that trade regulatory agencies were inadequately coordinated.[633] However, with the growth of the country's private sector and its accession to the EAC Customs Union at the turn of the new millennium, the paradigm changed. The country has increasingly gained proficiency in trade policy governance. Official government documents reveal that Kenya will be managing the AfCFTA with more 'willingness' and intentionality than it had previous trade agreements. The issues explored in this section are used to highlight this willingness (i.e. Kenya's political will) vis-à-vis the AfCFTA.

[631] Interview with governmental stakeholder/official.
[632] See section 5.1; Omiti et al op cit note 552 at 19; For a general history of Kenya's trade and economic thought see also Socrates et al op cit note 552 at 123-138.
[633] Omiti et al op cit note 552 at 54.

A) Coordinating device[634]

The relationship between the extent of development of a country and presence of coordination or institutional systems has empirical support in trade literature. For instance, a 2015 UNCTAD study of trade facilitation measures showed a positive correlation between the institutionalisation of trade facilitation and trade development.[635] Institutionalising trade coordination is thus important for ensuring stakeholders (especially those that are less informed of the measures to enable trade) are carried along. The nature and degree of institutionalisation that is beneficial for implementing a trade agreement is dependent on the administrative culture and political priorities of a state.

While Kenya's strategic positions during the AfCFTA negotiations were mainly coordinated by the State Department for Trade, its implementation is to be spearheaded by a National Implementation Committee (NIC).[636] This body is like the Trade Sub-technical Committee recommended by the National Trade Policy.[637]Housed in the MOTED, this NIC is to serve as the fulcrum of Kenya's AfCFTA governance structure. The roles of the NIC include AfCFTA policy negotiations and deliberations, priority sector modifications, the implementation of sector strategies, managing the communication plan, and ensuring the adequacy of stakeholder sensitisation and consultation.

One development-enabling feature of the NIC is its inclusive organisational structure. It is a multi-stakeholder platform that incorporates all trade-related ministries, departments, and agencies (MDAs); Council of Governors representing 47 country governments; private sector associations, academic and research institutions, and non-governmental organisations. Furthermore, the fact that institution has the mandate to mainstream gender and youth strategies affirms that inclusiveness is indeed a value that is now inherent in the country's trade governance architecture.[638] Inclusivity will not only ensure there is buy-in from and by all Kenyans, it will also enhance development within Kenya's use of the AfCFTA.

However, as with most policies in the Global South to govern trade, implementation may prove to be challenging. Systems created are often poorly implemented and this reduces

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[634] Interview with governmental stakeholder/official; See also Government of Kenya op cit note 560 at ch 7 . See also Omiti et al op cit note 552 at 2.

[635] Based on data from the online repository of national trade facilitation committees. See UNCTAD 'Database for National Trade Facilitation Committees' available at *https://unctad.org/topic/transport-and-trade-logistics/trade-facilitation/committees-around-world* Accessed on 15th May 2022.

[636] Interview with governmental stakeholder/official. See also Government of Kenya Op cit note 563 at 107.

[637] Kenyan MITC op cit note 553 at 60.

[638] Interview with governmental stakeholder/official. See also Government of Kenya Op cit note 563 at 94.

their impacts. Also the fact that the proposed NIC exists without a legal framework (to define its scope) may create legitimacy issues. Furthermore, the situation of the NIC within a department in a ministry may create accountability issues and affect its ability to coordinate the stakeholders. Such a structure may require a permanent secretariat separate from the ministry and with significantly more autonomy.

B) Managing consultation and sensitisation

Laura Dawson and Christopher Maule set out two generic roles of consultation and sensitisation, both relevant in Kenya's context. The first is to gather information in order to design policies that serve the public interest, and the second is to educate the public on the importance of such policies.[639]It is an approach to building trust and a formal and planned dialogue between the government and the public to establish a shared knowledge of a problem and to obtain input and advise on acceptable solutions.[640] The importance of consultation and sensitisation to trade governance generally and the AfCFTA specifically cannot therefore be overemphasised.

All the stakeholders interviewed noted that consultation and sensitisation exercises were conducted leading up to the ratification of the AfCFTA Agreement. This was mainly because consultations with county governments and other stakeholders are constitutionally mandatory. Kenya's trade policy architecture incorporates channels through which stakeholders are consulted before a policy is deployed.[641] In terms of sensitisation (vis-à-vis the AfCFTA), a strategic plan was crafted which targets five categories of stakeholders; these are the Government, the private sector, women, youth and NGOs. At the governmental level, the aim of the NIC was to conscientise the different ministries and agencies of the Government (at both the national and county levels) through retreats and workshops. At the private sector level, the aim was to not only inform them of the AfCFTA agreements and their benefits but mainly to make them aware of the opportunities within AfCFTA countries. These include opportunities in respect of various commodities and services, market-access requirements, rules to be satisfied by businesses to qualify for tariff preferences;

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[639] Laura Ritchie Dawson and Christopher Maule *Background Paper on Public Consultation and Trade Policy*(2005) ,available at *LINK* ,accessed on 23 May 2022.

[640] Bryce Lambert *Forum Building Effective Consultations, As Cited in Public Consultation Guide* (1990).

[641] Before 2010, public participation was dependent only on the goodwill of the government. Kenya's 2010 Constitution changed this situation by vesting all sovereign power in the people and effectively made public participation mandatory. See Interview with governmental stakeholder/official. See also Government of Kenya Op cit note 563.

documentation; government actions in support of business taking advantage of the AfCFTA; trade facilitation measures and mechanisms; dispute settlement mechanism; and trade remedy measures. The mandate for sensitising women and youth is to ensure that the development dividends of the AfCFTA are mainstreamed inclusively. This is to be done through mass media channels accessible to both demographics in urban and rural areas. Non-governmental organisations were being educated on a different level because they have more elaborate networks for reaching out to the disadvantaged groups of the Kenyan society, most of which trade informally.

C) Monitoring and evaluation

Kenya's monitoring strategy aims to assess the extent to which the AfCFTA initiative achieves sector-specific goals. This monitoring and evaluation system utilises the theory of change and is based on five principles: relevance, effectiveness, efficiency, impact, and sustainability.[642] It also tracked the implementation conditions of various interventions based on pre-set indicators and reported both quarterly and annually.[643] There is also to be an evaluation at the end of every five years. These evaluations are to inform five-year strategic plans. [644]

Overall, the strategy's monitoring and evaluation structure is based on assessing the success of these specified goals.

GOALS	STRATEGY'S SPECIFIC GOALS.
GOAL 1	Kenya's exports to Africa grow at a faster rate than those to Asia, America, and Europe over the 5-year period
GOAL 2	Kenya's exports to identified priority countries increase by 101.1% over the 5-year period (i.e. a cumulative annual increase of 15% per annum)

[642] Interview with governmental stakeholder/official. See also Government of Kenya Op cit note 563 at 114.

[643] Interview with governmental stakeholder/official; See also Ibid 114.

[644] Interview with governmental stakeholder/official. See also Ibid at ch 7.

GOAL 3	Kenya's domestic, re-exports and service exports to Africa grow by 27.6%, 101.1% and 101.1%, respectively, over the 5-year period and Kenya's manufacturing sector real value-added increases by 5% per annum
GOAL 4	Kenya's manufacturing sector real value-added increases by 5% per annum

Illustration: *Kenya's Strategy for monitoring and evaluating the AfCFTA*

5.3.4. Uncertainties, concerns and risks

Trade is not a zero-sum game. Notwithstanding the gains, with the AfCFTA comes risks. In the next section, six concerns were identified by Kenya's stakeholders as having the potentials to undermine (or make uncertain) the initiative's gains.

A) Unclear financial plan for financing the AfCFTA and for addressing adjustment:

Kenya's AfCFTA strategy will be costly to implement and thus it will impose an onerous burden on the fiscus. Kenya is estimated to lose up to US$14.2 million in intra-Africa trade tariff revenue in the first five years of liberalisation.[645] There is also a risk of revenue losses due to trade deflection. A financial strategy is therefore required. This cost and revenue loss challenge was generally identified by key stakeholders at the National Consultation Forum held in September 2019. The forum noted that poor implementation caused by inadequate financing could in turn lead to the inequitable distribution of the welfare projected to accrue from the initiative.[646] This concern is not unfounded. For instance, one of the key issues noted to have stultified the implementation of Kenya's National Industrial Transformation Programme of 2015 was funding limitations.[647] The absence of a plan for financing the implementation of the AfCFTA strategy and the governance structures created under it implies two things. First, that the Kenyan government is not adequately prepared to deal with the exigencies of the initiative, and, secondly, that there will be immense short-term costs, the fallout from which may affect Kenya's abilities to engage more seriously with the initiative

[645] Bulime Enock, Nattabi Aida, & Shinyekwa Isaac 'Within the EAC which countries stand to benefit from the implementation of the AfCFTA' (2020) 123 *Policy Brief*.
[646] Interview with governmental stakeholder/official. See also Government of Kenya op cit note 563 at 98.
[647] Interview with governmental stakeholder/official. See also Government of Kenya pp cit note 563 at 98.

in the long run. Such a financial plan must be coherently designed and must ration fiscal revenue to prepare for adjustment shocks.

B) The challenges of unfair trade and the absence of a functional trade remedies institution.

Concerns were also expressed about the risk of unfair trading practices such as dumping, subsidisation, and other welfare distorting practices. Against this concern, the Kenya Trade Remedies Act was passed and inter alia created a remedial institution called Kenya Trade Remedies Agency (KETRA) in 2017.[648] Although the law which legitimised KETRA was passed in 2017, KETRA is still not running at full capacity. Two reasons were identified for this: the inadequate appointment of personnel and the general lack of experience. Against this backdrop, Kenya faces a very high risk.

C) Illicit trade practices as a cost of trade creation under the AfCFTA.

Illicit trading practices could undermine economic gains in any liberalisation arrangement. The illicit trading practices prevalent in Kenya (and expected to thrive in the AfCFTA in the absence of proper enforcement) may be categorised into four (4) groups; smuggling: counterfeiting, piracy, and substandard goods; transit fraud/dumping; and trade in prohibited goods or products.[649] While illicit trade hurts the Kenyan economy broadly, its effects are felt more by manufacturers who lose market share, the government which loses out on tax revenue, and consumers who not only miss out on quality but may also be exposed to various forms of the health risks effects of illicit trade. Interviews conducted with a stakeholder from the Kenya Association of Manufacturers revealed that up to 40 per cent of the market share of its members (US$42m annually) had been lost to counterfeiters.[650] With the surge in trade due to the AfCFTA comes a commensurate surge in the risk of illicit trade. This thus requires an updated action plan which proactively accounts for the AfCFTA by incorporating newer and more conducive mitigating measures.

[648] See section 3(1) Kenya Trade Remedies Act 2017. The Act was entered into force in 2017.
[649] They include smuggling of excisable goods; intellectual property infringement; trading with illegal weights and measures; human trafficking; environmental crime; illegal trade in natural resources; trade in harmful or substandard goods or substances that may carry serious health and safety risks; trade in illegal drugs; trade in illegal plant parts, seeds and animal material, illegal manufacturing; illicit arms trade; and illicit financial flows. See State Department of *Trade National Action Plan to Combat Illicit Trade, 2019-2022*.
[650] See State Department of Trade Ibid at 2. Confirmed in an interview with a participant from Kenya Association of Manufacturers (KAM).

D) Inequality risks and the imperatives for youth and gender mainstreaming.

Women and youth groups are often not included in trade policy governance dialogues due to the highly patriarchal nature of Kenyan society. Some civil society stakeholders perceive that, going forward, this could lead to imbalances in the distribution of the gains from trade. This shallow inclusion of the society in trade policy governance could impact Kenya's ability to maximise the AfCFTA. This is especially because women and the youth dominate informal trade and SMSEs.[651] Kenya's implementation plan identifies this Achilles heel and recommends two measures for a more balanced distribution of benefits: first, to specifically fund retraining programmes for youth and women workers in sensitive industries that will be subject to liberalisation and. secondly, to repurpose the national AfCFTA strategy to prioritise these groups and the other vulnerable and marginalised ones.

E) Coordinating rules of origin and market access constraints

In Kenya (and essentially the EAC) participants interviewed shared concerns about trade deflection and the possibility of the welfare gains of the AfCFTA being eroded by the transhipment of non-originating goods through entry points in the AfCFTA with the lowest tariffs.[652] For that reason, they have not only championed the expedited conclusions to negotiations on the Rules of Origins (ROO) framework to forestall the arbitrage activity. However, research shows that while ROOs might be helpful to prevent deflection by defining the terms under which goods will benefit from AfCFTA concessions, they could also reduce welfare. This is because ROOs by their design distort the sourcing behaviours of firms within an FTA and often burden local producers with expensive red tape.[653] This distortion of the sourcing behaviour of firms could lead to a reduction in preferential utilisation rates.[654] Furthermore, empirical evidence of FTAs confirms the negative costs of compliance with ROOs to consumer prices,[655] argued in respect of different RTAs to increase them by between 3 to 15 per cent, depending on the commodity.[656] The implication of this is that

[651] For instance, in Kenya, 63 per cent of street vendors (a significant informal trade sector sub-group) are women. International Labour Organisation '*Engaging Informal Women Entrepreneurs in East Africa: Approaches to Greater Formality* at 6, available at Link, accessed 30 August 2022.
[652] The AfCFTA Secretariat *The Futures Report: Making the AfCFTA work for Women and Youth* (2020)48. See also interview with governmental stakeholder/official.
[653] Paola Conconi, Laura Puccio, Manuel García-Santana, et al 'From final goods to inputs: The protectionist effect of rules of origin' (2018) 108 *American Economic Review* 2335–2365.
[654] Alexander Keck & Andreas Lendle *New Evidence on Preference Utilization* (2012).
[655] Felbermayr et al op cit note 359 at 121.
[656] José Anson, Olivier Cadot, Antoni Estevadeordal, Jaime De Melo, Akiko Suwa-Eisenmann, Bolormaa Tumurchudur 'Rules of Origin in North-South Preferential Trading Arrangements with an Application to

Kenya must find a way to manage the ROOs with the welfare of firms and consumers in mind. This will require trade facilitation innovations including, but not limited to, the reduction of export documentations and the build-up of legal know-how —for exporters and the border and customs control officials of the KRA. Participants interviewed mentioned that a sensitisation work plan had been drafted to that effect.

In terms of market access constraints, concerns have been shared on the propensity for a rise in the use of non-tariff barriers (NTB) by other State Parties.[657] This could alter the terms of competition in the domestic spaces of other State Parties to the detriment of Kenyan firms. Besides high levels of NTBs across borders, market access concerns that could impair the competitiveness of Kenyan producers that have been identified include currency convertibility, the absence of adequate export incentives, disparities in commercial laws, and language differences.[658]

5.4. Addressing peculiar supply-side constraints

Like Nigeria, Kenya realises that for it to optimise the AfCFTA it must coherently develop strategies to address the real constraints that have stifled productivity.[659] In this regard, the country has identified several areas for reform. In this section three important ones are highlighted.

5.4.1. Infrastructural deficits and trade infrastructure

The theoretical nexus between adequate infrastructure and economic growth is well established.[660] For instance, an empirical study of 18 lower-to-middle income countries between 1995 and 2017 showed a positive correlation between investments in transportation,

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NAFTA' (2005) 13 *Review Of International Economics* 501-517; Cadot, Olivier, Antoni Estevadeordal, and Akiko Suwa-Eisenmann 'Rules of origin as export subsidies' (2005) *CEPR Discussion Paper;* Olivier Cadot, Antoni Estevadeordal, Akiko Suwa-Eisenmann, and Thierry Verdier *The Origin of Goods: Rules of Origin in Regional Trade Agreements* (2006); Carrère, Céline and Jaime de Melo 'Are different rules of origin equally costly? Estimates from NAFTA' in Jamie de Melo *Developing Countries in the World Economy* (2015) 277-298; Antoni Estevadeordal 'Negotiating Preferential Market Access: The Case of the North American Free Trade Agreement' (2000) 34 *Journal of World Trade* 141-166.

[657] Interview with governmental stakeholder/]official. See also Government of Kenya Op cit note 563 at 68 - 69.

[658] Ibid.

[659] Ismail op cit note 69 at 142.

[660] Masahisa Fujita & Paul Krugman 'The New Economic Geography: Past, Present And The Future' in Raymond J G M Florax & David A Plane *Fifty years of Regional Science* (2004)139-164; Richard E & Warren E Weber 'Wagner's Law, Fiscal Institutions, and the Growth of Government' (1977) 30 *National Tax Journal* 59-68.

energy and telecommunication and their economic growth.[661] Similarly, the investment in creating more reliable logistics infrastructure has been attributed as one of the reasons for China's economic growth over the past few decades.[662] These findings support the view that adequate infrastructure matters to trade because it lowers the cost of trade and reduces the cost of doing business.[663]

Inadequate infrastructure is one of the most prominent impediments to Kenya's productivity quotient. While 30 per cent of the cost of finished goods is attributable to high transport expenses (and exemplifies the dire nature of Kenya's transport infrastructure),[664] frequent power disruptions due to poor energy infrastructure account for up to 7 per cent loss of sales.[665] This not only makes the cost of doing business costly, but also makes the general environment for trade, and industry unfriendly and reduces private investment in the core areas of the Kenyan economy.

The World Bank estimates that the country faces an infrastructural financing deficit of US$2.1 billion annually,[666] and that the country will require up to $4 Billion to meet its infrastructural needs every year.[667]

While Kenya has a series of policy responses to its infrastructural dilemma, three relevant ones are the establishment of a regional infrastructure development fund, the recalibration of its macro-economic policies to enable the allocation of 80 per cent of capital expenditure to infrastructure financing, maintenance and productive sector capital development and ,lastly, the utilisation of Public Private Partnership (using concession and infrastructure bonds) for purposes of infrastructure development. On the last point a US$40 million IDA loan from the World Bank in 2012 aided in the establishment of a PPP statute and the development of government capacity to oversee PPPs.[668] Kenya currently has a PPP

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[661] Irshad R, Mehr-un-Nisa & Ghafoor N 'Infrastructure and Economic Growth: Evidence from Lower Middle-Income Countries' (2022) *Journal of Knowledge Economy* 3.

[662] Wang C, Kim Y S and Kim C Y 'Causality Between Logistics Infrastructure and Economic Development in China' (2021) 100 *Transport Policy* 49-58; See also Fujita & Krugman op cit note 657 at 139-164.

[663] See Donaubauer J, Meyer B, Nunnenkamp P 'A New Global Index of Infrastructure: Construction, Rankings and Applications' (2015) 39 *The World Economy* 236–259; See also Asian Development Bank (2011) Projections prepared for ADBI's study role of key emerging economics—ASEAN, the People's Republic of China (PRC), and India—for a Balanced, Sustainable and Resilient Asia.

[664] Kenyan MITC op cit note 553 at 36.

[665] Ibid at 36.

[666] World Bank *Kenya: Enabling Private-Sector Participation in Infrastructure and Social Services* (2018), available online at LINK , accessed on 23 March 2022.

[667] Ibid.

[668] Ibid at 27.

unit and committee that oversees projects in accordance with legislation while also assessing fiscal risks and contingent liabilities. They established local PPP procedures at the county level, and a related capacity-building program taught over 200 individuals.

5.4.2. Enabling access to trade finance

One of the seven clusters of the AU's plan for Boosting Intra-African Trade is trade finance.[669] This is because trade finance is a crucial tool for enabling trade.[670] However accessibility to cost friendly financing is still a barrier to trade development in Kenya. This position is considerably more important for MSEs than for larger firms with substantial internal and external financial sources. Despite the banking sector's substantial liquidity, there are insufficient new lending products to enable economic growth.[671] This is especially true when it comes to long-term investment and working capital loans. Where such loan is available, collateral requirements are burdensome, interest rates and bank costs are exorbitant, and payback conditions are unappealing. Furthermore, inaccessibility of export finance and credit programmes continue to be a source of concern for exporters. Banks do not give back-to-back letters of credit, and MSEs have limited understanding of alternative trade financing services.

5.4.3. Trade capacity development and skills upgrading

The challenge of inadequacy of capacity for trade may be perceived into two different by closely aligned ways. The first is the absence of skills necessary for production for exports purposes as well as its promotion, and second the absence of skilled personnel for the management, of the foreign trade agreements to which Kenya is State Party.

As regards the first point, exporters and firms that produce for export purposes experience difficulties in getting skilled labour. One reason given for this that the educational system is not designed in a way in which the skills needed to support export- oriented enterprises are developed. These skills include supply chain management, ICT skills, international trade management, logistics management, and warehousing. In terms of the second point, the absence of qualified personnel for the negotiation, implementation and management of the complex array of multilateral and bilateral trade agreements in which

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[669] African Union, *Boosting Intra-African Trade* (2012), available at *https://au.int/en/ti/biat/about* Accessed on 23 March 2022; Ismail op cit note 69.
[670] Toye, J, and R Toye *The UN and Global Political Economy: Trade, Finance, and Development* (2004).

