



FROM OAU TO AFCTA - ANALYSING THE PROSPECTS FOR ECONOMIC DEVELOPMENT IN AFRICA

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DECLARATION

Research Dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LL.M. in International Trade Law in approved courses and Minor Dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. in International Trade Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and this dissertation conforms to those regulations.

Signed by candidate

Yakubu Idisire Nagu

December 2018

DEDICATION

I dedicate this work to God Almighty, my family and the people truly striving for the economic development of Africa.

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ABSTRACT

On the 21st March 2018, leaders from across the African continent met at an extraordinary summit of the African Union (AU) in Kigali, Rwanda to sign a deal for the formation of an African continental free trade area (AfCFTA). This step is perhaps the biggest leap towards the age-long dream of cross-border economic integration on the African continent since the formation of the Organisation of African Unity (OAU) in 1963. With the continent's population expected to hit the two billion mark in 2050, it seems the pact could not have come at a better time.

Africa, the subject of the agreement, consists of fifty- five States which collectively, is a 1.2 billion people large market however possessing a joint GDP of only \$2.5 trillion dollars. If negotiations are concluded, the African continent would have succeeded in the creation of the largest free trade area since the Marrakesh agreement which led to the WTO governed multilateral trading system. Today the top trading partners of African Union member States are non-African countries. Only twenty per cent of Africa's total trade is with its continental neighbours, whereas an estimated eighty per cent of its trade is with other trading partners across the world. The African continental free trade initiative aims to shift the trade paradigm in this regard, in a way that will increase the region's share of its internal trade and consequently lead to growth and development.

It is against this background that this work assesses the prospects of the new African Continental Free Trade Area (AfCFTA) towards meeting the goal of continental development. This research argues that the development integration approach is the most suitable option for the attainment of the ambitious goals of the initiative. In particular, the work explores the ways in which the new AfCFTA can manage the asymmetrical developmental needs of various African States. The research also assesses the dispute settlement mechanisms which are necessary to resolve friction which may arise as deeper levels of integration are attained.

ABBREVIATIONS

ADB	African Development Bank
AEC	African Economic Commission
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
ATPC	African Trade Policy Centre
AU	African Union
AUA	African Union Assembly
CEMAC	<i>Communauté Économique et Monétaire d'Afrique Centrale</i>
CFTA-NF	Continental Free Trade Area Negotiating Forum
CTF	Continental Task Force
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSP	Dispute Settlement Protocol
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECA	Economic Community for Africa
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community of West African States
EU-ACP	European Union - African, Caribbean and Pacific
LDCs	Least Developed Countries
LPA	Lagos Plan of action
NAI	New Africa Initiatives
OAU	Organisation of African Unity
REC	Regional Economic communities
SADC	Southern African Development Community
STO	Senior Trade Officials

UEMOA	<i>Union Économique et Monétaire de l'Afrique de l'Quest</i>
UNCTAD	United Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WIDER	World institute for Development and Economic research
WTO	World Trade Organisation
WWII	World War Two – Second World War

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CHAPTER 1:

INTRODUCTION

"Our peoples, our business community and our youth, in particular, cannot wait any longer to see the lifting of the barriers that divide our continent, hinder its economic takeoff and perpetuate misery, even though Africa is abundantly endowed with wealth,"¹

- AU Commission Chair Moussa Faki Mahamat.

On the 21st March 2018, leaders from across the African continent met at an extraordinary summit of the African Union (AU) in Kigali, Rwanda to sign a deal for the formation of an African continental free trade area.² This step is perhaps the biggest leap towards the age-long dream of cross-border economic integration on the African continent since the formation of the Organisation of African Unity (OAU) in 1963. With the continent's population expected to hit the two billion mark in 2050,³ it seems the pact could not have come at a better time.