[671] Kenyan MITC op cit note 553 at 50.

Kenya is State Party poses a challenge for the country. These qualified personnel are not only important for ensuring that the interests of the Kenyan stakeholders are well represented but are also for ensuring that the other domestic policies and institutions act in ways that enable the foreign trade agreement signed rather than subvert it. The relevant skills under this rubric include trade negotiations, antidumping (and associated practices) investigations, customs management, quality and standards regulation, amongst others. The Kenyan government is responding to the skills deficit issue by working with international and regional partners to undertake in-house and in-post organisation training to educate and capacitate key stakeholders in trade.[672]

5.5. Conclusion

This chapter explored some important themes or factors in Kenya's trade architecture and with the legal and regulatory trade frameworks through which it aspires to optimise the AfCFTA. In this chapter it was shown that Kenya's progressive outlook on development as well as its more dynamic and people-oriented trade ideology situates it in a position to make a more meaningful use of the AfCFTA for development. Furthermore, the country's well-articulated, coordinating plan/system to manage trade under the AfCFTA puts it at a relative advantage than many of the other AfCFTA state parties. In the next chapter Ethiopia will be examined. It is a member of the Common Market for Eastern and Southern Africa, and one of the most inexperienced (trade-wise) State Parties to the AfCFTA.

[672] Kenyan MITC op cit note 553 at 49.

6. CHAPTER SIX: LEGAL FRAMEWORKS AND INSTITUTIONS FOR AfCFTA: A CASE STUDY OF ETHIOPIA

6.1. Introduction

In the previous chapter themes around Kenya's trade architecture were explored. This was done in the context of the legal and regulatory frameworks through which they aspire to optimise the AfCFTA. It was divided into three sections; While the first section contextualised the country by examining issues that impact on the functionality of its legal frameworks and institutions for trade (such as development outlook and history of its trade ideology), in the second the existing legal and institutional frameworks for moderating AfCFTA-trade has been examined. In the last section the chapter closed by reflecting on supply-side constraints to the utilisation of the AfCFTA for development.

This chapter examines yet another AfCFTA state-party — the Federal Democratic Republic of Ethiopia. Ethiopia is an interesting case study for three reasons: Firstly, while the idea of regional integration is not new to Ethiopia,[673] that of engaging with (i.e., negotiating, signing and ratifying) Multilateral Trade Agreements is. Ethiopia is one of the only AfCFTA member states that has never been a party to any regional trade agreement.[674] Its relative inexperience in negotiating trade agreements makes it an interesting case study. Secondly, Ethiopia is a land-locked developing country (LLDC).[675] As with the other 16 AfCFTA State Parties that are land-locked, their geographical nature imposes relatively unique burdens,[676] especially in their ability to engage in international trade meaningfully. This essentially requires domestic policy considerations, innovations, and adjustments worth evaluating in a comparative sense. Thirdly, Ethiopia's ability to maintain remarkably high growth rates despite its geographical disadvantage presents an interesting paradox worth examining. A discussion on Ethiopia could therefore lend insights on some innovations for LLDCs and how they can be used complementary with the AfCFTA for development purposes. As with

[673] Ethiopia was a founding member of the OAU and is a member of two African RECs - the IGAD and COMESA.

[674] Along with Morocco, Tunisia, and Mauritania. However, Morocco and Tunisia have signed trade agreements external to Africa's REC blueprint such as the Pan-Arab Free Trade Area (PAFTA) and the Agadir Agreement – see United Nations Economic Commission for Africa ARIA IX op cit note 44 at 12 available at *Link* accessed 15th May 2022.

[675] Ethiopia is one of the continent's 16 landlocked developing countries - *United Nations Conference for Trade and Development* op cit note 45 Available online at Link , accessed on the 23rd September 2021. Also see United Nations Economic Commission for Africa ARIA IX op cit note 44 at 25–26. available at *Link* accessed 15th May 2022.

[676] Compared to the other two state parties explored in chapters 4 (Nigeria) and 5 (Kenya).

Nigeria and Kenya in their respective RECs, research into Ethiopia could allow some generalisations (again, albeit cautiously) to be made on the likely behaviour of other LLDCs with low levels of trade participation.

Ethiopia is analysed using the ALDIM model proffered in chapter two. The ALDIM model submits three factors that may determine how regional integration initiatives could yield development outcomes in an African state are the design or outline of the domestic setting within which the initiative is to be deployed (Domestic Setting), the legal frameworks and institutions for its governance and measure to address Productivity Constraints. Accordingly, the central question this chapter examines is – how is Ethiopia situated to engage in African trade integration within the context of the AfCFTA? What is first shown in the chapter is that while Ethiopia's development state model has led to vast economic growth despite low engagement with foreign trade, the AfCFTA and its WTO ratification process will be necessary for sustaining the growth rate, institutional modernisation, and development of Ethiopia. Secondly, also shown are the ways in which Ethiopia's multi-stakeholder approach to trade governance and development planning may situate to engage with the AfCFTA, and how the lack of sufficient private sector collaboration could serve as a disadvantage in this regard. In addition to the disadvantage of inadequate private sector collaboration, other weaknesses in Ethiopia's trade governance architecture that could undermine the country's AfCFTA gains is also reflected on. Lastly, also demonstrated is how Ethiopia's investments in industrial parks and its Grand Ethiopian Renaissance Dam (GERD) electrification project could assist it in addressing supply-side constraints. While the first section a general overview of Ethiopia is given, thereby inter alia, shedding light on factors that characterise the functioning of its developmental state economy, the second examines closely the legal frameworks and institutions that govern and incentivises trade. The chapter is concluded by appraising the two trade enabling measures that Ethiopia is putting in place to, hopefully, bolster its AfCFTA gains.

6.2. Domestic Context: Issues relevant to understanding and situating Ethiopia as state party to the AfCFTA.

Ethiopia is the oldest independent country in sub-Saharan Africa (SSA). Its centralisation as a state predates the idea of formal colonialism in the region and this, on its own, makes the

country a unique AfCFTA State Party.[677] After Emperor Haile Selassie I ascended the throne of Ethiopia in 1930 and instituted the first modern bureaucracy in SSA,[678] he led the country to formally begin to reflect on Africa's integration and the roles Ethiopia could play in uniting the region. Due to the political upheavals in the country, however, its practical commitment to the idea of regional integration shifted. It became one of the most closed countries in Africa in terms of trade, and before it acceded to the AfCFTA, the country had never acceded to a multilateral trade agreement. Despite this, Ethiopia maintained one of the region's highest growth rates. This growth has been attributed to continued learning and economic pragmatism.[679] In this section of this chapter themes around this pragmatism are examined to provide a lens for understanding Ethiopia as an AfCFTA State Party. The factors reflected on will also aid an understanding of the ideas that impact on the design of its regulatory framework and the overall development context on which Ethiopia's decision to join in AfCFTA negotiations was framed. In this regard, four contending aspects lend valuable insights. First the shifts in Ethiopia's economic policy thinking through the years (post-World War Two) are examined as well as how they led to creating the modern Ethiopian state; secondly, the country's relatively unique developmental approach, thirdly, the themes around its remarkable economic growth trajectory pre-AfCFTA, and, lastly, its engagement with foreign trade.

6.2.1. Economic policy regimes and transitions: The making of the modern Ethiopian economy

Because development is primarily a political process, it is intimately affected by how interests are formed and collectivised over a period. Therefore, understanding the political processes and settlements through which the present Ethiopian state was formed is important for equally understanding the overarching design of its existing trade frameworks. Ethiopia has been through three eras or episodes of change in its economic ideology. These could be categorised

[677] The centralisation of the administration of Ethiopia began from 1855 and colonialism in Africa will not be formalized until the negotiation of the General Act of the Berlin Conference in 1885. On the history of Ethiopia. See Tewodros Makonnen, and Halellujah Lulie *Ethiopia, Regional Integration and the COMESA Free Trade Area* (2014) 198 *South African Institute of International Affairs* 6; Bahru Zewde *A History of Modern Ethiopian 1885-1991* 2 ed (2002); On the institutionalization of colonialism in Africa see – Ieuan Griffiths 'The scramble for Africa: Inherited political boundaries' (1986) 152 *The Geographical Journal* 204-216; Matthew Craven 'Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade' 2015 3 *London Review of International Law* 31–59.

[678] J Isima 'Report on the current position with regard to the security sector in Ethiopia' (2003) *Journal of Security Sector Management* 3–5.

[679] Cheru, F, Cramer, C and Oqubay, A (eds.) *The Oxford Handbook of the Ethiopian Economy* (2019).

into the following rubrics: The pre-Derg (or imperial) period, the Derg period and the EPRDF (or post-Derg) period.[680]

The pre-Derg period or the imperial period (1930 to 1974) was the era under the leadership of Emperor Haile Selassie I. It was a time of economic modernisation, and the agents of this modernisation were the landed aristocracy and peasants. The economic policy pursued by the imperial regime was market-based and the imperial order at the time fiercely pursued institutional creation to support Ethiopia's young market-based economy. International trade in this era was characterised by the absence of quantitative restrictions and the government's policy emphasised export promotion and the importation of capital and raw material.[681] The growth of Ethiopia's free-market prompted new forms of socio-political thinking and the contestation for power, and a new socio-political order, and social change ushered in the Derg - the country's second economic episode.

The Derg era was one under the leadership of a military junta officially known as the Political Military Administrative Council (PMAC), and the economic ideology of the period was Marxist-Leninist.[682] During this period economic growth was static, mainly due to the repression of market forces and the socialisation of factors of production. Furthermore, private enterprises were nationalised, economically significant laws suspended,[683] and hard restrictions[684] constituted major disincentives for entrepreneurship and productivity growth.[685] Arkebe Oqubay calls this period the lost decades,[686] due to the stifled economic growth caused by misguided policies, the poor provision of public goods, and a protracted civil war. The absence of infrastructure added to production costs and disincentivised manufacturing. Its left-leaning economic ideology also pitted Ethiopia against the West geo-politically and made it a

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[680] The *Derg* or *Dergue* is an Amharic word for '*Committee'* or '*Council'*. It was a body of military officials that ruled Ethiopia from the mid 1970s. More on this is stated below.

[681] Zewdu Bedasa, and Minyahil Alemun 'Economic growth nexus trade liberalization in Ethiopia: Evidence from the Johnson's Multivariate Cointegration Analysis' (2017) 3 *International Journal of Latest Research in Engineering and Technology (IJLRET)* 53, 59 available at Link, accessed on 16 August 2021.

[682] The *Derg* or *Dergue* is an Amharic word for '*Committee'* or '*Council'*. It was a body of about 120 young military officials that at first organised themselves into a new body called the Coordinating Committee of the Armed Forces, Police, and Territorial Army and later the Derg (or Dergue). See Thomas P Ofcansky and LaVerle Berry *Ethiopia: A Country Study*. (1991); Siegfried Pausewang, Kjetil Tronvoll &Lovise Aalen. *Ethiopia Since the Derg: A Decade of Democratic Pretension and Performance* (2002).

[683] For example, the formation of new limited liability companies was not permitted because the existing company law or regime was suspended. See Solanki, N K and Vidani J N 'The study legal aspects of trade in Ethiopia' (2016) 6 *ZENITH International Journal of Multidisciplinary Research* 270.

[684] These included investment caps, credit constraints, price controls, and shortage of imported intermediate inputs. See Solanki Ibid.

[685] Ibid.

[686] Oqubay 'Industrial policy and late industrialization in Ethiopia' in Cheru et al op cit note 676 at 605-629.

front for a proxy war between the West and East at the climax of the cold war. Altogether, the legacy of this era was slow growth, conflict and poverty.[687] For this reason, at the fall of the Derg a newer and more suitable economic policy ideology was imperative.

Accordingly, the Ethiopian People's Revolutionary Democratic Front (EPRDF), began ushering in Ethiopia's third economic policy period or episode. The EPRDF (led by Zenawi) liberalised the previous control regime. It was pragmatic in its approach and introduced economy-boosting manoeuvres to kick-start an economy that was left comatose by the Derg.[688] It liberalised the interest rate, with the government setting only the floor, introduced an inter-bank market for foreign exchange, began liaising with the private sector and devalued the currency. The period of the EPRDF is thus characterised by pragmatic efforts to promote the market and the institutions that are compatible with a liberalised economy. Even though the government welcomed new ideas for economic growth, it took a rather reluctant stance on regional trade integration and favoured a state-centred economic growth model. This development model will go on to shape Ethiopia's economic growth trajectory.[689]

6.2.2. Development outlook: Ethiopia's developmental state model

Ethiopia's outlook on development is embodied in its developmental state model. Meles Zenawi (former Prime Minister of Ethiopia) argued that a dynamic pathway to development was through strengthening the state and endowing it with 'indisputable authority' over its own agenda.[690] This is a succinct expression of Ethiopia's developmental state model. Not a novel idea, a developmental state (DS) is a state-centred economic governance model in which economic assets such as land, finances and crucial infrastructural facilities are directly controlled. In this regard, it (the government) actively defines development objectives and programmes and closely supervises all economic activity by exercising effective control over

[687] Mekonnen Manyazewal & Admasu Shiferaw 'Economic policy and structural transformation in Ethiopia' in Cheru et al op cit note 676 at 137-158.
[688] Alemayehu Geda 'The political economy of growth in Ethiopia' in Benno Ndulu et al (eds) *The Political Economy of Economic Growth in Africa* (1960 - 2000) 116-142.
[689] Ibid.
[690] See United Nations Economic Commission for Africa, Speech by Meles Zenawi at 'Africa: Development Forum, 26 October 1999', available at *https://www.africa.upenn.edu/Urgent_Action/apic_102699.html*, accessed on 29 August 2022; See also K Y Amoako 'Growing with Depth: What African Countries can Learn from the Ethiopian Experience' in Cheru et al op cit note 676 at 885; See also Meles Zenawi; United Nations. Economic Commission for Africa. (19992010). Statement by H.E Ato Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia on African Challenges and Visions for Development at the First Meeting of the African Development Forum organized by the Economic Commission for Africa (ECA). UNECA African Development Forum (1st : 1999, Oct. 24-28 : Addis Ababa, Ethiopia) Addis Ababa.

all operations and players.[691] It also emphasises economic growth and treats as secondary other goals, like the rule of law, social welfare, or equality. In this regard, the state's ambitions are driven through processes like industrialisation. The private sector's role as far as policy is concerned is to be reactionary. In other words, the state is the protagonist in developmental affairs and expresses this through the provision of infrastructure and by guaranteeing that a conducive environment for development exists.

Ethiopia's developmental state (DS) model has provided intellectuals with a prism for explaining its remarkable growth rates.[692] Zenawi explains the success of the model to be due to how it prudently combines market forces, and state intervention.[693] Through the model, Ethiopia has led the reshaping of its economy using significant investments in economic infrastructure in strategic areas.[694] One example of the pragmatic ways the Ethiopian government has played a leading role in development is through the use of Special Economic Zones (SEZ) or industrial parks and development corridors.[695] For this purpose public funds were channelled towards the provision of hard and soft infrastructure, industrial policy design and deployment, skills development, and agricultural productivity.[696] In summary, there are four core characteristics of Ethiopia's outlook on development; First, it is state-led, secondly, it prioritises economic variables such as industrialisation,[697] thirdly, development is led using a heterodox policy mix, and, lastly, it relies heavily on external borrowing.[698]

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[691] Martha B Hailu and Zeray Yihdego 'The law and policy of foreign investment promotion and protection in Ethiopia: An appraisal of theories, practices and challenges' in Zeray Yihdego, Melaku G Desta and Martha B Hailu (eds) *Ethiopian Yearbook of International Law 2017* (2018) at 18.

[692] The regard of Ethiopia's economic model as a developmental state is replete in the literature. See, Ha-Joon Chang and Jostein Hauge 'The concept of a "developmental state" in Ethiopia' in Cheru et al op cit note 676 at 824 – 841; Clapham C 'The Ethiopian Developmental State' (2018) 39 *Third World Quarterly 1151-1165*; Between 2005 and 2015, Ethiopia was able to sustain growth rates of up to ten percent, earning itself a tag as 'African Lion' See Seid Y, Taffesse A S & Seid N A *Ethiopia: An Agrarian Economy In Transition* (2015) - See also Camille L Pellerin 'The Aspiring Developmental State And Business Associations In Ethiopia–(Dis-) Embedded Autonomy?' (2019) 57 *The Journal of Modern African Studies*, 589-612 at 589.

[693] Meles Zenawi 'States and Markets: Neoliberal Limitations and the Case for a Developmental State', in Akbar Noman et al (eds) *Good Growth and Governance in Africa: Rethinking Development Strategies,* (2012) 140–174; Meles Zewani 'Zenawi: "We're on the Right Track"' *New African Magazine* 10 December 2011, available at *https://newafricanmagazine.com/2677/* ,accessed on 29 August 2022.

[694] M B Hailu and Z Yihdego 'The law and policy of foreign investment promotion and protection in Ethiopia: An Appraisal of theories, practices and challenges' in Yihdego, Z, Desta, M and Belete, M, *Ethiopian Yearbook of International Law: Towards Diversifying and Democratizing Voices in the Making and Development of International Law* (2021) 28.

[695] Berihu A Gebrehiwot, Trade policy in Ethiopia, 1991–2016 In Cheru et al op cit note 676 at 230.

[696] Ibid at 230-231.

[697] In this regard, Ethiopia's vision of structural transformation follows the *Lewis model*, whereby the process of industrialization gradually absorbs surplus labour from the agriculture sector. This is associated with labour productivity growth, urbanization, and reduced population growth. See World Bank, *Ethiopia's great run*: *The growth acceleration and how to pace it* (2015) 25.

[698] Including bilateral, non-concessional credits, especially from China. Sovereign bond financing is also used. External debt has constituted a well-known challenge to many or most African states, and does for all the other

While the model has been lauded for the growth rates it has enabled in the country,[699] it has also faced several criticisms. Two recurring criticisms relevant to this study are, first, on the disproportionality to which economic variables on development are emphasised (over the other variables) and, secondly, on the idea of control, a principle entrenched in the model. In the first instance, the country's model focuses on economic growth rather than other aspects of development that enables the enrichment of lives and 'expansion of human freedoms'.[700] This view has been argued to be limiting or reductive.[701] This reductivism could pave the way for the treatment as unimportant (or as a relegation) of the other developmental values, such as the enhancement of political human rights, social (and gender) inclusivity, the promotion of the rule of law. This parochial view on development (as expressed in the developmental state model) could explain the country's poor human development indices.

In terms of the second point, the idea of state control (which is embedded in Ethiopia's DS model) has been argued to be effected in ways that negatively affect the growth of country's private sector and their engagement with developmental policies.[702] For instance, the Ethiopian People's Revolutionary Democratic Front (EPRDF) — the country's ruling party until 2019 —was known to weaken the associational systems by restructuring them, in order to avoid contestation from private sector actors.[703] While this system of domination and control debilitated the private sector, it also cultivated unhealthy dependencies on the state.[704] This could explain the concerning inability of the private sector to gainfully and pragmatically engage with development-related policies.[705] It is submitted that Ethiopia's developmental gains from a large trade agreement like AfCFTA will be better optimised by having a more robust outlook on development and by institutionalising a healthier relationship with its private sector. More on this is reflected on subsequently in this chapter.

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country case studies in this thesis. An attempt to elaborate on the extents of this is however outside the scope of this study. See World Bank Ibid at 25.

[699] Between 2005 and 2015, Ethiopia was able to sustain growth rates of up to ten percent. See Seid op cit note 689; Also See also Pellerin op cit note 689 at 589.

[700] See Sen op cit note 51. Also see J Timmons et al op cit note 51.

[701] See chapter 2.

[702] Pellerin op cit note 689 at 589–612.

[703] Pellerin Ibid at 589-612.

[704] Toni Weis 'Dominant parties and the private sector in Sub-Saharan Africa: A typology of approaches' (2014) 8 *Zeitschrift Für Vergleichende Politikwissenschaft* 263-281.

[705] Camille Pelerins extensive study on the issue suggests that the EPRDF's relationship to the private sector was characterized by the twin objectives of curbing the private sector's power to prevent challenges to the EPRDF rule and mobilizing them as part of the ruling coalition's developmental state programme. See also Pellerin Ibid at 589–612.

6.2.3. Ethiopia's economic growth profile and trajectory

Ethiopia's economic growth rate has astounded intellectuals,[706] and is a relevant theme for understanding its positionality in the context of the broader goals of the AfCFTA. In other words, the country has been a leading paradigm for accelerated growth in Africa.[707] Over the past two decades, Ethiopia's 10 per cent annual average Gross Domestic Product (GDP) growth rate has been amongst the highest in the entire region.[708] This has seen its real GDP expand to US$96 billion[709]—the highest expansion in SSA. The fact that its economic success in this regard was amidst low levels of international or regional trade makes Ethiopia exceptional. Ethiopia's high growth rate (unlike the other two case studies —Nigeria, Kenya and most countries in SSA) has been primarily due to a public sector growth strategy that focused on investments in public infrastructure.[710] This has directly impacted on the services and construction sectors. For instance, while the service industry has grown by an average of 12.9 per cent over the past decade, the construction sector has equally boomed and created several jobs and reduced unemployment.[711]

Regardless of this growth, structural transformation, per capita income, and human development indices in Ethiopia are among the region's lowest. Furthermore, the contribution of the manufacturing sector to the country's GDP is marginal,[712] and the private sector still struggles to overcome supply-side constraints. These issues have, therefore, prompted scepticism around the sustainability of Ethiopia's growth. Considering this scepticism, alternative approaches (like trade liberalisation and participating in multilateral or regional trade) were being taken more seriously. Accordingly, the idea of participating in multilateral or regional trade is now being prioritised to enhance competitiveness, boost industrialisation, sustain economic growth, and enable development.

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[706] K Y Amoako 'Growing with Depth: What African Countries can Learn from the Ethiopian Experience' in Cheru et al op cit note 676 at 885-887; See also Robert Looney 'Ethiopia's Economic Miracle Is Running Out of Steam' (2015) *Foreign Policy* 16.
[707] Ibid.
[708] African Development Bank *Federal Democratic Republic of Ethiopia Country Strategy Paper 2016-2020* available at *Link,* accessed on 29 August 2022.
[709] World bank 2019 estimate.
[710] See Federal Democratic Republic of Ethiopia: National Planning Commission *Growth and Transformation Plan (GTP II) 2015/16 – 2019/20–(*2016) 162–6; See also A Oqubay 'Industrial policy and late industrialization in Ethiopia' in Cheru et al op cit note 676.
[711] African Development Bank op cit note 705.
[712] Ibid.

6.2.4. Ethiopia's engagement with integration and multilateral trade

Ethiopia's engagement with the idea of international trade and regional integration prior to its ratification of the AfCFTA is an interesting theme that can assist in shaping our understanding its design of its regulatory frameworks for the AfCFTA. In this section, an attempt is made to consider (more closely) why Ethiopia never activated multilateral trade options for its economic development.

A) Multilateral trade

I. The World Trade Organisation

Ethiopia's first engagement with multilateral trade was during its imperial era. Shortly after World War Two, when the idea of establishing a rules-based trade system to consolidate the post-War peace process was conceived, Ethiopia was amongst the countries invited to participate in discussions, but it refused.[713] Its attitude to the multilateral trade system fluctuated throughout the imperial or pre-DERG era, and it participated on an ad hoc basis.[714] Even though by 1984 it had started to participate in the General Agreement on Trade and Tariffs (GATT) as an observer, [715] it never really committed fully to the idea of joining it. In the Derg years, Ethiopia became enmeshed in an economic crisis, prompted mainly by the command economy approach adopted, which left the country in ruins. When the Derg fell in 1991, the EPRDF moved to replace vestiges of the old command economy with a relatively friendlier free-market one. This was done under the auspices of the Agricultural Development-Led Industrialisation (ADLI) — which, inter alia, promoted macro-economic liberalisation. In other words, it was therefore in the context of rebuilding Ethiopia from the ruins of the DERG that the country began to think in terms of alternative approaches to

[713] After the draft of the ITO charter was finalized by the preparatory committee invitations were sent to Ethiopia (as with all the other UN members) to participate in the Havana Conference of November 1947 but Ethiopia along with seven other countries refused (Byelo Russia (Belarus), Saudi Arabia, Ukraine, USSR, Yugoslavia, Siam (Thailand), and Bulgaria) — see United Nations Economic and Social Council *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, E/PC/T/PV2/7, 30 October 1947 17; Melaku Geboye Desta 'Ethiopia's reluctant move to join the WTO: A preliminary look at legal and institutional implications of accession' (2008) 22 *Journal of Ethiopian Law* at 25.

[714] For instance, in 1956 it participated in the debate on the problem of commodities regulation and responded positively (as Melaku notes) to the invitation by the GATT for non-member developing countries to take part in the work of the Trade Negotiations Committee of Developing Countries in 1967. See *GATT Intersessional Committee, Commodity Problems: Present Situation Regarding the Draft on Commodity Arrangements,* IC/W/51 10 September 1956; See also See *GATT Trade Negotiations Committee of Developing Countries, Participation of Non-GATT Countries: Note by the Secretariat,* TN(LDC)/6, 10 April 1968; See Desta op cit note 710 at 28

[715] Desta op cit note 710 at 28; See *GATT, Observer Status in GATT: Note by the Secretariat, GATT doc*. C/129, 27 June 1984.

development. Acceding to the WTO, this became a logical approach to effectuate and expedite economic reform.[716]

When the WTO was established in 1995, Ethiopia had not yet concretised its plan to join the multilateral trading system and had no ongoing trade negotiations. It was only two years after the WTO's establishment — in 1997 —that the Ethiopian government applied for accession (observership). [717] When the country took the next step by officially requesting for accession in 2003,[718]its application was warmly welcomed.[719] Accordingly, an accession working party was set up to examine the application under Article XII and submit recommendations to the General Council.[720]

Between 2007 and 2013 Ethiopia went through three rounds of negotiations,[721] and from then until 2019 the process stalled. Ethiopia's ratification of the AfCFTA in 2019 then prompted it to resuscitate its WTO accession process. Accordingly, a 10-member national committee was approved by the Council of Ministers in 2019 to proceed with a fourth round and expedite the bilateral track by submitting goods and service price offers to WTO members.[722] At this point a more collaborative approach was adopted and a 40-member technical committee composed of representatives from government offices, the private sector, non-governmental organisations, and the academic community was also set up to assist the national committee.[723]

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[716] See World Trade Organisation, *Trade-Related Technical Assistance Needs-Assessment Presented By Ethiopia, WT/COMTD/IF/19, 26 February* 1998, at 8; Also see Desta op cit note 710 at 35.

[717] The next section considers Ethiopia's WTO Accession process. Please note that Ethiopia's WTO accession receives relatively extensive focus due to its significance as a dominant international trade issue for Ethiopia in recent years. Unlike Nigeria and Kenya, which became inaugural members of the WTO in 1995, Ethiopia had to undergo an intensive accession process to join the organization. This process played a crucial role in shaping Ethiopia's trade governance framework and policy landscape. By highlighting the specific attention given to Ethiopia's WTO accession, the this section acknowledges the distinctiveness of this case study. The other two case studies, Nigeria and Kenya, had already achieved WTO membership relatively smoothly, without encountering major hurdles or controversies during an accession process.World Trade Organisation*, Ethiopia – Request for Observer Status: Communication from Ethiopia,* WT/L/229, 10 October 1997.

[718] See World Trade Organisation, *Minutes of Meeting – 10th February 2003* WT/GC/M/78.

[719] Desta op cit note 710 at 30.

[720] Ethiopia's accession process (like most) proceeded along two tracks. First, a multilateral/fact-finding track that begins with the submission of a Memorandum on the Foreign Trade Regimes (MFTR) of acceding states, and a Bilateral track involving market access negotiations on goods and services between the acceding country and any interested WTO member. In 2007 Ethiopia submitted its Memorandum on Foreign Trade Regime (MFTR) which led to interrogations from members of the Working party; Desta op cit note 710.

[721] On issues of agriculture, domestic laws, and initial offers on goods, information on import licensing procedures and information on state trading enterprises were discussed. Desta op cit note 710.

[722] The committee included ministries of Foreign Affairs, Revenues, Finance and Trade and Industry; the National Bank of Ethiopia; the National Planning and Development Commission; the Attorney General's Office and the Policy Study Institute. Desta op cit note 710.

[723] Ethiopian Chamber of Commerce and Sectoral Associations 'Ethiopia to Reinstate WTO Negotiations' available at *http://ethiopianchamber.com/wto.aspx* accessed on 21 October 2021.

Ethiopia's reason for joining the WTO was to accelerate economic growth and development, attract foreign investment, secure predictable and transparent market access; and play its role in directing the speed and nature of globalisation.[724] While the attempt toward securing WTO membership was rightly important for facilitating economic reform and development, it played a more critical role in securing Ethiopia's commitment to economic, legal, and overall policy reform. The economic development experienced by WTO members (post their accession) is mainly attributable to this internal commitment to reform.

II. Other trade agreements

A benefit Ethiopia enjoys as a least-developed country is preferential treatment by many large trading states and blocs. Accordingly, Ethiopia is a beneficiary of several non-reciprocal trade agreements. Some of the prominent ones include the Cotonou Partnership Agreement which it signed in 2000, and the Everything But Arms (EBA) initiative, with the European Union (EU) through which all imports from least developed countries (LDCs) gain duty-free and quota-free market access to the EU. The country was also a beneficiary under the United States' African Growth and Opportunity Act (AGOA), which granted preferential access to 6,500 products into the United States of America.[725] Similarly, the Trade and Investment Framework Agreement (TIFA) signed in 2001 between the United States of America and COMESA enables strategic dialogues on trade and investment issues between the US and Ethiopia. The country enjoys further privileged duty treatment and Generalised System of Preferences (GSP) from countries like Australia, Canada, Japan, Finland, Russia, Switzerland, and Turkey.[726] Notwithstanding the preferences Ethiopia receives under these agreements, non-tariff measures from these blocs still reduce Ethiopia's exporters' chances of market access.[727] Ethiopia has a formal bilateral trade relationship with only Sudan. This is via a 2000 preferential trade agreement that liberalised tariff on all industrial and agricultural

[724] World Trade Organisation, *Minutes of Meeting – 10th February 2003* WT/GC/M/78; Interview with stakeholder/official.

[725] Ethiopia was suspended from the AGOA in 2022 due to what the US government deemed were actions in violation of the AGOA Statute. See Aljazeera *US Cuts off Ethiopia, Mali and Guinea from Trade Programme* (2022) , available at Link, Accessed on 20 September 2022).

[726] Interview with governmental stakeholder/official; See International Trade Centre 'Pulses sector investment profile: Ethiopia' available online at *Link,* accessed on 12 September 2021.

[727] UNCTAD *Diagnostic Trade Integration Study (DTIS) Update Ethiopia* June 2016, at 68 available at Link accessed on 12 September 2021.

products and led to discussions on customs harmonisation.[728] Before the AfCFTA, this was the furthest the country had gone to boost its trade with an African State.

B) Regional integration

Even though Zenawi acknowledged the importance of integration, especially as a collaborative approach to opportunity creation, [729] Ethiopia has often been selective in committing to regional arrangements. For instance, while the country supports the collaborative development of infrastructure projects around the Horn of Africa, its support for deepening market integration leaves much to be desired and has been perfunctory at best. Ethiopia has never been a party to any regional trade agreement, and this hints at its anti-market integration bias. The infant industry argument[730] is often utilised by the Ethiopian government to excuse its non-participation in regional market integration agreements and its preference for protectionism. Ethiopia explains that protectionism is necessary to shield its manufacturing sector, which, due to the maladministration of the Derg-era, has never been able to achieve a sufficient level of competitiveness.[731] This reluctance has negatively impacted the pace of market integration in the Intergovernmental Authority on Development (IGAD), the regional economic community in which Ethiopia is most active.

Ethiopia ranks amongst the lowest in overall regional integration according to the African Regional Integration Index (ARII),[732] and is in the bottom tier in all the dimensions measured on the index. It ranks 5th in the IGAD and 16th in the COMESA. The country's low overall ranking in regional integration is due to its passive engagement in the RECs it belongs. In this section Ethiopia's membership of these RECs will be reflected on to shed light on what its participation in the AfCFTA may portend.

I. The Common Market for Eastern and Southern Africa (COMESA)

Ethiopia was a founding member of the Common Market for Eastern and Southern Africa (COMESA) and played active roles in the formative years of the REC. However, from its

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[728] Ethiopian Ministry of Foreign Affairs *Ethio-Sudan Trade Agreement* (2003).
[729] Alex de Waal *The Future of Ethiopia: Developmental State or Political Marketplace?* (2018) 9.
[730] The infant industry/protectionism argument has been reflected on in chapter 2.
[731] De Waal Ibid note 726.

[732] The ARII, measures the extent to which African countries fulfil their commitments under pan-African integration frameworks like Agenda 2063 and the Abuja Treaty. It assesses integration across five dimensions, including trade integration, productive integration, macroeconomic integration, infrastructural integration, and the free movement of people. See African Union et al *Africa Regional Integration Index (ARII) Report* (2019) Available online at Link accessed on 13 July 2023.

transition to civilian rule in 1991, its participation declined. Ethiopia prioritises the developmental agenda of the COMESA over its trade integration agenda and, therefore, is not a party to its free trade agreement which was launched in 2000.

Its low participation in intra-COMESA trade is regarded as one of the reasons for the relatively negligible role trade plays in Ethiopia's economic growth. Ethiopia is not a party to the COMESA free trade agreement,[733] and this is justified using the infant-industry argument. It was concluded (after an empirical study was commissioned on the issue) that Ethiopia's industries were not yet competitive enough to cope with more experienced producers from the other COMESA State Parties.[734] The study showed that even though joining the COMESA FTA would enhance general welfare, the negative impacts on the manufacturing sector and the job and revenue losses would threaten the country's economic growth.[735]
Accordingly, Ethiopia's trade relationship in the COMESA has been unilateral. Despite this, it drew up a phased strategy for joining the REC beginning in 2014 when goods in categories (a) and (b) would have their tariffs eliminated and ending in 2021.[736] In the period before its full accession, it hopes to improve the capacity of its private sector to compete in the FTA. Ethiopia has, nevertheless, been significant in other development projects. For instance, the country is one of six chosen for an oil seed development project in the region; is the host of COMESA's centre for producing livestock medicine, and COMESA's Leather and Leather Products Institute, and a regional site for manufacturing hand tools and spare parts.[737]

II. The Intergovernmental Authority for Development (IGAD)

Ethiopia is also a member of the Intergovernmental Authority for Development (IGAD) and plays a more active role in the REC.[738] The IGAD, established in 1986 (as the Intergovernmental Authority on Drought and Desertification - IGADD) with the objective to combat desertification and drought, was repurposed from dealing with ecological issues to

[733] UNCTAD op cit note 724 at 68; Interview with stakeholder/official; See also Common Market for Eastern and Southern Africa *2018 Annual Report: COMESA Towards Digital Economic Integration* (2018) at 24, 26.
[734] Ethiopian Ministry of Trade and Industry, *Study of the Competitiveness of Ethiopian Manufacturing Firms for Participation in the COMESA FTA* (2011); See also Ethiopia, Ministry of Trade and Industry, *Implications of Joining COMESA, the East African Community (EAC) and the South African Development Community (SADC) Tripartite FTA*, *(*unpublished commissioned study, 2011); UNCTAD op cit note 724 at 70.
[735] The findings showed that that Ethiopia's manufacturing sector is relatively underdeveloped, uncompetitive, and inefficient. It also showed that even though trade liberalisation in the context of the COMESA will lead job creation, the job losses that will occur may not be fully offset and de-industrialization may occur. Ethiopian Ministry of Trade and Industry Ibid.

[736] UNCTAD op cit note 724 at 70.
[737] Tewodros op cit note 674 at 18.
[738] For example, Ethiopia, was the chair of IGAD from 2008–2014; See Tewodros op cit note 674 at 9.

attend to conflict prevention issues in the Horn of Africa which is regarded as perhaps the most volatile region in the world.[739] Even though market integration is theoretically one of the pillars of the REC, little has been done besides a proposed IGAD Minimum Integration Programme that utilises COMESA's rules and regulations. Therefore, the AfCFTA will be the foremost collective trade liberalisation framework for boosting trade in the Horn of Africa (excluding Eritrea). Ethiopia's engagement with the IGAD is framed around two issues: peace and security; and infrastructural development. These two IGAD agendas are preferred because they align with the country's infrastructure-led growth strategy, do not extensively encroach on its policy space, and preserve its hegemony in the Horn.

While in terms of the peace and securitisation of the Horn of Africa, Ethiopia within IGAD has addressed regional concerns like Sudan-Somalia peace processes and the IGAD Conflict Early Warning and Response Mechanism (CEWARN). In terms of infrastructure integration, Ethiopia has utilised the IGAD prominently regards to collaborating on the exploitation of regional energy resources,[740] and for developing transportation corridors through regional transport networks.[741]

The relationship between the Intergovernmental Authority on Development (IGAD) and the Common Market for Eastern and Southern Africa (COMESA) can be described as complementary and interconnected. Both IGAD and COMESA are regional integration organizations that operate in overlapping geographical areas within the Eastern and Southern Africa region. IGAD primarily focuses on political and security cooperation among its member states, aiming to promote peace, stability, and development in the region. On the other hand, COMESA is primarily an economic integration organization that seeks to enhance trade, investment, and economic cooperation among its member states. Although IGAD's main focus is not trade governance per se, it recognizes the importance of economic

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[739] Redie Bereketeab 'Inter-Governmental Authority on Development (IGAD): A critical analysis' in Kidane Mengistead & Redie Bereketeab (eds) *Regional Integration, Identity and Citizenship in the Greater Horn of Africa* (2012) at 173-194; Tewodros op cit note 674 at 18.

[740] For instance, in 2010 it began collaborating with Sudan for the inter alia the sourcing of petroleum products and while this did not entirely yield results, oil imports from Sudan have grown and are projected to continue to do so as Sudan gets more politically stable. This relationship therefore not only provides energy resources for Ethiopia but also incentivises stability in Sudan. Another instance in which Ethiopia has collaborated with its region to exploit energy resources is the supply of electricity to South Sudan, Djibouti and Kenya; See Tewodros op cit note 674 at 18.

[741] African Development Bank *Kenya and Ethiopia: Mombasa-Nairobi-Addis Ababa Road Corridor*, available at *Link*. accessed on 31 November 2021. A notable transport integration project is the LAPSSET Corridor, a 100 metre-wide highway connecting the port of Lamu in Kenya to South Sudan and Ethiopia. The project, regarded as the most ambitious infrastructure integration project in East Africa, is expected to boost economic integration and the economic growth of all three countries by facilitating trade, investment, and tourism. See in this regard - Gediminas Lesutis 'How to understand a development Corridor? The case of Lamu Port–South Sudan–Ethiopia-Transport Corridor in Kenya' (2019) *Area 52* 600–608.

development as a crucial element for achieving regional stability and prosperity. Therefore, there are linkages and cooperation between IGAD and COMESA in areas that intersect political and economic dimensions. This collaboration aims to create synergies and ensure coordination between peacebuilding efforts and economic integration initiatives.

As has been noted, Ethiopia's membership in the Common Market for Eastern and Southern Africa (COMESA) has been relatively passive, with limited participation in the market integration process. As such, COMESA's role as a building block or stumbling block for Ethiopia's efforts in the African Continental Free Trade Area (AfCFTA) needs to be considered in this context. On one hand, the passive nature of Ethiopia's membership in COMESA may limit its potential as a building block for the AfCFTA. The lack of active engagement and integration within COMESA may result in a limited transfer of knowledge, experience, and harmonized policies that could have supported Ethiopia's participation in the AfCFTA. On the other hand, the limited engagement in COMESA can also be seen as a potential advantage for Ethiopia's AfCFTA effort. It allows Ethiopia to approach the AfCFTA with more flexibility and independence, without being bound by the existing dynamics and potentially conflicting interests within COMESA. Ethiopia can focus on tailoring its trade policies and strategies to align with the objectives of the AfCFTA and seize the opportunities presented by the continental free trade area, independent of COMESA's limitations or constraints. While Ethiopia's passive membership in COMESA may restrict its potential benefits as a building block for the AfCFTA, it also provides an opportunity for Ethiopia to pursue its own trade objectives within the continental framework.

In summary, Ethiopia's accession to the WTO and its phased ratification process to the COMESA FTA shows that the country is not oblivious to the importance of trade and integration. However, its choice to pace itself in these regards reflects intentionality and political agency. While intentionality and political agency helps form relationships that are meaningful and gainfully aligns with national economic plans — it often results in missed opportunities. For Ethiopia, the reluctance to activate trade for national development has however not affected its growth trajectory. However, concerns are raised as to the extent to which said growth may be sustained without trade. This is one of the reasons why its accession to the WTO and the AfCFTA are essential. Both processes could provide Ethiopia with a framework to implement macro-economic reforms for sustaining its growth trajectory. Also, the AfCFTA could provide Ethiopia with a controlled space to gain some experience in trade policy management. This will prepare it for more robust participation in the more extensive multilateral trade system. In the next section of this chapter Ethiopia's trade

architecture will be examined, as will some reforms made as Ethiopia launched its WTO accession process and the policy and institutional gaps that its recent ratification of AfCFTA revealed.

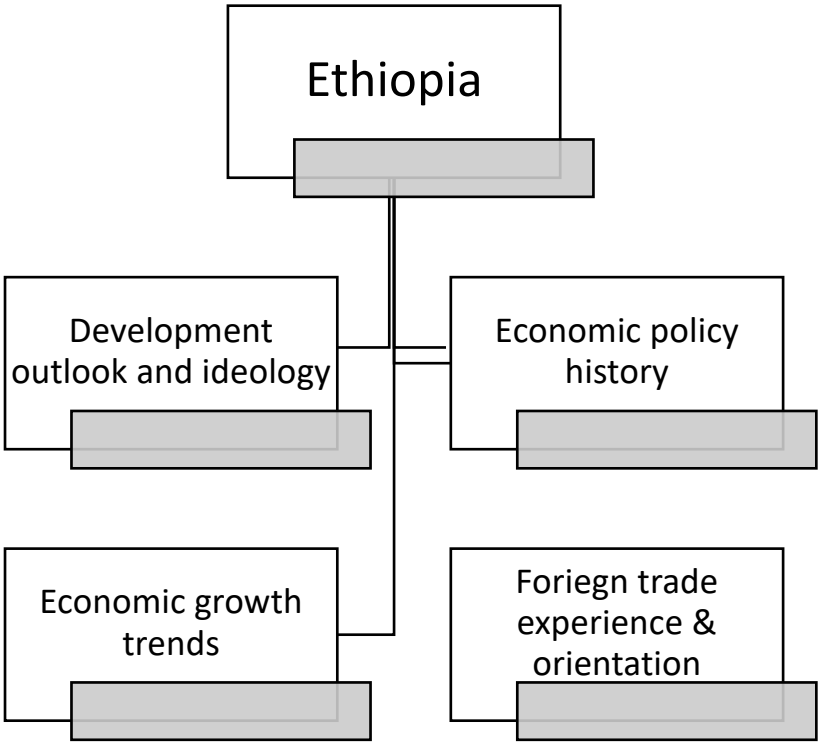

Illustration: *Key themes considered in section 6.2 (above) summarising Ethiopia's positionality as a state-party to the AfCFTA.*

6.3. Regulating or implementing trade: The legal frameworks and institutions in place for the AfCFTA in Ethiopia

Unlike in Kenya and Nigeria, the legal and institutional setting for trade in Ethiopia is not so complex. Until it started considering being a part of the AfCFTA, the growth of Ethiopia's trade architecture was shaped by its WTO accession which was dragged on since 2003. The AfCFTA has prompted the country to expedite trade policy reforms to enable it to become a significant player in African trade. In this section, some of the laws and strategies governing the marginal trade experience Ethiopia are reflected on. This section also reveals the role of the AfCFTA in building the institutional capacity of the LDCs. It begins with an array of laws and policies that affects the terms in which Ethiopia engages in international trade and then considers the institutional setting.

6.3.1. Constitutionalism, development plans and other relevant trade-related legal frameworks.

A) Constitution of the Federal Democratic Republic of Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia is the supreme law of the country.[742] It supersedes all federal and state laws and is binding on all federal and regional states institutions.[743] The powers to negotiate and ratify international agreements (like the AfCFTA) fall under the federal government's exclusive jurisdiction.[744] The Constitution also provides a list of democratic rights to be upheld by the Ethiopian state, one being the Right to Development.[745] The idea of development as a right is interesting because it charges the government to act to improve living standards and for sustainable development. In this regard, it recommends participation by Ethiopians in the governance process and imposes a duty of consultation on the government.

Article 9(4) of the Constitution provides that all international agreements ratified by Ethiopia are integral parts of the country's laws. This makes the AfCFTA being a ratified international agreement an active Ethiopian law. It also stipulates those international agreements must protect and ensure Ethiopia's right to sustainable development. However, the status of international agreements like the AfCFTA in the hierarchy of laws in Ethiopia, especially in relation to domestic trade-related laws, is unclear. A hint could be gleaned on from a qualifying provision in the Constitution[746] which requires international agreements concluded in the promotion of the country's external relations to respect and accord sovereignty to Ethiopia and be in the interest of its people. Article 86 of the Constitution mandates the observance of only those international agreements which ensure respect for — and are not against — the interests of Ethiopia. The express mention of this implies that agreements against the country's interests may not be observed.[747] This curiously vague provision may be used conveniently to excuse non-compliance with international obligations. Considering that the benefits from trade agreements may not be overtly evident in the short term, the Ethiopian government could conveniently utilise the provision to subvert trade agreements. For instance, a domestic industrial policy that interferes with the terms of market competition to

[742] Article 9(1) of the Constitution of the Federal Democratic Republic of Ethiopia 1995.
[743] Article 9(3) Ibid.
[744] In chapter five, the Constitution states that the federal government; Article 54 (8) Ibid.
[745] Article 43 Ibid.

[746] That is, principles of external relations in Article 86 Ibid.

[747] See Article 86 (4) Ibid.

the detriment of other imported goods in Ethiopia could be projected to be valid in the interests of the Ethiopian people.

The Constitution also empowers the government to formulate policies and plans regarding economic, social and development matters.[748] It is in this light that the Government has deployed its development plans since 1994. The current development plan is the Homegrown Economic Reform Agenda (HGRA), and it is the first development plan to be deployed after the ratification of a multilateral trade agreement.

B) Development planning: The Homegrown Economic Reform Agenda (HGRA)

The Homegrown Economic Reform Agenda (HGRA) is a plan for transforming Ethiopia into an industrialised lower-middle-income country by 2030.[749] The HGRA builds on the Growth and Transformation Plan II (GTP II) under which the AfCFTA was negotiated. The GTP II set out the goal of creating a modern, fair, and competition-based trade system.[750] It also set out the goal of building a modern commodity exchange system and acceding to the WTO, as well as regional FTA negotiations, to expand reliable market access opportunities.[751]

The HGRA represents an attempt to transition to a private sector-driven growth model and reduce the interventionist role of the state in the economy. This change in approach comes in light of the argument that the double-digit growth of the previous decade was only due to capital accumulation from heavy public investment,[752] rather than total factor productivity gains.[753] Accordingly, HGRA's ten-year perspective plan focuses on three pillars of reform: macroeconomic, sectoral, and structural, all situating the private sector at the centre of economic development. The priority sectors identified in the HGRA are modern agriculture, manufacturing, mining, and tourism.[754] However, this plan has been criticised for being overly neoliberal and exposes the country to the sort of macroeconomic disasters experienced with the Structural Adjustment Programmes of the 1990s.[755]

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[748] See principles of external relations in Articles 51(2) & 86 Article 86 Ibid.
[749] Federal Democratic Republic of Ethiopia *Homegrown Economic Reform Agenda (HGRA) A Pathway to prosperity (2019) Available online at Link accessed on* 13 September 2021*;* See also Ayele Addis Ambelu 'A Homegrown Economic Reform Agenda: A Pathway to Prosperity' *Africa News Channel* 26 December 2019 available at *https://www.africanewschannel.org/africa/a-homegrown-economic-reform-agenda-a-pathway-to-prosperity/* accessed on 13 September 2021.

[750] See Federal Democratic Republic of Ethiopia, National Planning Commission op cit note 707 at *162 – 166.*
[751] See Ibid at 162 – 166.
[752] Kidanemariam Hailu, Mulu Gebreeyeus & Tsegay Tekleselassie 'Ethiopia Productivity Report' (2020) *Policy Studies Institute (Ethiopia) and the National Graduate Institute for Policy Studies*.
[753] Federal Democratic Republic of Ethiopia op cit note 745. Also see Kidanemariam Ibid.
[754] Federal Democratic Republic of Ethiopia op cit note 745.
[755] Zinabu Samaro 'Reform Agenda Neither Homegrown nor Pathway to Prosperity' (2019) 20 *Addis Fortune*.

In summary, the plan aims to improve the business environment to boost investment, resolve foreign exchange shortages, and accelerate transformation. It also introduces a more pragmatic attitude to trade and integration. In this regard, it prioritises two objectives for enabling market access to Ethiopian exports: first, it expedited the WTO accession and secondly strengthening its engagement with regional trade integration (i.e. the AfCFTA). This prioritising of the private sector and the attention given to engagements with the WTO and regional engagement makes the HGRA a suitable policy document for sustaining Ethiopia's growth trajectory in the context of the AfCFTA. Because the HGRA is the legal anchor of Ethiopia's development strategy, its trade laws are read and examined in the context of the strategy. The other laws affecting trade and Ethiopia's engagement with the AfCFTA are now considered.

C) Trade remedies and competition regime

While Ethiopia has a legal regime governing competition, it has no framework for regulating unfair international trade practices like dumping, import surges and subsidisation. Competition is currently regulated by the Trade Competition and Consumer Protection Proclamation No. 813/2013 (TCCPP).[756] Article 3(1) of the TCCPP No. 813/2013 states the proclamation's objective is to protect Ethiopia's business community from anti-competitive and unfair market practices and establish a system conducive to promoting a competitive free market. In this regard, the regime identifies four kinds of anti-competitive practices; abuse of market dominance; anti-competitive agreements; concerted practices and decisions; and unfair competition.[757] Competition reform in Ethiopia was prompted by the WTO Accession process, by virtue of which the existing competition regime was amended several times.[758]

On the other hand, Ethiopian law is inadequate in terms of trade defence. While no legislation to regulate the terms on which institutions respond to unfair international trade practices exists, the issue was once given attention to in the Trade Practice Proclamation no.

[756] Federal Democratic Republic of Ethiopia op cit note 745.

[757] See Articles 5 - 8 of the Trade Competition and Consumer Protection Proclamation No. 813/2013 (TCCPP); Also see Elias N Stebek 'Deliverables and Pledges under Ethiopian Trade Competition Law: The Need for Private Sector Empowerment and Enablement' (2017) 11 *Mizan Law Review* 32-63.

[758] A legislation known as the Trade Practice Proclamation no. 329/2003 existed, but this legislation was repealed by the Trade Practice and Consumers Protection Proclamation 685/2010, which was in turn amended in 2013 by the Trade Competition and Consumer Protection Proclamation No. 813/2013. see Stebek ibid at 33.

329/2003.[759] However this proclamation was repealed. The current regime did not give attention to the issue (i.e. TCCPP No. 813/2013). This omission exposes a limitation in Ethiopia's trade architecture. With the amendment of the Trade Competition and Consumer Protection Proclamation in 2013 Ethiopia missed an opportunity to attend to a very integral trade policy concern.

This notwithstanding, the fact that Ethiopia's competition regime has gone through several processes of amendments is laudable and an expression of pragmatism. Nigeria, a comparatively more significant trading economy, only had its first framework dedicated to competition in 2019.[760] The Competition regime is not without issues. Besides the omission to mention unfair international trade practices - the lack of technical capacity (of the Trade Competition and Consumer Protection Authority) to enforce the competition regimes, the rather vague mandate of regional governments to enforce anti-competitive trade laws and the little representation of private sector stakeholders in Competition policy formulation may affect the effectiveness of the law.[761] This will require attention if Ethiopia regulate their market as trade under the AfCFTA intensifies.

D) Customs and Excise framework

In 2014 as a part of trade facilitation reforms, Ethiopia launched a legal regime to modernise its customs framework effectively. The regime - Customs Proclamation 859/2014 - was a part of the tax and customs reforms pursuant to the country's Growth and Transformation Plan I (GTP I),[762] intended to bring Ethiopia's customs laws to align with international and regional trade standards. For instance, the valuation chapter Customs Proclamation contains several valuation rules aligned to the WTO Customs Valuation framework. One example may be found in Article 33, dealing with the issue of customs value of imported goods. The section

[759] Article 10(2) (h) of proclamation no. 329/2003, states that "The importation of any goods from any foreign country into Ethiopia at a price less than the actual market price or wholesale price of such goods in the principal markets of the country of their production with the intent to destroy or injure the production of such goods in Ethiopia or to restrict or monopolize any part of trade in such goods"….is deemed to be unfair competition and prohibited; See HabtamuLanjore Bokoro and D Surya Prakasa Rao 'Trade Remedy Laws in Ethiopia: A Critical Review.' (2020) 25 *IOSR Journal of Humanities And Social Science (IOSR-JHSS)* at 53.

[760]Nigerian National Assembly, The Federal Competition and Consumer Protection Act, 2019; See also Felicia Anyogu, and Blessing C Agubosim. 'A Critical Overview of the Federal Competition and Consumer Protection Act.' (2021) 3 *International Review of Law and Jurisprudence (IRLJ)*.

[761]Elias T 'Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia' (2015) 9 *Mizan Law Review* 83-107. See also Bogale Anja Abba & Yared Kefyalew Demarso 'Critical Analysis of Prohibition of Anti-Competitive Trade Practices in Ethiopia: The Case of Arbaminch Town, Southern Ethiopia' (2021) 12 *Beijing L Rev* 215.

[762] Federal Democratic Republic of Ethiopia *Growth and Transformation Plan (GTP) 2010/11 – 2014/15* (2010), available at Link, accessed on the 21 September 2021.

defines the customs value for imported goods as the actual total costs of the goods up to the first entry point to the customs territory of Ethiopia. This definition is consistent with Article 1 of the CVA that stipulates the transaction value of a good as a basis for customs valuation.[763]

Even though in 2019 this legislation was amended to incorporate essential issues necessary for international trade, it missed the mark in respect to some issues. For instance, it once more contains no allusion to unfair international trade practices such as dumping and subsidisation. Article 89(2) and 90(1) of the proclamation dealing with the determination of dutiable and transaction value of the goods failed to incorporate the controlling mechanism about goods dumped and other types of unfair trade.[764] The law, however, empowered the Ethiopian Revenue and Customs Authority (ERCA) to set rules regarding embargos and other restrictions based on public health concerns, environmental standards, public morality, as well as security reasons.[765]

E) Industrial policy instruments

Arkebe Oqubay notes Ethiopia's active use of industrial policy instruments for boosting competitiveness.[766] These policy devices include measures for boosting exports and productive investment, as well as for industrial financing. As a part of its developmental state model Ethiopia also used state-owned enterprises (SOEs) to shape strategic sectors. Some of these policies are reproduced below.

[763] Kassahun, Tilahun Esmael. 'Trade facilitation in Ethiopia: The role of WTO accession in domestic reform.' (2014) 8 *Mizan Law Review* at 158.
[764] Bokoro op cit note 755 at 53.
[765] See Article 6 Custom Proclamation No.859/2014; See Bokoro op cit note 755 at 53.
[766] Arkebe Oqubay 'Industrial policy and late industrialization in Ethiopia' - in Cheru et al op cit note 676 at 605–629.

Policy instruments	'Facilitative'	Getting prices 'wrong''[31]
Five-year plans	Plan for Accelerated and Sustained Development to End Poverty, 2005/06-2009/10 (PASDEP); Growth and Transformation Plan I, 2010/11-2014/15 (GTP I); Growth and Transformation Plan II, 20014/15–2019/20 GTP II)[32]	
Industrial financing	Critical support in developing priority productive sectors)	
Investment financing: Development Bank of Ethiopia (DBE) and Commercial Bank of Ethiopia (CBE) as co-financier)		Targeted at specific sectors, selective allocation, long-term and subsidized loans
Trade financing (CBE, private banks)		CBE: Relaxed terms to exporters and manufacturers
Export promotion	Essential support for export promotion	
Target setting		Exercised on few priority sectors
Retention of forex earnings		Applied to exporters
Voucher, bonded warehouse, duty-drawback		Applied to manufacturing exporters
Exchange rate policy	Aim to support exporters and productive sectors	
Devaluation (jumps: 1992, 2010, 2017)		Aimed at revitalizing and supporting exporters
Managed floating system	Facilitative	
Forex allocation (triggered by scarcity in 2010)		Applied to priority sectors in manufacturing
Investment promotion	Essential support to support productive investment	
Incentive structure		More generous incentives to productive sectors (especially manufacturing)
One-stop service (OSS)	Facilitative for FDI and manufacturers	
Industrial parks (specialized)		Targeted at priority export-oriented manufacturing sub-sectors, subsidized facilities (land, sheds, bank services), one-stop government services, skills development
Trade protection	Essential in protecting domestic manufacturers	
Import tariffs	Tariff protection and harmonization (average 25–35 percent)	Protective tariffs to support domestic manufacturing (automotive manufacture etc.)
Import ban		Protect the cement industry
Export ban (crust and semi-finished)		To promote value addition in leather sector
SOEs investment	Important policy to develop strategic sectors	
Privatization		Gradual process, priority to local firms, selective, to support targeted industries
SOEs in strategic areas		Strategic and targeted to support of development goals
Sector-targeted instruments and institutional supports	Targeted support to nurture priority industries	
Cement industry	Expansion of public housing and infrastructure	Targeted: energy, quarry, forex, import ban
Horticulture industry		Targeted: phytosanitary standards, land, airfreight, packaging
Sectoral institutes		Targeted on priority sectors (such as the Textile Industry Development Institute (TIDI), Leather Industry Development Institute-(LIDI) Ethiopian Horticulture Development Agency-EHDA)

Illustration: *Oqubay's summary of Industrial Policy Instruments in Ethiopia*[767]

Because trade is inherently a cross-cutting economic sector it involves several ministries, departments, and actors in several sectors. [768] It also requires consolidation of several interests and perspectives to be efficiently coordinated and gainfully implemented.

6.3.2. Institutional architecture for trade

Due to the inadequacy of its laws to empowering the existing institutions, Ethiopia still struggles with implementing trade goals.[769] Owing to their cross-cutting nature, international

[767] Arkebe Oqubay 'Industrial policy and late industrialization in Ethiopia' - in Cheru et al op cit note 676 at Table 35.1.

[768] UNCTAD op cit note 724 at 43.

trade objectives often require multi-sectoral stakeholders and players for their effectuation. Accordingly, Ethiopia's trade objectives are implemented by several institutions. This, no doubt, yields many coordination related issues. It also convolutes the academic reflections on the country's trade architecture. For clarity, the different institutions dealing with trade policy formulation are categorised into four groups, namely, the objective setting level, the objective coordination level, and the systems for mediating between the different sectors. The status of the private sector in Ethiopia's trade architecture is also reflected on.

A) Objective setting at the ministerial level

Trade objectives in Ethiopia are set at the ministerial level and several ministries play active roles in this regard. While none particularly leads in this regard, the Ministry of Trade and Industry (MOTI) seems to play the most active role. It also bears the primary responsibility for acting on trade policy goals in Ethiopia's National Plan (i.e. the HGRA). In acting on its mandate, the MOTI has a tradition of partnering with and coordinating several development institutions towards developing trade promotion strategies.[770] For example, the task of preparing Ethiopia's Trade Policy Framework was commissioned was being led by the UNDP.[771] This was the same for its diagnostic trade Integration study commission in 2004 and updated in 2016 and led by the UNCTAD.[772] The MOTI takes the lead in trade negotiation and economic partnership agreements like the AfCFTA through a department of Trade negotiation led by a planning commissioner who serves as its chief negotiator.[773] Ethiopia's trade objectives are also acted on by other ministries like the ministries of Foreign Affairs, Finance, Agriculture and Economic Development. These ministries control the many other regulatory parastatals.

The fact that different ministries act concurrently in furthering trade objectives rather than under the leadership of one of them is a weakness in its implementational architecture that impacts on Ethiopia's trade goals. This often results in the duplication of functions,

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[769] Interview with private sector, governmental stakeholder/official; UNCTAD op cit note 724 at 70.
[770] The MOTI maintains a healthy relationship with bodies like UNCTAD, UNECA, UNIDO, and UNDP which advice on key policy agenda. Interview with private sector, governmental stakeholder/official; UNCTAD op cit note 724 at 52.
[771] UNDP, Procurement Notice *ETH2259: International Firm to Establish Trade Policy Framework (TPF), Trade Policy Statement and Implementation Plan for Ethiopia*, available online at Link, accessed on 30 August 2022.
[772] The study was a product of a collaboration between an international and Ethiopian team of trade and sector specialists. Also in partnership with the Executive Secretariat of the Enhanced Integrated Framework (EIF) and the other EIF agencies as well as the United Nations Industrial Development Organization (UNIDO). UNCTAD op cit note 724 at 7.
[773] UNCTAD op cit note 724 at 47.

disorganisation, and incoherence. For example, in the furtherance of trade objectives (including the initiation of bilateral trade negotiations), other ministries have been reported to act without the knowledge of the MOTI.[774] The absence of a trade policy framework that would have otherwise provided one for the coordination of inter-ministerial activities exacerbates this issue.[775] This absence of clear leadership is, therefore, a foundation for a myriad implementation issues. The efforts to ensure more efficient coordination have led to the creation of several ad-hoc committees and coordinating systems reflected in the next heading.

B) Objective coordination: Ethiopia's use of inter-ministerial and ad hoc committees.

Inter-ministerial activities on trade are coordinated either through inter-ministerial setups and ad hoc committees. One noteworthy inter-ministerial setup is the National Export Coordinating Committee (NECC). The NECC was created primarily to resolve bottlenecks related to infrastructure, tax, customs, logistics and finance to create a conducive policy environment for the private sector by fostering international market competitiveness.[776] The body is chaired by the prime minister, whose presence on the committee, expresses political will and endows the committee with legitimacy. However, the NECC has a narrow composition.[777]Important institutions (like the National Bank of Ethiopia) are not a part of it. Other coordination systems include the National Productive Sector Competitiveness Support Council (NPSCSC) and the National Economic and Business Diplomacy Coordination Committee (NEBDCC).[778] However, the fact that several inter-ministerial setups lack private sector representation casts uncertainties on their effectiveness.

Accordingly, several ad hoc committees are often created to fill this gap. They provide support and contribute to many trade policy conversations including on trade negotiation, analysis, and research. They also provide recommendations regarding policy implementation challenges. However, the multiplicities of ad hoc committees also exacerbate the coordination issue. This is because such a multiplicity of committees often leads to the duplication of functions and role strains (which ultimately diminish the motivations of stakeholders).

[774] UNCTAD op cit note 724 at 47.

[775] Ibid.

[776] Ibid at 50; See also Arkebe Oqubay *Made in Africa: Industrial Policy in Ethiopia* (2015) ch 3 s 3.7.1.

[777] Oqubay Ibid at ch 3 -s 3.7.1, available at Link

[778] UNCTAD Ibid 50.

C) Mediation on trade objectives: The use of sector-specific intermediaries and the role of international organisations

Sector-specific intermediaries and institutions serve as mediators. They enable public and private sector actors to dialogue in response to the specific needs of the different sectors. They include autonomous government institutes on specific sectors and membership-based sectoral associations. Autonomous government institutes were set up by the Ethiopian government to comprehensively support the private sector in addressing value chain-related challenges after several attempts to utilise directorates within ministries failed. The first three institutes to be set up in this regard were the Leather Industry Development Institute (LIDI), Textile Industry Development Institute (TIDI), and the Metal Industry Development Institute (MIDI).[779] Subsequently, the approach was institutionalised and several others were created for different sectors including the Chemical and Constructions Inputs Industry Development Institute, the Food, Beverage and Pharmaceuticals Industry Development Institute, and the Milk and Meat Products Institute.[780] This approach (of using autonomous institutes) assisted Ethiopia in subverting the bureaucratic inertia and organising an incentive structure. It also strengthened government-industry information flows and collective learning.

International organisations and donors also aid autonomous government institutes.[781] Despite the international support, there is often a reluctance by the actors in Ethiopia to leverage the support offered for meaningful impact.[782]

[779] See also Oqubay op cit note 772 at ch 3 s 3.7.2.
[780] UNCTAD op cit note 724 at 51.
[781] They include UNCTAD, UNECA, UNIDO, UNDP and major donors like USAID, DFID, SNV of the Netherlands, Swedish aid, Canadian aid, the European Union, UNCTAD, UNECA, UNIDO, UNDP and Italian Cooperation. See UNCTAD Ibid at 52.
[782] Ibid.

<table>
<tr><th colspan="7">MINISTERIAL LEVEL</th></tr>
<tr><td>Ministry of Trade and Industry</td><td>Ministry of Foreign Affairs</td><td>Ministry of Agriculture</td><td>Ministry of Finance</td><td>Ministry of Revenues</td><td>Attorney General</td><td>Ministry of Labor and Social Affairs</td></tr>
<tr><td colspan="4">TRADE REGULATION PARASTATALS</td><td colspan="3">TRADE PROMOTION PARASTATALS</td></tr>
<tr><td colspan="4">• Ethiopian National Accreditation Office
• Ethiopian Standard Agency
• National Bank of Ethiopia
• Trade Practices and Consumer Protection Authority
• Ethiopian Legal Metrology Institute
• Ethiopian Inland Revenue Customs Authority
• Ethiopian Conformity Assessment Agency
• Ethiopian Commodity Exchange Authority
• Petroleum And Petroleum Products Supply and Distribution Authority</td><td colspan="3">• Ethiopian Export Promotion Agency
• Ethiopian Bank of Development
• Ethiopian Investment Cooperation
• Ethiopian Seed Corporation
• Ethiopian Sugar Industry Support Centre
• Ethiopian Shipping Lines
• Ethiopian Industrial Input Development Company
• Federal Small and Middle Manufacturing Industry Expansion Authority</td></tr>
<tr><td colspan="7">HIGH LEVEL COORDINATION SYSTEMS</td></tr>
<tr><td colspan="4">Inter-ministerial Setups</td><td colspan="3">Ad-Hoc Committees</td></tr>
<tr><td colspan="7">MEDIATION SYSTEMS</td></tr>
<tr><td colspan="4">Autonomous Institutes</td><td colspan="3">International & Donor Organizations</td></tr>
<tr><td colspan="4">• Development Institute
• Leather Industry Development Institute
• Horticulture Development Corporation
• Metal Industry Development Institute
• Food, Beverage & Pharmaceutical Industry Development Institute
• Chemicals & Construction Input Industrial Development Institute
• Meat & Diary Industry Development Institute</td><td colspan="3">• International Organisations include: UNCTAD, UNECA, UNIDO, and UNDP
• Donors Organisations include like USAID, DFID, SNV of the Netherlands, Swedish aid, Canadian aid, the European Union, UNCTAD, UNECA, UNIDO, UNDP and Italian Cooperation.</td></tr>
<tr><td colspan="7">PRIVATE SECTOR GROUPS</td></tr>
<tr><td colspan="3">Ethiopian Public Private Consultative Forum</td><td colspan="2">The Ethiopian Chamber of Commerce and Sectoral Associations (ECCSA)</td><td colspan="2">Other Groups</td></tr>
</table>

Illustration: *The institutional setup for trade governance in Ethiopia*

D) The role and status of Civil Society Organisations

International trade, while formally a domain of public law (and states), prejudices and profits private and civil society interests.[783] The reason for this is obvious: through their real-time experiences, private actors engage, validate, and legitimise the strategic positions taken by the government on trade issues. Therefore, the importance of sufficient links with private actors regarding trade agreements like the AfCFTA by any state cannot be overemphasised. Where the design of trade architectures inadequately accounts for or establishes linkages with civil society groups, the result are coordination failures and asynchronous deployment of trade strategies.

[783] Shaffer op cit note 193 at 3. Please note that the term " Civil Society Organisations (CSO)" is introduced in this case study (and throughout this thesis) as an umbrella term encompassing various non-governmental organizations, advocacy groups, private business interest groups, community-based organizations, and other actors operating within civil society. Non-profit actors which may include organizations working on social issues, human rights, or development, are also part of the broader civil society landscape (albeit less visible).

Ethiopia's civil society plays a minor role in the country's governance architecture. While the Ethiopian government has acknowledged the importance of growing and increasing the competitive base,[784] it still struggles to act in this regard. Studies on the issue conclude that the reasons for this range from the inadequacy of international commercial banking and financial services (which was for a long time reserved for the government and Ethiopian investors) and[785] the lack of capacity of civil society actors. [786] Furthermore, a reoccurring theme in the conversation is the unwillingness (of the government of Ethiopia) to institutionalise collaboration with civil society actors.

Two reasons for this unwillingness appear in the literature; firstly, the de-modernisation of the Ethiopian economy during the Derg period which effectively dismantled its (then fragile) civil society sector, and, secondly, the developmental state model employed by the EPRDF in its attempt to rebuild the Ethiopian economy. First, the socialist-oriented policies of the Derg period (after the fall of Emperor Haile Selassie) had crippling effects on private sector growth which was, at the time, nascent.[787] Amongst other things, businesses were nationalised as key private sector players were suspected to be counterrevolutionaries.[788] This not only interfered with the growth of the private sector, it also established the groundwork for the tense relationship between the government and the private sector and the distrust of the latter over the former. Secondly, the developmental state model employed with the emergence of the EPRDF (and the fall of the Derg) did little to correct the terms of the relationship between the government and civil society actors, even though radical steps were taken to re-create and modernise the economy. While the developmental state model[789] led to unprecedented levels of economic growth, its effect on the private sector was stifling. The developmental state model's approach to boosting the private sector was designed with the twin objectives of mobilising them as part of the ruling coalition's developmental state programme whilst at the same time curtailing them in its

[784] Federal Democratic Republic of Ethiopia op cit note 745*;* Federal Democratic Republic of Ethiopia, op cit note 707*;* See also Federal Democratic Republic of Ethiopia 'op cit note 758.
[785] Tamirat Yigezu, Imeru, et al. *Review of the Legal and Institutional Framework for Market Competition in Ethiopia* (2009) at 46.
[786] UNCTAD op cit note 724; World Bank Group, *Ethiopia Country Private Sector Diagnostics: Creating Markets in Ethiopia: Sustaining Progress Towards Industrialization* (2019).
[787] For instance, the Chamber system, the first of which was established in 1947 under Emperor Haile Selassie to encourage the growth of capitalism, was restructured to align with socialist central planning policies. See Proclamation No. 184 of 1978; Proclamation No. 184 of 1978 'Chambers of Commerce Proclamation'. Addis Ababa: Negarit Gazeta; See also Pellerin op cit note 689 at 589-612 and Yigezu Ibid note 781 at 46.
[788] Sarah Vaughan & Mesfin Gebremichael 'Rethinking Business and Politics in Ethiopia: The Role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray' (2011) *Africa Power and Politics. See also* Pellerin op cit note 689 at*,* at 593.
[789] See above for the discussion on the developmental state model.

attempt to consolidate and prevent affronts to its hard-won power. These objectives often conflicted, thus resulting in the sacrifice of private sector growth to consolidate power and authority.[790] This sacrifice led to the dis-engendering of collaboration between the government and the private sector.

Ethiopia's accession to the WTO prompted reforms to this disaggregated collaboration paradigm. One of these was the creation of the Ethiopian Public Private Consultative Forum (EPPCF). This forum set up a more formal system of collaboration between it, the Ethiopian Chamber of Commerce, sectoral associations and the Ministry of Trade and Industry.[791] This helped to create a more institutionalised mechanism for policy deliberations.[792] The EPPCF led to meetings being held four times a year, and general public-private consultative forums that took place twice a year.[793]

However, the new system of collaboration was still far from perfect, and one challenge experienced has been the poor implementation record in respect of decisions reached.[794] The disinclination for collaboration is often displayed by government which still treats it as an afterthought, as was the case with the negotiation and signing of the AfCFTA.[795] Government officials excuse the limited consultation with the private sector on trade agreements, on account of weak leadership and low capacity of private sector groups.[796] Governmental stakeholders explain that private sector groups are often unable to comprehend and meaningfully engage in trade policy conversations and are better excluded altogether. For this reason (they explain), hard-line trade policy conversations are driven by the institutions of the government, only which has the capacity and staffing for the purpose. However, private sector groups have a rather different view on the issue. They attribute their low engagement to the lack of transparency and paternalistic approach the government employs

[790] Pellerin op cit note 689 at 589–612.

[791] This was through a memorandum of understanding in July 2010. This concept (i.e. of a formal mechanism for public-private dialogue) is not novel to Ethiopia. The UNDP worked closely with government and private sector stakeholders in the late 1990's under an initiative called the Public-Private Partnership (PPP). The EPPCF secretariat began operation in September 2011 with support from international organizations. Its secretariat has a "small but nimble team" that steers the dialogue process in an organized manner. See Pellerin Ibid at 605; See also Mamo Mihretu, Eyob Tekalign Tolina 'Public private Dialogue' (2011) *Ethiopian Public-Private Consultative Forum (EPPCF)*.

[792] UNCTAD op cit note 724 at 49.

[793] Also, the Ministry of Foreign Affairs and the presidency also consciously attempts to engender cooperation with the private sector in crucial economic interactions with other nations. Interview with private sector, governmental stakeholder/official. See UNCTAD op cit note 724 at 49- 50.

[794] Pellerin op cit note 689 at 605.

[795] Interview with private sector stakeholder/official noted that consultations only came after the decision to be a part of the AfCFTA was made by the government of Ethiopia.

[796] Note that a comprehensive survey on this was not done, however some participants with previous experience in government were interviewed and they gave personal opinions on the consultation issue. I also rely on interviews conducted by UNCTAD in a study published in 2016. UNCTAD op cit note 724 at 49–50.

policies that affect the private sector. They explain that the government's fixation on the idea of control renders it inattentive. This (they explain) suffocates important policy conversations and disincentivises meaningful engagement on trade policy issues.[797]

What is clear is that, for a meaningful and beneficial engagement with the AfCFTA, Ethiopia must redesign its trade architectures to institutionalise cooperation, communication, information sharing, and capacity building for private sector groups.[798]

6.3.3. Issues and challenges to gainful implementation of AfCFTA

A) Absence of a trade policy framework

A concern expressed of Ethiopia's trade architecture is the lack of cohesiveness regarding the policies affecting trade. In this regard a comprehensive trade policy framework (TPF) which consolidates the policies affecting trade actors/institutions could be useful. Due to the absence of a cohesive trade policy framework, Ethiopia has relied on its commercial laws, Constitution, and its other policy documents as a source of trade policy, which are often not suitable for the demands of international trade – especially in the context of an agreement with impacts as extensive as the AfCFTA.[799]

There are five apparent advantages of a trade policy framework (TPF) for Ethiopia These are, first. a TPF will give certainty to the trade policies and regulations existing in Ethiopia, and by doing, impact on conformity.[800] This is especially imperative for Ethiopia, given that it has just recently begun to activate multilateral trade options for development. Secondly, a TPF will enable the creation of a predictable trade policy environment. This is crucial for achieving Ethiopia's foreign investment targets as stated in its Homegrown Economic Reform Agenda. Thirdly, it provides a valuable framework for institutionalising trade policy formulation best practices. Best practices in this regard leverage the contribution of all the public and private sector players regarding international trade agreements like the AfCFTA. It will enable Ethiopia to effectively engage in complicated multi-layered trade negotiations like the AFCTA — an agreement the like of which it has no experience of

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[797] Interview with private sector stakeholder/official revealed that consultations only came after the decision to be a part of the AfCFTA was made by the government of Ethiopia.
[798] Anton J Said and Sophie Krantz 'The role of the private sector in export strategy development' (2009) 4 *International Trade Forum* at 40.
[799] See UNDP Procurement Notice op cit note 767.
[800] UNCTAD, *Trade Policy Frameworks for Developing Countries: A Manual of Best Practices* (2018) 6.

negotiating.[801] Fourthly, trade policy coherence is crucial for defining the extent to which Ethiopia's trade objectives contribute to achieving its Homegrown Economic Reform Agenda. In this regard, a TPF that is drafted to acknowledge national development plans plays meaningful roles in its actualisation. Lastly, a TPF has a guidance or roadmap functionality. In other words, it provides a roadmap for Ethiopia's policymakers and guides their actions on specific trade issues. In this regard it opens conversations on the core trade policy inefficiencies or barriers that the country faces and enables the creation of strategic plans to overcome those challenges over a clearly defined time period. In summary, a TPF will benefit Ethiopia by providing a holistic picture of its economy and enables it to finally develop a philosophy that treats AfCFTA-trade and development not as competing goals, but as complementary ends.[802]

B) Trade defence mechanism and the absence of a trade remedies framework:

As with Nigeria and Kenya, Ethiopia does not have defence mechanisms for dealing with unfair trade practices like dumping, subsidisation, import surges and other welfare distorting practices by foreign government. To date, the 2003 version of the Trade Competition and Consumer Protection Proclamation which included unfair trade concerns like dumping is the closest Ethiopia has come to having a framework for regulating trade remedies.[803] However, the replacement of that legislation by the Trade Competition and Consumer Protection Proclamation No. 813/2013 has left the country exposed. Considering its ratification of the ambitious AfCFTA, Ethiopia will have to create a defence or remedies framework, the utility of which has been well established in international trade literature.[804] This defence mechanism will pave the way for developing technical capacity for enforcement actions against unfair trade practices. It will also facilitate the engagement of the private sector in the trade policy formulation process.[805] Furthermore, a comprehensive trade remedies framework will legitimise and institutionalise measures by the government of Ethiopia against measures

[801] Ibid.
[802] UNCTAD op cit note 796 at 5.

[803] Bokoro op cit note 755 at 53.

[804] Van Bael, Ivo, and Jean-François Bellis *EU Anti-Dumping And Other Trade Defence Instruments* 2011; Vermulst, Edwin 'Modernization of the EU's Trade Defence Instruments and the Law of Unintended Consequences' (2013) 8 *Global Trade and Customs Journal 8*; Bungenberg, Marc et al., (eds.) *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (2018).
[805] Shaffer op cit note 193.

that constrict the AfCFTA playing field in ways detrimental to infant industries in Ethiopia.[806]

C) Institution building for the coordination of trade policy

A concern noted of Ethiopia's trade architecture is the relative weakness of its institutions. This prompts an unhealthy reliance on international organisations for driving trade policy conversations. Therefore, in addition to formulating a comprehensive trade strategy, the need for institution-building specifically for trade policy implementation cannot be overemphasised. Optimising the AfCFTA will require a coordinating approach that is entrenched. In this regard, the practice of utilising ad hoc committees to coordinate trade policy as is the tradition in Ethiopia,[807] may not be so helpful. It will be suitable to create a cohesive coordinating mechanism for evaluating trade policy objectives and the performances of the institutions implementing them. This coordinating mechanism will have to be high-level and include the trade policy implementing ministries, parastatals, and civil society groups. It should also have a clear mandate and budget for consulting and sensitising the stakeholders of new trade agreements, trade policy directions, and the changes in the national development priorities.

D) Building capacity across the board

Concerns have equally been raised by private sector and other civil society interests of their lack of capacity. Meaningful use of the AfCFTA for driving Ethiopia's Home-Grown Economic Reform Agenda will also require capacity building initiatives at the national, regional, and sectoral levels. One way this can be done is to create and implement measures to build the skills base and trade competences of the private sector and other civil society players. Here close attention must be paid to knowledge creation and sharing. Furthermore, there will need to be a more structured approach to aligning the curricula of the various

[806] Illy Ousseni. *Trade Remedies In Africa: Experience, Challenges And Prospects* (2012) at 6; See Beseler J F *Anti-dumping and Anti-subsidy Law: the European Communities* (1986) 3; T P Stewart 'Administration of the Antidumping Law: A Different Perspective' in Richard Boltuck and Robert E Litan (eds) *Down in the Dump: Administration of the Unfair Trade Laws* (1991) 288-330; G C Hufbauer and H F Rosen *Trade Policy for Troubled Industries* (1986); See, among others, J M Finger 'The Origins and Evolution of Anti-dumping Regulation' (1991); *World Bank Working Paper;* A Sykes 'Trade Remedy Laws' (2005) *M Olin Law & Economics Working Paper No. 240*; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters *The Law and Economics of Contingent Protection in the WTO* (2010) 34; T Voon 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' (2010) 59 *International & Comparative Law Quarterly* 625-667.

[807] UNCTAD op cit note 796 at 239.

learning institutions to the skill requirements of AfCFTA prioritised sectors. This will also require the deepening of industry-university collaboration and boosting capacity for national research and development and innovation.

E) Engaging the private sector: Imperatives for adequate sensitisation and consultation

Finally, concerns have been raised by private sector and other civil society groups on the nature and depth of consultations by the Ethiopian government in deciding on policy approaches.[808] As far as international trade policy is concerned, these (i.e. consultations and sensitisation) are crucial. Ethiopia must formulate an approach to the AfCFTA that institutionalises consultation, cooperation, communication, information sharing, and capacity building for private sector and other civil society groups.

6.4. Addressing peculiar supply-side constraints

As highlighted above, Ethiopia has several challenges that serve as constraints to productivity and negatively impact the developmental yield of the AfCFTA. While the country has developed several strategies to attend to these supply-related constraints, this section highlights two of the most noteworthy. These are the use of industrial parks and large-scale electrification projects like the GERD.[809]

6.4.1. boosting productivity through industrial parks

An industrial park is a carefully designated part of the country earmarked for boosting industrial growth. Cox explains it using the notion of an ecosystem 'with a diverse assembly of businesses, with built-in resilience' and created to enable what he called 'mutualistic and communalistic relationships'.[810]This aims to maximise the use of inputs, products, and waste materials.[811] Industrial parks are drivers of export-led industrialisation and are veritable tools

[808] Interview with private sector stakeholder.

[809] Ismail op cit note 69 at 142.

[810] C Côté R and Hall J 'Industrial parks as ecosystems' (1995) 3 *Journal of Cleaner Production* 41-46; See also E Kuznetsova, E Zio and Romain Farel 'A methodological framework for eco-industrial park design and optimization' (2016) 126 *Journal of Cleaner Production* 308–324.

[811] Although the essential notions of industrial ecology were explored in studies from the mid-1950s which Erkman (1997) examined, Frosch and Gallopoulos' study was the first to explicitly outline the principles of such an approach and to bring these ideas to a wider audience (1989).See S Erkman 'Industrial ecology: An Historical View' (1997) 5 *Journal of Cleaner Production* at 1-10; See also R A Frosch N E Gallopoulos 'Strategies For Manufacturing In Managing Planet Earth' (1989) *Scientific American* at 144-153.

for attracting investments, generating employment, and boosting manufacturing. They are also valuable instruments for technology transfer, economic learning, diversification, and structural transformation.[812] The correlation between industrial parks or special economic zones (SEZs), and economic development especially in the context of developmental states has empirical support. For instance, SEZs were noted to be the drivers of China's growth,[813] at one point contributing up to 60 per cent of its GDP.[814]For this reason (i.e. the intellectual support to the idea), Ethiopia invested in the idea, developing industrial parks in different parts of the country.

Industrial parks in Ethiopia have legal foundations in the Industrial Park Proclamation and are regulated by the Industrial Parks Development Corporation (IPDC). Created in 2014, the IPDC is a public enterprise that collaborates with other government agencies (such as the Ethiopian Investment Commission and the Ethiopian Revenue and Customs Authority) to provide and enable access to investors investing in designated industrial parks. The creation of Ethiopia's parks is anchored on five principles, the first of which is specialisation. In this regard, the government hopes to increase economies of scale and efficiency by establishing clustered parks dedicated to key areas such as apparel and textiles, leather and leather products, pharmaceuticals, and agro-processing. Secondly, the principle of export oriented-ness which views cluster parks as valuable contributors to boosting export performance. Thirdly, the skills and technology transfer principle — ensures that a pool of Ethiopian workers with industrial capacity and skills is trained. Fourthly, vertical integration — enables backward and forward economic linkages, and, lastly, the principle of sustainability. The sustainability principle ensures activities in the industrial parks are done using environmentally friendly technologies as well as other socially sustainable facilities.[815]

There are currently thirteen industrial parks in Ethiopia. Combined, the parks have created over eighty thousand jobs and generated over US$850,000 in revenue. The primary aim of these parks is to enable linkages between suppliers and investors and address investment promotion and facilitation issues. The parks have, however, not been run without challenges. For example, a common complaint about their administration has been the prevalence of poor

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[812] Tesfachew Taffere (2021) 'Industrial parks in Ethiopia: Newcomer advantages' in Nziku, D M and Struthers, J J (Eds.) *Enterprise and Economic Development in Africa* 259–275.

[813] Zeng, D Z 'China's special economic zones and industrial clusters: The engines for growth' (2012) 3 *Journal of International Commerce, Economics and Policy* 15.

[814] China Ministry of Ecology and Environment *Press Conference Release* (2018) Available at Link (Accessed on May 31, 2018).

[815] See Industrial Parks Development Corporation *Industrial Parks: An Emerging Manufacturing Hub of Africa* (2022), available at *https://www.ipdc.gov.et/media/Booklet_IPDC.pdf*, accessed on 1 June 2022.

labour conditions. Workers complain of low wages, unduly long hours, and impediments to joining association/unions.[816]

Some features of Ethiopia's industrial parks make them useful enablers of development in the context of the AfCFTA. Among these are their strategic situation along economic corridors, their proximity to vast labour pools, their connectivity by trade infrastructure, and the fact that they benefit from governmental support. While the strategic situation of the parks along economic corridors could enable the more efficient use of resources as well as lead to the creation of value chains, their proximity to the country's vast labour pool could enable a smoother transfer of skills. Similarly, while the interconnectivity between the parks, the market and borders by trade enabling infrastructures such as railway lines and roads has the advantage of ensuring that products from the parks get into the broader market created by the AfCFTA, the government support that the parks enjoy could translate to fiscal and non-fiscal incentives which keeps the parks productive.

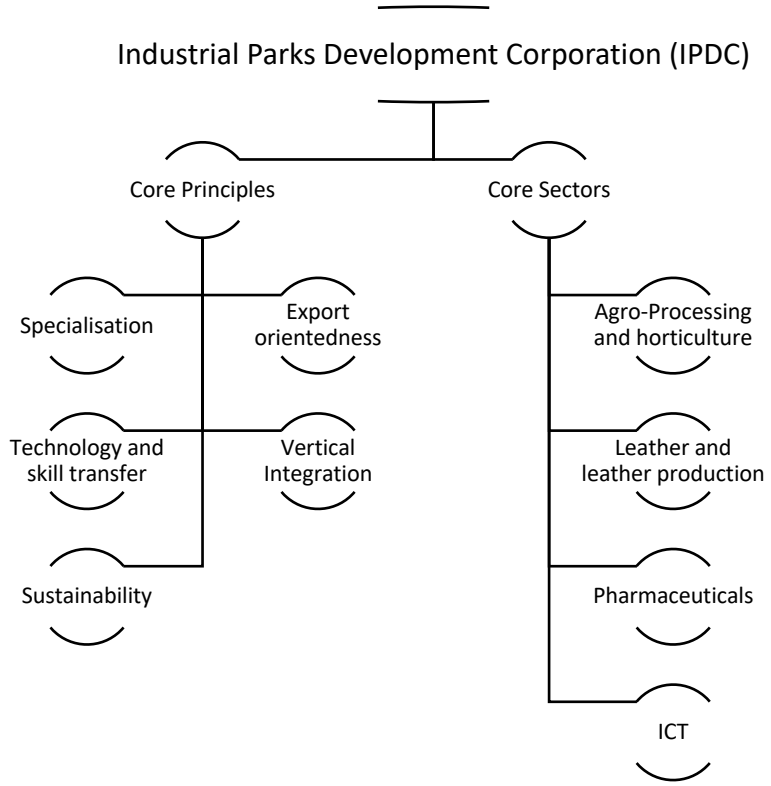

Illustration: *Priority sectors of Ethiopia's industrial parks initiative and principles driving same*[817]

[816] Redae M *Investment and Labor Rights in Ethiopia: Some Challenges and Opportunities* (May 2016) Proceedings of seminar series of the school of law, Addis Ababa University.

[817] See Industrial Parks Development Corporation op cit note 811.

6.4.2. Electrifying Ethiopia: The Grand Ethiopian Renaissance Dam (GERD)

A critical issue that has continued to affect productivity in Ethiopia is the absence of electricity in most parts of the country. This issue is exacerbated by the energy demand which continues to rise with the country's economic expansion. Even as demand for energy is predicted to increase at a pace of 10 to 14 per cent every year until 2037, only half of the economy has access.[818] The numbers are lower in rural areas, in which case only 27 per cent of the population has access to the electricity grid.[819] A UNDP study of the country's manufacturing sector ranked power interruptions and limited access to electric power, within the top five (of up to 42) impediments to productivity.[820] This gives empirical credence to the notion of electricity being vital to economic growth.[821]

The HGRA, the country's framework on development, sets out a robust energy plan to remedy the country's power deficit. The development plan's main focus areas include ensuring access to energy supply, providing clean energy supply technologies to the rural population, providing high quality electric power service, building a reliable electric power infrastructure, ensuring the energy sector's healthy financial position, encouraging private investment in the sector, and developing skilled and ethical manpower. The primary goals of the energy development plan are to provide the economy with accessible, equitable, and cheap quality electric power service, as well as to expand a stable energy infrastructure.[822] Key targets include the increase of electricity generating capacity from 4,478 to 19,900 megawatts and the increase of power transmission lines from 18,400 to 29,900 kilometres. However, this plan remains elusive. One means through which it hopes to achieve this is through the Grand Ethiopian Renaissance Dam (GERD) project.

The GERD now under construction in Ethiopia's Upper Blue Nile (UBN) basin, is one of the continent's largest hydroelectric projects. With a total capacity of 5 150 MW, the GERD is advertised as a hydroelectric project that will significantly enhance electricity supplies in

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[818] See World Bank *Ethiopia- Access to Electricity* , available at *Link,* accessed on 1 June 2022.

[819] Ethiopian Electric Power Corporation*: ETH Energy Master Plan* (2013).

[820] UNDP *Understanding African Experiences in Formulating and Implementing Plans for Emergence: Growing Manufacturing in Ethiopia, A Case Study* (2018).

[821] See Yinka Omorogbe, and Ada Ordor *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (2018); See also Sonja K Kolin, Daria K Sedlar and Tomislav Kurevija 'Relationship between electricity and economic growth for long-term periods: New possibilities for energy prediction' (2021) 228 *Energy*; Govinda Timilsina, and Jevgenijs Steinbuks 'Economic costs of electricity load shedding in Nepal' (2021) 146 *Renewable and Sustainable Energy Reviews*.

[822] Ethiopia Planning and Development Commission *Ten Years Development Plan: A Pathway to Prosperity (2021–2030),*' available at *Link.*

Ethiopia and adjacent countries. Effective completion of the project will alleviate a significant bottleneck in Ethiopia's industrialisation by boosting the supply of electric power from roughly 2 000MW per annum at the start of the project to more than 10 000MW per annum. In addition to meeting estimated local energy demands, the GERD could also create foreign exchange opportunities for Ethiopia. This could place it in a better position to export power to neighbouring nations. This revenue-generating advantage could enable the government to augment the finances necessary for the AfCFTA and development. The project is in its third phase and is close to completion.

6.5. Conclusion

This chapter situated Ethiopia at the centre of Africa's ambitious trade endeavour, showing inter alia the extent to which the country's trade and macro-economic environment is prepared to react thereto. It generally explored some important factors in the country's trade governance architecture and critiqued some of the frameworks and institutions to be used in optimizing gains from the initiative. In this regard, the chapter shed insights on the settings that characterize the functioning of Ethiopia's developmental state economy and the institutional context that governs incentives within it.

Amongst other things, the chapter demonstrates that, while Ethiopia's development state model has resulted in vast economic growth despite low engagement with foreign trade, trade, The AfCFTA, and its WTO ratification process will be required for Ethiopia to sustain its growth rate, institutional modernization, and development. Second, the chapter demonstrates how Ethiopia's multi-stakeholder approach to trade governance and development planning positions it to participate in the AfCFTA, and how a lack of adequate private sector and civil society engagement might be a disadvantage in this respect. In addition to the disadvantage of insufficient private sector and civil society engagement, several flaws in Ethiopia's trade governance architecture that might jeopardize the country's AfCFTA benefits are highlighted. The next chapter shall conclude and summarise the thesis. It does this by comparatively analysing the trade frameworks in Nigeria, Kenya and Ethiopia.

7. CHAPTER SEVEN: SUMMARIES, RECOMMENDATIONS, AND CONCLUSION

7.1. Introduction

This research explored Africa's ambitious attempt to scale up continental trade integration– the African Continental Free Trade Agreement (AfCFTA). Also examined were the structures for its governance using Nigeria, Kenya, and Ethiopia as case studies by drawing on classical theories of international trade, law, development studies and regional integration. These theories provided the conceptual foundation for creating a framework (namely, the Analytical Law and Developmental Integration Model (ALDIM)) for reflecting on the processes through which development may be mainstreamed using domestic laws and institutions, in the context of integration initiatives between African states. In this process, the gap created by the absence of an analytical tool for testing the impacts of regional development initiatives in domestic settings was filled by the study.

The central questions around which this research was framed were: How suitable is the African Continental Free Trade Area (AfCFTA) agreement for enabling development in its member states? In what ways should the legal and institutional frameworks of African Countries reconfigure to support the AfCFTA in a manner that advances their development? What factors are key to the effective implementation of the AfCFTA as an enabler of development while addressing the supply-side constraints and advancing the industrialisation of its member states? To answer these questions, doctrinal and empirical research methods were combined in the study. The primary sources used for the doctrinal research included the legal text of the African Continental Free Trade Agreement, domestic legislation, and official government records of the case-studies. Empirical research was conducted by way of semi-structured interviews with senior officials in governmental institutions and executive members of private sector and other civil society coalitions in the case studies. The open-ended interviews were utilised for scoping the legal and regulatory environments to highlight the key legal frameworks and institutions in place for the operationalisation of the AfCFTA.

The research was structured into two parts, the first of which constitutes chapters one through three. While chapter one introduced the study by providing the background and putting forward the main points of inquiry, chapter two provided theoretical context for the study by reviewing an extensive body of literature on the subject. The second chapter was

important, not only because it situated the object of the study (i.e. the AfCFTA) in the existing knowledge on international trade, and regional integration, but also because it provided the analytical model (i.e. the Analytical Law and Developmental Integration Model (ALDIM)) — that was used effectively in part two of the research. Chapter three of the study built on chapter two by focusing on the AfCFTA. It showed, using a historical lens, how the AfCFTA initiative compares to other attempts or programmes towards African development and how it is a much different expression of the concept of integration. The chapter also appraised the AfCFTA initiative and its legal text, recounting some of the factors that prompted its creation, and some risks and challenges projected to inhibit its objectives.

The second part of the study constituted chapters four to six which were dedicated to examining the case studies. While chapter four examined Nigeria and chapter five examined Kenya, chapter six did the same for Ethiopia. The case studies were analysed using the Analytical Law and Developmental Integration Model (ALDIM) model discussed in chapter two. The chapters discussed the extent and limits to which the AfCFTA could yield developmental outcomes in the three countries in the light of any factors that impact on their regulatory frameworks for trade. The empirical work conducted in the three countries was useful in presenting a close-up picture in this regard and the insights and observations drawn from this are summarised below.

7.2. Summary of research findings

The theoretical take off point for this study was the concept of development. In this regard, the study found the respective submissions of Sen and Adedeji to be better aligned to the aims sought to be achieved by the AfCFTA. Sen was of the view that development should reflect the progressive social, political, and economic change to the human condition, while Adedeji maintained a view of development as a complex, holistic and people-oriented process that encompasses social, cultural, political, environmental, and economic variables.[823] Against this notion, an important hypothesis in the study was that trade (and, by extension. regional integration) could be a vital tool for development. In chapter 2, the intellectual support for this hypothesis was distilled from the submissions of scholars like Adam Smith, David Ricardo, Jacob Viner, and Faizel Ismail, amongst others. Combining international trade, law and development and regional integration theories (to validate this

[823] Far ahead of its time, Adedeji's insights questioned the idea of conflating economic growth (and the easily quantifiable indicators of same) with the other the less-easily measurable (i.e. continuously evolving) process of development. See Asante op cit note 1 at 6; Simon op cit note 1 at 4.

premise) the study put forward the Analytical Law and Developmental Integration Model (ALDIM) which, inter alia, has submitted three useful points of inquiry (or impact parameters) for assessing the developmental potentials of regional integration initiatives such as the AfCFTA within the State Parties to them. These were the design of the regulatory environment for trade, the legal frameworks and institutions in place for the implementation of the development initiative and lastly measures to address constraints to productivity (supply-side constraints).[824]

In other words, the ALDIM submits that the developmental potential of an integration initiative in an African state, would be determined by the extent to which its regulatory environment for trade is designed for enabling development, the extent to which the legal frameworks and institutions for the implementation of the integration initiative (the trade governance processes) are present and endowed with the necessary capacity to make it efficient, and lastly the degree to which the factors that inhibit productivity are engaged with.

In the following section the findings on the country case studies along the lines of the ALDIM impact parameters are submitted. Theoretical linkages and contradictions in the case studies are reflected on thereafter.

7.2.1. Summary of findings on Nigeria

A) Design of regulatory environment for trade

Nigeria is one of the largest and most complex State Party actors in the single market created by the AfCFTA and thus many factors within its free-market capitalist economy shed light on how it operates. Four elements were found in the study to be most relevant for a developmental engagement with the AfCFTA. The first is its outlook on the concept of development; secondly, the history of its economy vis-à-vis its trade policy ideologies; third, the nature of its engagements with foreign trade and regional integration; and, lastly, a cluster of environmental variables which include economic profile, the demographic transitions in them, and inclusivity. Key insights from these indicators are summarised below.

First, Nigeria's outlook on development shows that it prioritises economic values (such as growth in GDP, national income, and income per capita) and does not adequately acknowledge the other variables (such as socio-cultural and political issues) that could

[824] See chapter 2 – where the ALDIM is developed by applying Lee's Analytical Law and Development Model (ALDM) to the economic integration space.

positively impact on the human condition of Nigerians. Secondly, an examination of its economic history shows the pernicious effects of crude oil in its trade governance process and the erosion of ideological clarity in it. Thirdly, Nigeria's foreign trade engagements reveal its experience with international trade institutions and the value it sees in Pan-African-driven collaboration. Lastly, environmental factors show that while its large economy and youth population position it amongst countries with high potential to experience growth due to the AfCFTA initiative, the fact that its formal economy provides disproportionately more opportunities to a few over the teeming majority of its population could undermine this potential for growth.

In summary, the study found the design of the regulatory environment for the AfCFTA to be advantaged by its size, dynamism, youthful population, experience with engaging in foreign trade and disadvantaged by factors such as the country's unprogressive outlook on development, the absence of a trade ideology and the absence of economic inclusivity.

B) Legal frameworks and institutions for trade governance and implementing the AfCFTA

One of the submissions made by the Analytical Law and Developmental Integration Model (ALDIM) is that to gainfully operationalise a development initiative, a state must endow its institutions with capacity, secure the buy-in of crucial stakeholders and be politically willing. Accordingly, the legal frameworks and institutions for trade governance in Nigeria were examined and there were three main findings in this regard.

First, before the AfCFTA process was launched, Nigeria had a wide array of laws and institutions for trade governance. Despite this, the country had no trade policy framework or a clear ideological leaning on trade issues. Trade policies were influenced by the performance of crude oil – its largest revenue earner. Secondly, the AfCFTA process prompted Nigeria to reform its trade governance architecture (endowing it with capacity), thus modernising it to be attuned to the AfCFTA and to be more beneficial for its development. In this regard, the reforms made were institutional and policy related. While the institutional reforms were aimed at creating and building on the institutional capacity for trade policy governance, the trade policy reforms were directed at bringing coherence into trade policies. Institutional reforms included the creation of the Nigerian Office for Trade Negotiation (NOTN) as well as a trade remedies mechanism which, before the AfCFTA, was non-existent. The trade policy reforms yielded a trade policy framework and a trade agreements repository. Thirdly,

the study found that thorough consultations were engaged in before Nigeria signed the AfCFTA. This led to one of the highest levels of stakeholder buy-in of any international agreement which the country had ever entered into. This also led to the creation of two structures for the institutionalisation of consultations: the National Committee on the African Continental Free Trade Agreement and the Enlarged National Focal Point on Trade (ENFP).

In summary, the evaluation of Nigeria's legal framework and institutions for trade governance showed the political willingness, implementation capacity, and stakeholder buy-in for engaging with the AfCFTA.

C) Supply-side constraints and development considerations

In the research, three prominent inhibitors of productivity in Nigeria namely, industrialisation, infrastructure and energy were analysed. First, in the context of industrialisation, the study found that Nigeria's manufacturing industry (due to years of an unhealthy dependence on crude oil) has been performing in terms disproportionate to the size of its economy. While Nigeria's policy response to this—the National Industrial Revolution Plan (NIRP) 2014 — seems to be exhaustive in attending to the issue, stakeholders expressed concerns that the industrial discipline needed for the implementation of the plan may be lacking. The NIRP prioritises the agribusiness and agro-allied industry, the construction and light manufacturing industry, oil and gas, and solid minerals and metals industry. Secondly, the study found Nigeria's infrastructural issues (i.e. another significant supply-side constraint) to be exacerbated by its poor maintenance culture. Further, while there exists a governmental policy response to its infrastructural challenges (i.e., the ambitious National Integrated Infrastructure Master Plan (NIIMP)), the policy remains undermined by its lack of implementation. However, it was submitted that the sheer existence of the NIMP represents a crucial step in addressing the infrastructural constraints that stand to undermine Nigeria's AfCFTA efforts. Lastly, the research revealed that of the three country case studies, Nigeria's energy infrastructure was in the most precarious condition. This was stated to be due to issues in the country's energy value chain. While the country revised its National Energy Policy in 2022 by introducing long-, mid- and short-term targets for revamping the electricity sector, implementation remains elusive.

7.2.2. Summary of findings on Kenya

A) Design of regulatory environment for trade

Like Nigeria, Kenya is one of the most influential actors in the AfCFTA single market. The study found the following themes in Kenya to be relevant in assessing the (developmental) design of its regulatory environment: its outlook on development, its trade policy ideology, its engagements with foreign and regional trade, and, lastly, environmental themes such as economic profile, demographic transitions in them and inclusivity. From these, the following insights were instructive and differentiated it from the other case studies.

First, Kenya has a more progressive development strategy than the other case studies, articulated in the Kenya Vision 2030 Policy, which prioritises economic and non-economic variables, thus escaping the criticism often directed at other development plans. The study found The Kenya Vision 2030 Policy document to be relatively more exhaustive in its framing of the variables that could enable its people to live much richer, meaningful, and higher qualitative lives than the others that limit same to economic values. Secondly, by tracing the evolution of Kenya's trade governance process and ideology, it was found that Kenya has been more pragmatic and intentional in its use of trade policy as an instrument of economic governance than the other case studies. This pragmatism (unlike the other case-studies) is embodied in its clearly articulated trade policy framework which explains the country's open-oriented trade ideology as well as its inclusive and principle-driven trade governance process. Thirdly, from a review of other environmental factors, the study showed that even though Kenya has a large economy (which was resilient even through the uncertainties precipitated by the COVID-19 pandemic), the inadequate management of its population changes could potentially be harmful. On the other hand, if properly managed, Kenya's population could be leveraged in driving industry/manufacturing, innovation and competition in the AfCFTA. Lastly, an examination of the Kenyan economy showed that even though the country is enthusiastic about regional trade (judging by its active participation in the East African Community) and boosting the African share of its total trade, its gains therein could be affected by the absence of inclusivity. This is because marginalised groups (such as MSMEs, women and the youth) that are crucial players in the Kenyan economy remain largely excluded.

In summary, these themes show that while the design of Kenya's regulatory environment for trade has the advantages of a more coherent and value-driven trade ideology, progressive

outlook on development, a relatively healthy economy and youthful population for innovation, and competition in the single market to be created in the AfCFTA, gains may be undermined by factors like the absence of economic inclusivity.

B) Legal frameworks and institutions for trade governance

As with Nigeria, the legal frameworks, and institutions for trade governance in Kenya were appraised against the notion that to gainfully operationalise a development initiative, a state must be politically willing, endow its institutions with capacity and secure the buy-in of its stakeholders. The following were findings in the regard.

First, Kenya has a more structured trade governance process than the other case studies. This governance process is shaped by a National Trade Policy that links back to its developmental framework — the Kenyan Vision 2030 blueprint — and in the spirit of which other trade-related laws and policies are made and implemented. Secondly, Kenya has entrenched a tradition of trade policy governance that is more inclusive (even though crucial groups are still economically marginalised), collaborative and participatory than the other case studies, through which stakeholders take ownership of regional trade initiatives. While the country has several institutions managing the exigencies of foreign trade, it coordinates the process through a National Trade Technical Committee (in the context of the AfCFTA, this was the National Implementation Committee (NIC)) within which civil society plays active roles. It was also noteworthy that Kenya's ratification of the AfCFTA was preceded by multiple consultative forums involving private sector and other civil society actors under umbrella associations. These included the Kenya Association of Manufacturers (KAM), the Kenya Private Sector Alliance (KEPSA), and the Kenya National Chamber of Commerce and Industry (KNCCI). Thirdly, although Kenya has a more institutional approach to trade remedies and defence than the other case studies, its trade remedies system is not fully operational. Lastly, it was found that Kenya's legal and institutional framework for trade governance could be disadvantaged by the absence of a financial plan for financing its AfCFTA strategy and for addressing adjustment, the fact that a trade remedies system is not yet in place, the absence of measures to address illicit trade practices, and the absence of adequate strategies for gender and youth mainstreaming.

In summary, the evaluation of Kenya's legal framework and institutions for trade governance showed that Kenya will manage the AfCFTA with more 'willingness' and intentionality.

More capacity is, however, required for managing issues like trade remedies, inclusivity in trade and illicit trade.

C) Supply-side Constraints and development considerations

Like Nigeria, the research examined three pressing productivity-related issues in Kenya: infrastructure deficit, absence of trade finance, and trade capacity. In the first instance it was found that the poor state of infrastructure in Kenya was amongst the most prominent impediments to the country's productivity quotient. For example, it was submitted that while up to 30 per cent of the cost of finished goods is attributable to high transport expenses, poor energy infrastructure (leading to frequent power disruptions) led to a 7 per cent loss of sales. Also noted however, was that Kenya responded decisively to these impediments with the establishment of a regional infrastructure development fund, the recalibration of its macro-economic policies to enable the allocation of more capital expenditure to infrastructure financing, and the utilisation of Public Private Partnerships. Secondly, the inaccessibility of trade financing was similarly highlighted as a prominent barrier to trade in Kenya, as was that of export finance and credit programmes. These were noted as sources of concern for exporters (and especially the excluded groups), in response to which the government of Kenya expressed commitment to encourage financial institutions to provide affordable financing and facilitate access to affordable finance for small and medium enterprise merchants through trade sector-specific credit guarantee programmes, amongst other passive commitments. Finally, trade capacity was noted to be inadequate and thus a barrier to export competitiveness. In this regard, the response of the Kenyan government to work with international and regional partners to undertake in-house and in-post organisation training to educate and capacitate key stakeholders in trade was appraised in the study.

In summary, it is submitted that while the measures to address its infrastructure deficit may be significant, its trade finance and human resource development responses seem passive. The AfCFTA single market will require a commensurate degree of definitive measures including meticulous attention to trade finance and capacity building of human resources for developmental outcomes to be yielded for Kenya.

7.2.3. Summary of findings on Ethiopia

A) Design of regulatory environment for trade

As with the other two case studies, factors relevant to understanding the terms under which Ethiopia is engaging in its first multilateral trade agreement — the AfCFTA— were examined. The elements that were found to be most relevant in this regard were its trade policy ideology, its engagement with foreign and regional trade, and relevant dynamics such as its economic growth trajectory. From this cluster of indicators, five insights which also differentiate it from the other two case studies were distilled and are summarised below.

The first is that Ethiopia's history and policy regimes (examined in three rubrics) shaped its economic system, outlook on development, and attitude toward foreign trade. The research found that one of the new ideas its Derg governance -period prompted (in the post-Derg or EPRDF dispensation) was a state-centred approach to economic governance. This made Ethiopia adopt a reserved outlook on trade. Secondly, Ethiopia's outlook on development is shaped by its developmental state model, in which the state has relatively more control over policies, and which prioritises economic values. Regarding the latter, Ethiopia's outlook on development shares more similarities to Nigeria than it does to Kenya in its disproportionate emphasis on economic variables (like economic growth) over other aspects of development that enable the enrichment of lives and 'expansion of human freedoms'. Thirdly, it was also found that Ethiopia has a more closed trade ideology and an inherent anti-market integration bias than the other case studies. This closed trade ideology is reflected in its limited engagement with foreign trade. Ethiopia is one of the few AfCFTA state parties that never ratified a regional trade agreement (pre-AfCFTA). The study found Ethiopia's participation in the IGAD and the COMESA RECs to be limited to a collaborative development of infrastructure projects. Fourthly the study found that Ethiopia's civil society continues to play a marginal role in its economic processes and, in the context of trade, plays a much more reserved role than in the other case studies. Lastly, despite its closed trade orientation, outlook on development and the reserved role of the private sector, Ethiopia has experienced higher levels of economic growth than the other case studies. This author acknowledges this to represent a slight contradiction to the theoretical notion that economic growth requires some level of foreign trade (as was advanced in Chapter 2).

In summary, these findings show that even though Ethiopia has maintained a healthy economy with unprecedented growth rates, its developmental gains from the AfCFTA could

be negatively impacted by its traditionally closed orientation and limited outlook on the concept of development. Ethiopia's emphasis on state control over more civil society collaboration could also affect the latter's (i.e. the private sector's) ability to engage meaningfully with the AfCFTA process.

B) Legal frameworks and institutions for trade governance

One of the submissions the ALDIM makes is that to operationalise a development initiative gainfully, a state must endow its institutions with capacity, secure the buy-in of crucial stakeholders and be politically willing. As with the other case studies, the legal frameworks and institutions for trade governance in Ethiopia was examined and there were five insightful findings;

First, a setting for trade governance in Ethiopia was found to be not as complex as the other case studies. This was due to its traditionally closed approach to foreign trade. Therefore, its attempt to create frameworks for trade governance (pre-AfCFTA) was shaped by its WTO accession process which had dragged on since 2003. Secondly, the absence of adequate legal and institutional frameworks for trade has left the country without clear terms of engagement with the AfCFTA. The country's most elaborate policy text for pragmatically engaging foreign trade is its development plan which vaguely states that its trade prioritises enabling market access for Ethiopian exports and improving its engagement with foreign and regional trade integration by the WTO accession and AfCFTA processes. Thirdly, it was established that while Ethiopia has a legal regime governing competition, other core institutions for trade governance are missing, including institutions for regulating unfair international trade practices like dumping, import surges and subsidisation. Fourthly, the country has taken reformative steps despite the deficit in legal and institutional trade governance mechanisms. For instance, its competition regime has been amended several times, and its excise and customs regime underwent reforms in 2014 to enable trade facilitation. Lastly, while there exists a relatively clearer institutional set-up for trade governance (in which trade objectives are set ministerially at the Ministry of Trade and Industry, coordinated using inter-ministerial arrangements and adhoc committees, and mediated through sector-specific intermediary and institutions), civil society plays a minor role. Although many reasons were given for this (such as the inadequacy of international commercial banking and financial services and the lack of capacity of private actors), what was actually found was a disinclination (on the part of the government of Ethiopia) to

institutionalise collaboration with private actors to be most recurrent in the literature in this regard.

In summary, the research found Ethiopia's trade architecture less adequate than that of the other case studies. The need for capacity-building specifically for trade policy governance cannot, therefore, be overemphasised.

C) Supply-side Constraints and development considerations

In this regard, the research examined two of the most pressing productivity related issues and measures to address them, these being, Ethiopia's use of industrial parks to address its productivity issues, and its electrification drive using the Grand Ethiopian Renaissance Dam (GERD). First, the research found Ethiopia's principle-driven approach to industrial parks creation to have the potential to boost productivity (for the AfCFTA) due to their strategic situation along economic corridors, proximity to vast labour pools, connectivity by trade infrastructure, and the fact that they benefit from governmental support. Secondly, it was noted that while (as in the other case studies) the absence of electricity infrastructure was a crucial impediment to productivity, Ethiopia was more proactive than the Kenya and Nigeria in resolving the issue. This, as is shown, was because the Homegrown Economic Reform Agenda (HGRA), the country's framework for development, sets out a robust energy plan that includes the GERD. The GERD is now under construction in Ethiopia's Upper Blue Nile (UBN) basin and is expected to be one of the continent's most significant hydroelectric projects. Notwithstanding this, the dam is still far from completion. In summary, Ethiopia was found to have more pragmatic responses to attending to the real constraints to productivity.

7.3. Linkages between the theories and findings in case studies

In appraising theoretical approaches to development, the study drew on theories of trade and regional integration. Below is a synopsis of the insights from the theories as reflected in the country case studies, summarised in three clusters.

First, one of the more important assumptions of free trade theory is the notion that foreign trade is more beneficial than it is detrimental. In this regard, several arguments were provided by theorists to the effect that there is no more efficient approach to economic growth than foreign trade. Adam Smith for example, while pushing back against the arbitrary, non-transparent and self-serving arguments proffered by mercantilists of his day

(see chapter two), submitted that free trade was especially beneficial because it would allow for the replacement of costly domestic production, and ensure that domestic resources could be redirected to cheaper and more productive uses.[825] Similarly, while David Ricardo submitted that free trade was advantageous because more welfare could be maximised through it, especially when countries traded along these lines of their comparative advantages, John Stuart Mill explained that that one of the most important gains from trade – is the tendency for an increased rate of human flourishing as well as the improvements in the human condition.

It was shown in chapter two how the reflections of Nobel laureate Paul Krugman stretched Mill's idea further. Krugman explains that free trade has some invisible appeals that include encouraging international migration (which represents a trade of labour for goods) and various forms of collaboration (including international borrowing and lending),[826] the facilitation of exchange of risky assets, and the diversification of wealth.[827] Also submitted was another invisible appeal of free trade which relates to the role of trade in modernising the state. In other words, trade encourages participating states to adopt modern laws, policies and business approaches that could be efficient and meaningful for socio-economic development.

The findings from the case studies reinforce this *modernising argument* by showing how the AfCFTA process prompted several reforms in them. Although reforms in reaction to the AfCFTA were more prominent in Nigeria and Kenya than in Ethiopia, it nonetheless validates the point. For instance, in addition to improving its entire trade governance architecture at the launch of the AfCFTA process, Nigeria (at the insistence of its manufacturing pressure groups) institutionalised consultations using the National Committee on the African Continental Free Trade Agreement and the Enlarged National Focal Point on Trade (ENFP). These institutions enabled Nigeria to undertake the most extensive consultations on an international issue in its history. Kenya, on the other hand, modernised its trade governance processes using the Trade Remedies Act 2017 (TRA) which, among other things, (for the first time) created a trade remedies framework (the Kenyan Trade Remedies Agency (KETRA). Even though reforms were not so prominent in Ethiopia (in response to the AfCFTA), country was found to have taken some reformative steps in response to its WTO ratification process (such as the modernisation of its excise and customs framework).

[825] Smith op cit note 58 at Book I ch. 3, Book 4 ch. 2 ch. 3.
[826] Krugman et al note 105 at ch 7, 32-33. See also Section 2.3 of this thesis.
[827] Ibid at ch 21,

Second, integration theories explain how the amalgamation of economic interests at varying levels could be useful for economic growth and development. The research inter alia submitted that studies on integration are usually considered against the backdrop of two things. Firstly, the transitions occurring in the liberalised trade network (i.e. from free trade area to a customs union, to a common market and to an economic union). Secondly, the economic impacts of the enlargement process of the liberalised trade network as new members are introduced.[828] This study considered integration against this second notion, examining the enlargement process precipitated by the AfCFTA – i.e. the most profound expression of the concept in Africa – to yield beneficial outcomes in the case studies.

Agreeing with African integration scholars, the study submitted that the development integration model is more relevant to the peculiar conditions in Africa and its efforts at answering its developmental questions by using the AfCFTA. This is because it is more cognisant of the real economic constraints to regional trade and development. A perspective of development integration that this study found to be appealing was 'developmental regionalism'. This is because the model reflects on some development-oriented themes relevant to increasing the developmental utility of regional trade. Developmental regionalism represents cooperation among countries in a broader range of areas than just trade and trade facilitation, including investment, research and development, as well as policies aimed at accelerating industrial development and infrastructure provisions, such as the building of better transportation networks.[829] On this background it appraised attempts within the case studies at reducing supply-side constraints that decelerated regional industrial development. The findings showed that although policy responses were proffered to these supply-side constraints, several issues impacted their implementation.

Lastly, both trade and regional integration theories highlight the positive correlation between the existence of adequate institutional and rules frameworks on one hand, and economic growth and development on the other. For instance, while Smith, in his seminal work, *An Inquiry into the Nature and Causes of the Wealth of Nations*, situates 'an appropriate framework of rules', as being important to ensure that trade is made with equality and justice and thus yields its intended results,[830] African development scholar, Carlos Lopes,

[828] Walz op cit note 113 at 3

[829] Ismail op cit note 21 at 19

[830] Smith op cit note 58 at Book I ch. 3, Book 4 ch. 2 ch. 3.

explains (thus reinforcing this proposition) that coherent policies and strategies are powerful tools for yielding development outcomes in the region.[831]

It is against this idea of the cruciality of institutions, that the institutional frameworks for implementing the AfCFTA in the case studies were considered. Findings have shown that Nigeria and Kenya appreciated the crucial role of institutions in managing the AfCFTA process for development more than did Ethiopia. While Nigeria moved to strengthen its capacity by introducing an institution to coherently manage its trade governance process, (this being the Nigerian Office for Trade Negotiations (NOTN)) led by seasoned WTO-proficient experts, Kenya introduced newer institutions for managing trade issues, such as the Kenya Trade Remedies Agency (KENTRA). No significant institutional change was, however, seen in Ethiopia's trade governance process. Without prejudicing the fact that Nigeria has attempted to build capacity, implementation may still be affected by other factors, such as the general lack of staff experience, and generally high levels of corruption in the civil service.

7.4. Policy recommendations

The research question had three dimensions, namely: to what extent is the African Continental Free Trade Area initiative designed for enabling development in African States? Secondly, in what ways should the legal and institutional frameworks of African countries be reconfigured to support the AfCFTA in a manner that advances their development? Thirdly, how can the AfCFTA Agreement be implemented to serve as an enabler of development while addressing the supply-side constraints and advancing the industrialisation of most African countries?

Regarding the first question, one of the things the study did was examine the extents to which a developmental focus was expressed in the AfCFTA initiative.[832] The AfCFTA initiative was therefore centered for analysis in chapter three. The study found strong development themes in the AfCFTA agreement. First, its text incorporates aspects of the AU's Agenda 2063 and prioritises the objectives of sustainable and inclusive social and economic development; second is its holistic connection of Africa's economic growth to the United

[831] Lopes op cit note 33 at 122, 65.

[832] In Chapter 3 (section 3.3.3.)

Nation's Sustainable Development Goals (SDGs); [833] and lastly, the inclusion of objectives like the need to promote industrial development through diversification and regional value chain development, agricultural development and food security, and structural transformation in the state parties, is also a positive tribute to its development focus. It is, however submitted in the study that a practical approach to effecting development within AfCFTA State Parties will have to be formulated.

The Analytical Law and Developmental Integration Model (ALDIM) was useful in providing answers for the second and third aspects of the research question relating to the requisite legal and institutional frameworks as well as supply-side constraints to be addressed for developmental outcomes from the AfCFTA. The findings and recommendations are presented in 7.2 and 7.4 respectively.

7.4.1. Recommendations for Nigeria: Positioning a major economy for an ambitious trade agreement

Five recommendations are proffered in the thesis in the light of the findings on Nigeria. The first of these is that Nigeria could benefit from a newer outlook on the concept of development and a clearer trade ideology. A look at the country's development plans (the Economic Recovery and Growth Plan (ERGP) and its successor, the Medium-Term National Development Plan) shows that Nigeria constructs its development plans around two economy-centred indicators, which are economic growth and transformation. This has set the tone for a rather inadequate acknowledgement of the other variables (i.e. socio-cultural, and political variables) that could equally impact the living conditions of Nigerians.

While economic growth and transformation have advantages (such as an increased national income), they can also lead to unintended consequences, such as higher inequality, an erosion of social cohesion, and environmental degradation all of which could impact on the wellbeing of society. On that note, it is recommended that the country undertakes a revaluation of its development priorities to include other equally important socio-cultural, environmental, and political variables.

Similarly, Nigeria's yield from trade could be positively impacted by a more coherent articulation of its foreign trade values, ideologies, and priorities. This could be stated in a trade policy framework which adequately affirms and reiterates the renewed outlook on

[833] See Article 3, Protocol on Trade in Services, African Continental Free Trade Agreement; See also African Union Commission *Agenda 2063: Framework Document: The Africa We* Want, available at *https://au.int/en/agenda2063/overview,* accessed on 16 July 2022.

development (as recommended above) stated in its development plans. While Nigeria has taken steps to create its first trade policy framework, the process has dragged on. It is recommended that the country expedite efforts in this regard.

Secondly, a prominent disadvantage inherent in the design of Nigeria's environment for trade is the absence of inclusivity. Interests commonly excluded include youth, workers in the informal economy, individuals with impairments, ethnic and linguistic minorities, and (most noteworthy) women. Nigeria's AfCFTA plan (like most of its economic plans) seems to ignore this issue. It is therefore recommended that increased attention be paid to ensuring that the complete talent pool in an economy (rather than just a part of it) is included. Nigeria's AfCFTA plan should therefore be modified to contain a part on inclusive trade.

Thirdly, in terms of Nigeria's legal and institutional framework for trade governance, even though the study noted the laudable reforms Nigeria undertook to its trade governance architecture, primarily due to the AfCFTA, the architecture could still benefit from some more capacity endowment and coordination. For instance, interviews with stakeholders revealed that the Trade Remedy Mechanism (TRM), newly created to safeguard against unfair and injurious trade practices, is not yet operational, and the legislation needed to empower it has not been passed. This needs to be expedited.

Similarly and fourthly, many institutions still manage different trade-related aspects of the country's economy. Although the creation of the NOTN has led to reasonably more harmony in how they operate, more efforts need to be made to facilitate collaboration among standard-setting bodies and domestic regulators, bolster synergy between federal, state, and local governments, and consolidate numerous regulators where relevant. Lastly, a very prominent weakness in Nigeria's economy is the weak nature of its infrastructure. While the country's National Integrated Infrastructure Master Plan (NIIMP) exists and sets out a shared vision for its infrastructure, it has still not been implemented.

Participants note that execution strategies have been poor, often creating avenues for funds earmarked for infrastructure to be misappropriated. Efforts must be put in place to expedite the implementation of this policy. In this regard, the mobilisation of capital for infrastructural projects with the most impact on trade cannot be overemphasised. A good example of this is transportation. Capital investments for the logistics and transportation sector (founded on the principles and values espoused in the NIIMP) will significantly increase Nigeria's yield from the AfCFTA.

7.4.2. Recommendations on Kenya: Situating Kenya for a more meaningful engagement with development through trade and regional integration

Kenya's relatively more coherent and democratic approach to trade policy governance and its progressive outlook on development situates it to make meaningful use of the AfCFTA, as has been shown in the study. However, its trade governance system could still benefit from the following recommendations:

First, even though Kenya's National Trade Policy recognises the importance of inclusivity, MSMEs, women and youth (who are crucial players in the Kenyan economy) remain primarily excluded from the economy. Despite their vital economic significance, they are challenged by an unfavourable regulatory environment, a lack of capital, inadequate infrastructure, instability, and a lack of productivity enabling data or information. They are also not adequately prioritised in the country's AfCFTA strategy. Some civil society stakeholders perceive that going forward. This could lead to imbalances in the distribution of the gains from trade.

It is recommended that Kenya's National AfCFTA strategy should be re-examined, and measures introduced to guarantee opportunities to capitalise on the plans' designated priority sectors and markets. Secondly, while the study found Kenya to have relatively more straightforward institutional means for managing the exigencies of the AfCFTA, its framework was noted to be lacking in some areas. An example is the operability of its trade defence or remedies institutions and mechanisms for tackling illicit trade. It is, therefore, recommended that the country expedite its measures to set up its trade remedies architecture and develop a concerted strategy for developing its capacity in this regard. In the context of illicit trade practices, it is recommended that Kenya updates its action plan on illicit trade to account to the AfCFTA (and the surge in illicit trade to be expected) by incorporating newer and more conducive mitigating measures.

Thirdly, Kenya's AfCFTA strategy will cast an onerous fiscal burden on it and, without a coherent financial plan, its institutions could poorly implement it. It is therefore recommended that a coherently designed financial plan be created, one which must account for the rationing of fiscal revenue to prepare for adjustment shocks imposed by the AfCFTA. Fourthly, gains from the AfCFTA will require more attention to trade finance and capacity development to yield developmental outcomes for Kenya. In the context of skills upgrading, the response of the Kenyan government of merely working with international and regional partners to undertake in-house and in-post organisation training to capacitate key

stakeholders in trade may not be tenable. It is thus recommended that an action plan be created that focuses on creating more financing for traders in the context of the AfCFTA and for capacity upgrading. The relevant skills needed includes trade negotiations, anti-dumping (and associated practices) investigations, customs management, quality and standards regulation.

7.4.3. Recommendations on Ethiopia: Trade as a new paradigm for sustaining economic growth

An important theme around Ethiopia was its relative inexperience with foreign trade. Despite this, the country (using its iteration of the developmental state economic model) has been able to experience steady economic growth. For sustaining this growth rate using the AfCFTA, the following recommendations are made.

First, as with Nigeria, Ethiopia could benefit from a more refined outlook on trade and development. In the context of trade, more steps to embrace openness may be helpful. In this regard, institutionalising an open trade ideology and creating a trade policy framework (TPF) in which ideals around liberalisation are espoused could foster more trade openness. In the context of development, the following is recommended: a shift in outlook to one that embraces aspects of the concept that facilitates liberty of action and the enrichment of lives and 'expansion of human freedoms' is recommended. While Ethiopia has experienced one of the highest growth rates in the world in the past decade, it is still one of the world's least developed countries (according to the United Nation's Human Development Index). Therefore, a change in its development thinking may be imperative to improve its development conditions. A practical way of driving this change could be by introducing newer priorities in its development plans, with a more substantial bearing on political and socio-cultural conditions.

Second, a finding made in the study relates to the minor role that Ethiopia's civil society plays in its trade governance architecture, even despite the government's ambition to transition to a private sector-driven growth model as stated in the country's development plan. In this regard, a reoccurring complaint by the civil society has been around the absence of the political will (by the government of Ethiopia) to institutionalise collaboration with private actors. Therefore, efforts must be made to alter the private-public collaboration paradigm.

Instead of treating collaboration as an afterthought (as was the case with its negotiation and signing of the AfCFTA), the Ethiopian government must do more to include civil society groups at all stages of the trade policy governance process. The study submits as untenable the 'weak leadership/low (private sector) capacity' excuse given by the government for the limited consultation with the civil society on trade issues. More efforts should instead be put in place to respond to the low civil society capacity with capacity building.

Third, a concern noted in relation to Ethiopia's trade architecture is the relative weakness of its institutions which has prompted an unhealthy tradition of reliance on international organisations, especially on issues like trade. Therefore, the need for institution-building specifically for trade policy implementation cannot be overemphasised, in addition to the formulation of a comprehensive trade strategy. Optimising the AfCFTA will require a coordinating approach that is entrenched. Furthermore, the practice of utilising ad hoc committees to coordinate trade policy (as is the tradition in Ethiopia),[834] may not be so helpful.

It is suggested that a cohesive coordinating mechanism for evaluating trade policy objectives and the performances of the institutions implementing them be created. This coordinating mechanism will have to be high-level and include the trade policy implementing ministries, parastatals, and civil society groups. It should also have a clear mandate and budget for consulting and sensitising the stakeholders about new trade agreements, trade policy directions, and the changes in the national development priorities. Finally, a noteworthy finding was the absence of adequate mechanisms for dealing with unfair trade practices like dumping, subsidisation, import surges and other welfare distorting practices by other foreign governments. The creation of such an important institution should be expedited. This defence mechanism will not only pave the way for developing technical capacity for enforcement actions against unfair trade practices but will also facilitate the engagement of the private sector in the trade policy formulation process.

7.5. Main contributions of the study

This thesis has four main contributions. First, it enriches the literature on multilateral trade in the global south by showing how it unfolds and the degree to which it changes the legal and regulatory systems therein. Secondly, it contributes a novel analytical framework that

[834] UNCTAD op cit note 1.

facilitates projections as to how regional integration initiatives could yield development outcomes in domestic settings in the context of African states. Thirdly, it provides strategically current insights into Africa's first whole-continent trade integration initiative by using comparative methods to contrast trade governance processes in three countries. Finally, through the case studies, the research findings reinforce the influence of trade as an agent for development, modernisation and the improvement of governance processes.

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Appendix

ANNEX A - PROFILE OF PARTICIPANTS FOR EMPIRICAL RESEARCH

S/N	ORGANISATION	ROLE/RELEVANCE
NIGERIA		
Government Affiliated Stakeholder		
1.	Nigerian Office for Trade Negotiations (NOTN) (Parastatal of the Nigerian Ministry for Industry Trade and Investment)	Deputy Chief Negotiator Co-convener of Sensitisation and consultati Exercises
2.	Nigerian Customs Authority (NCS)	Deputy Comptroller General of Customs

3.		Deputy Superintendent Of Customs/Strategic trade and customs policy Researcher
Civil Society Affiliated Stakeholders		
4.	Manufacturers Association of Nigeria (MAN)	Senior Research Economist – Research and policy Department
5		Research Economist - Research and policy Department
6.	National Association of Nigerian Traders (NANT)	Executive Committee member
7	Nigerian Private Sector Alliance (NIPSA)	Executive Committee member
8	Abuja Chambers of Commerce	Committee member/ Trade researcher

KENYANOTES		
Government Affiliated Stakeholder		
1.	Kenya Trade Network Agency (KTNA)	Director Trade Facilitation and Member National Trade Negotiation Committee
2.	Kenya Revenue Authority (KRA)	Manager, Trade Facilitation and Member National Trade Negotiation Committee
Civil Society Affiliated Stakeholder		
3.	Kenyan Association Of Manufacturing (KAM)	Manager, Kenyan Association of Manufacturers
4.	International Trade Centre (Kenya)	Lead researcher, AfCFTA Spokesperson, Former staff of EAC
5.	Mandeleo Group (Private Think Thank)	Chief Executive Officer/Former Staff AU

ETHIOPIA

Government Affiliated Stakeholder		
1.	Ethiopian Investment Agency	Policy Advisor (Rtd)
Civil Society Affiliated Stakeholder		
2.	Ethiopian Civil Society Organizations Forum	Executive Director
3.	Addis Ababa University School Of Law	Ethiopian, Trade, Customs And Economic Policy Expert

ANNEX B –INTERVIEW QUESTIONS FOR PUBLIC SERVICE AFFILIATED PARTICIPANTS

Introductory comment and ethical briefing by the interviewer

i. This interview will take about 60 minutes and it will be recorded.
   - Permission to record will be sought before the interview begins and you may decline to grant the interview or to be recorded if you do not feel comfortable with it.
   - If you choose to take part, you may stop at any time, or skip any questions you do not want to answer.
   - You may also go off the record with a comment if you want to and that information will not be used in the thesis.
   - No cost or payment is involved during or after the interview and no risk is envisaged.

ii. Information collected from this interview will be utilised confidentially and primarily for writing my thesis as described above.
   - You shall be kept anonymous in the research

- Your name and other personal identifiers shall be not be reflected in the thesis

iii. Furthermore, as the data collected may be useful for future research, audio recordings, transcripts and other documents obtained will be digitally stored on cloud storage (accessible only to me).

Interview questions (all case studies)

SET A: Introduction

i. What is the name of the institution that you work in?
ii. What are the aims and objectives of this institution?
iii. What are your views on the AfCFTA and its emergence at this time?
iv. In your view has the (name of country) government considered the costs and the benefits of the AfCFTA?

SET B: On consultations and sensitisation

i. Have there been broad sensitisations and consultations (i.e. with the different non-government stakeholders)? How are the sensitisation drives planned/how are they being conducted?
ii. Does (state country) have a regular/permanent consultation mechanism or institution for consultations with stakeholders on trade agreements?

SET C: On the legal frameworks and institutions

i. Which institution (or government department) governs trade policy formulation in (name of country)? And what are the key issues with how trade policy is implemented in (name of country)?
ii. What are the gaps in legislations that govern how trade policy is formulated and implemented in (name of country)?
iii. What are the gaps in the administrative rulemaking process of trade policy enforcement institutions ? (i.e. how transparent are they)
iv. What major reforms were made (legal or institutional) to prepare for the AfCFTA?
v. To what extent are the synergies between trade policy enforcement institutions maintained?
vi. What trade blocs/RECs are (name of country) a part of and how is the implementation of the AfCFTA affecting those RECs?
vii. Do you think there has been an expression of political will across the board? To what extent so?
viii. How does the (name of country) government frame compliance within the context of the AfCFTA?
ix. How equipped is the (name of country) government to activate and enforce decisions of the Dispute Settlement Body of the AfCFTA?

SET D: Adjustment and transition costs around the AfCFTA

i. Considering the scale and ambition of the Agreement on the one hand and the structure of the (name of country) economy on the other, how does the (name of country) government define or frame the issue of transition and adjustment costs (i.e.

the public and private costs to be incurred as a result of the reallocation of resources to suit the AfCFTA, including decreases in tariff revenues as well as unemployment, atrophy of skills and lower wages in certain economic sectors)?

ii. Does the (name of country)'s trade policy take into consideration Post-AfCFTA adjustment costs?

iii. What adjustment assistance programmes (or other domestic policy measures) are in place to mitigate the transition/adjustment costs around the AfCFTA?

SET E: Border control, unfair trade, anti-competitive practices and other specific issues

i. In your opinion, how efficient are the (name of country) customs and border institutions?

ii. In your opinion, how equipped is (name of country) to identify, monitor and react to trans-shipment?

iii. Considering the scale and ambition of the Agreement, does (name of country) have a trade remedies institution to protect from imports from more advanced competitors in other markets within the AfCFTA?

iv. What policy measures are in place to mitigate against the impact of dumping?

v. What are the policy measures put in place to mitigate against the impact of subsidies on the (name of country) market?

vi. Does (name of country) have competition laws in force (as well as an operational competition authority to enforce them) to mitigate against anti-competitive practices?

vii. If yes, is the competition authority sufficiently prepared to identify, monitor and react to the presence of cross-border anti-competitive practices?

SET F: Supply-side constraints and conclusion

i. What do you think will be (name of country) most pressing productivity and supply-side challenge (overall) to the optimisation of the opportunities that the AfCFTA presents?

ii. What are (name of country)'s key strengths or advantages in relation to optimising AfCFTA opportunities.

iii. Do you have any relevant policy documents, strategy/white papers, etc. which may in which I can find more insights or which substantiates the insights you have kindly shared?

iv. Final comments?

ANNEX C – INTERVIEW QUESTIONS FOR CIVIL SOCIETY/PRIVATE SECTOR PARTICIPANTS

Introductory comments and ethical briefing

i. This interview will take about 60 minutes and it will be recorded.
   - Permission to record will be sought before the interview begins and you may decline to grant the interview or to be recorded if you do not feel comfortable with it.
   - If you choose to take part, you may stop at any time, or skip any questions you do not want to answer.
   - You may also go off the record with a comment if you want to and that information will not be used in the thesis.
   - No cost or payment is involved during or after the interview and no risk is envisaged.

ii. Information collected from this interview will be utilised confidentially and primarily for writing my thesis as described above.

- You shall be kept anonymous in the research
- Your name and other personal identifiers shall be not be reflected in the thesis

iii. Furthermore, as the data collected may be useful for future research, audio recordings, transcripts and other documents obtained will be digitally stored on cloud storage (accessible only to me).

Interview questions (all case studies)

SET A: Introduction

i. What is the name of the CSO that you work for?
ii. What role do CSOs generally play in respect to International agreements in (name of country)?
iii. What role did your organisation play in engaging with the AfCFTA? (i.e. are you an interest group, a labour union, what sector do you belong etc?).
iv. What is the aggregate view of civil society in (name of country) on the AfCFTA and its emergence at this time?

SET B: On the legal frameworks and institutions

i. Which institution (or government department) governs trade policy formulation in (name of country)? And what are the key issues with how trade policy is implemented (name of country)?
ii. What are the gaps in the administrative rulemaking process of trade policy enforcement institutions ? (i.e. how transparent are they)
iii. What major reforms were made (legal or institutional) by the government to prepare for the AfCFTA?
iv. What Trade blocs/RECs is (name of country) a part of and how is the implementation of the AfCFTA affecting those RECs?
v. Do you think there has been an expression of political will across the board? To what extent so?
vi. Are there any political issues around CSO engagement with government (transparency, accountability, etc.)?
vii. In your opinion what are the gaps in the institutional frameworks that govern how trade policy is formulated and implemented in Ethiopia?
viii. Do you trust that the government's policy (on the AfCFTA) will benefit CSOs?
ix. What is the gap/problem with (name of country)'s strategy to optimise the gain and mitigate losses of the AfCFTA?
x. In your opinion what are the issues that are still yet to be considered in (name of country) implementation plan for the AfCFTA initiative?
xi. What issues/challenges/policy gaps do you think there are right now that may obstruct AfCFTA

SET C: Consultations and sensitisation and adjustment assistance

i. Have there been broad sensitisations and consultations (i.e. with the different non-government stakeholders)? How are the sensitisation drives being conducted?

ii. Does the (name of country) government have a regular/permanent consultation and sensitisation mechanism in place respect of its international agreements?
iii. In your view, has the (name of country) government considered the costs and the benefits of the AfCFTA?
iv. Do you know of any adjustment assistance measures in place (i.e. for the sectors that will be affected)?

SET D: Perceived challenges

i. What do you think will be the biggest challenge (overall) to the implementation of the AfCFTA by (name of country)?
ii. How concerned is civil society about technical risks (such as the risk of dumping, subsidies, unfair trade and other unfair trade practices)?
iii. What policy measures (in the private sector) are in place to mitigate against the impact of dumping, subsidies and other unfair trade practices?
iv. Does the (name of country) government have a trade remedies institution? What are the gaps around the design of Trade remedies FW?

SET E: Supply-side constraints and conclusion

i. What do you think will be (name of country) most pressing productivity and supply-side challenge (overall) to the optimisation of the opportunities that the AfCFTA presents?
ii. What are (name of country)'s key strengths or advantages in relation to optimising AfCFTA opportunities.
iii. What issues/challenges/policy gaps do you think there are right now that may obstruct AfCFTA in (name of country)?
iv. Do you have any relevant policy documents, strategy/white papers etc which may in which I can find more insights or which substantiates the insights you have kindly shared?
v. Final comments?

ANNEX D - COVER LETTER/REQUEST FOR INFORMATION

Dear _____

Greetings. My name is Yakubu Nagu and I am a student in the Department of Commercial Law at the University of Cape Town. I am doing this research for the purpose of attaining a PhD degree. I am researching into how the African Continental Free Trade Agreement (AfCFTA) can be implemented to enable development through trade liberalisation, while protecting participating countries from the risks of free trade. Specifically, the research examines the kinds of legal and institutional frameworks crucial for the gainful implementation of the AfCFTA.

You will recall that the agreement establishing the African Continental Free Trade Area (AfCFTA) was officially signed in March 2018 and became operational in July 2019. The AfCFTA Agreement which binds 54 of Africa's 55 states under a regime of trade liberalization is regarded as the most ambitious development agenda emanating from the continent. However, it is argued that the AfCFTA by only its design will not guarantee development. The AfCFTA is merely a means to an end and not an end in itself. If the opportunities presented by its free trade regime are not properly identified and taken advantage of by countries, the continent may remain in its condition of underdevelopment. This imposes the imperative for state parties to develop appropriate policies, regulations, laws and institutions for its implementation and for actualizing the AfCFTA's potentials.

Having read of your contributions in this area, from your years of experience in negotiating and engaging with it in Nigeria I realised it would be necessary to discuss these issues with you in an interview so that your expertise can feed into the research that would benefit the public at large.

This interview will take about 60 minutes and it will be recorded**.** Permission to record will be sought before the interview begins and you may decline to grant the interview or to be recorded if you do not feel comfortable with it. **If you choose to take part, you may stop at** any time, or skip any questions you do not want to answer. You may also go off the record with a comment if you want to and that information will not be used in the thesis. No cost or payment is involved during or after the interview and no risk is envisaged. However, if you would like to participate and you do not have access to internet connectivity, I am willing to pay for data costs. Also, your contribution shall be treated with the utmost confidentiality and any information mentioned in the interview which may compromise anonymity will be omitted from the thesis or any publication from it.

Information collected from this interview will be utilised primarily for writing my thesis as described above. Furthermore, as the data collected may be useful for future research, audio recordings, transcripts and other documents obtained will be digitally stored on cloud storage (accessible only to me); however, field notes will be shredded. Also, there is no direct benefit of this research to you, except that the results will be directed towards enabling policymakers to act in the interest of the public. There are no anticipated financial costs to you.

Should you agree to be interviewed by me, may I request that you please complete and sign the consent form below.

I look forward to being granted permission to interview you.

Thank you for your kind co-operation.

Yours Sincerely
Yakubu Nagu

+23408168995675
yakubunagu@gmail.com,
ngxyak001@myuct.ac.za

ANNEX E – CONSENT FORM

Name of researcher:

YAKUBU NAGU

Title of research project:

Implementing the African Continental Free Trade Agreement (AfCFTA): Policies, regulations, laws and institutions required for development.

By answering the questions put to me:

- I agree voluntarily to participate in this research project and I understand that I am not obligated to take part in this study.

- I have read this consent form and the information it contains and had the opportunity to ask questions about them.
- I agree with my responses being used for education and research on condition that my privacy is respected, and that my answers are used in a way that I cannot be personally identifiable.
- I understand that my identity will not be revealed.
- I understand that the interview will be recorded unless I indicate otherwise.
- I understand that I will not receive payment for my participation.
- I understand that this interview will not take more than an hour of my time.
- I understand that I have the right to withdraw from this project at any stage.
- I understand that data costs for internet connectivity may be made available to me if I wish.
- I understand that this research might be published in a research journal or book. Since this research is for a thesis, the document will be available to readers in a university library in printed form and in electronic form as well.

Name of Participant: _____

Signature of Participant: _____

Date: _____

_

The researcher must supply you with a **cover letter** which provides his / her contact details, outlines the nature of the research and how the information will be used and explains what your participation in the research involves (e.g. how long it will take, participants' roles and rights (including the right to skip questions or withdraw without penalty at any time), any anticipated risks/benefits which may arise as a result of participating, any costs or payment involved (even if none, these should be stated))

Has this been provided?	**YES**		**NO**	
Have your received verbal confirmation/explanations where needed?	**YES**		**NO**	

ANNEX F - ETHICAL CLEARANCE APPROVAL LETTER

Faculty of Law: Research Ethics Committee

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa
Room 6.29 ▪ Kramer Building ▪ Middle Campus
Tel: +27 021 650 3080 Fax: +27 021 650 5660
E-mail: lamize.viljoen@uct.ac.za Internet: www.law.uct.ac.za

Certificate of Approval for Ethical Clearance

PRINCIPAL INVESTIGATOR/SUPERVISOR: ADA ORDOR STUDENT: YAKUBU NAGU – **[NGXYAK001]** FACULTY: LAW DEPARTMENT: COMMERCIAL LAW	**ETHICS REFERENCE NUMBER: L0153-2020** ORIGINAL APPROVAL DATE: 05-NOVEMBER-2020 APPROVAL EXPIRY DATE: 04-NOVEMBER-2021

PROJECT TITLE: Implementing the African Continental Free Trade Agreement (AfCFTA): Policies, regulations, laws and institutions required for development.

PURPOSE OF RESEARCH: PhD Degree. The African Continental Free Trade Area (AfCFTA) initiative is the subject of this research. It is one of the flagship projects of the African Union's 'Agenda 2063'.

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications
To make any changes to the approved research procedures in your study, please submit a formal "Request for a Modification" to the REC Administrative Office. You must receive ethics approval before proceeding with your modified protocol.

Renewals
Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before the expiry date on your certificate. You are responsible for submitting this by at least 2 months prior to the expiry date of clearance date issued.

Project Closures
When you have completed all data collection activities and will have no further contact with participants, please formally notify the REC: Law as well as your supervisor where applicable.

Certification

This certifies that the University of Cape Town Law Faculty's Research Ethics Committee has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Cape Town Research Regulations Involving Human Participants.

Signed by candidate

Ms Dianne Jefthas
LAW REC: LEAD REVIEWER

Certificate Issued On: 09/11/2020