Negotiations leading up to the historic signing of the agreement on the African continental free trade area, were launched officially on the 15th of June, 2015 at the 25th ordinary summit of heads of States and governments held in Johannesburg, South Africa,⁴ and commenced with ambitious aspirations. The aspirations included inclusive growth and sustainable development, integration on a scale that will be expressive of pan-Africanist ideals and visions of an African renaissance, as well as the hope of increasing the continent's intra-African trade levels from less than twenty percent today to above fifty percent by the year 2063.⁵

¹ Aljazeera 'African leaders sign continental free-trade agreement' available at <https://www.aljazeera.com/news/2018/03/african-leaders-sign-continental-free-trade-agreement-180320180017027.html>, accessed on 31 March 2018.

² Representatives of 44 of the 55 African Union (AU) member states attended the events. Notably absent was the Nigerian president, Muhammadu Buhari, who stated that Nigeria had chosen to abstain because it needed more time for 'broader consultations.

³ UNECA '*African Continental Free trade Area. Question & Answers*' (2018) available at <https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers> accessed on 25 May 2018.

⁴ Trade Law Centre '*African Continental Free trade Area (AfCFTA). FAQs. Question & Answers*' (2018) 1 available at <https://www.tralac.org/documents/resources/faqs/2019-african-continental-free-trade-area-faqs-june-2018-1/file.html> accessed on 25 May 2018.

⁵ Brendan Vickers, '*Handbook on Regional Integration in Africa- Towards Agenda 2063*' (2017). See also Nwaodu Okechukwu & Ijeoma Chikata, '*The African Union Continental Free Trade Area: Challenges and Prospects*' (2018) International Journal of Sustainable Development Research. 4(2) 36-43.

Africa, the subject of the agreement, consists of fifty- five States which collectively, is a 1.2 billion people large market possessing a joint GDP of \$2.5 trillion dollars. If negotiations are concluded, the African continent would have succeeded in the creation of the largest free trade area since the Marrakesh agreement which led to the WTO governed multilateral trading system.⁶ Today the top trading partners of African Union member States are non-African countries.⁷ Only twenty per cent of Africa's total trade is with its continental neighbours, whereas an estimated eighty per cent of its trade is with other trading partners across the world. A survey of the trade indices of Africa's largest economies, Nigeria and South Africa, reflects similar statistics. In 2017, about \$35 billion worth of Nigeria's exports and \$20 billion of its imports were to and from non-African countries respectively, accounting for about 87.9 % of its total trade.⁸ In the case of South Africa, about \$65 billion of its export trade and \$74.5 billion of its imports, were to and from non-African countries accounting for about 89.7% its imports and 73.7% of its export trade. These skewed indices which have persisted over time raises concerns about whether Africa has done enough trade-wise to raise itself from the abyss of under-development.⁹

The African continental free trade initiative aims to shift the trade paradigm in this regard, in a way that will increase the region's share of its internal trade and consequently lead to even growth and development. In an expression of this objective, the initiative contains *inter alia*, a framework for the reduction of tariff barriers to trade on ninety per cent of goods, followed by the other ten per cent dubbed as 'sensitive goods'¹⁰ It also contains commitments towards the liberalisation of trade in services, as well as the free movement of people. ¹¹ It is therefore not surprising that the agreement is regarded as the single most ambitious expression of Africa's attempt at actualising

⁶ The Marrakesh agreement was instrumental to the formation of the WTO in 1995.

⁷ World Integrated Trade Solutions 'Sub-Saharan Africa Trade at Glance: Most Recent Values' available at <https://wits.worldbank.org/CountrySnapshot/en/SSF/textview> accessed 1 April 2018.

⁸ International Monetary Fund 'World Economic Outlook Database (GDP based on Purchasing Power Parity)' available at <https://wits.worldbank.org/CountrySnapshot/en/SSF/textview> accessed on 19 April 2018.

⁹ Ibid. Without prejudice to the fact that the statistics are an improvement on the intra-African trade relations which existed about a decade ago, it still leaves much to be desired.

¹⁰ United Nations Conference on Trade and Development 'Modalities for tariff negotiations towards a Continental Free trade Area some key issues for consideration' available at https://unctad.org/en/PublicationsLibrary/ditc2015misc3_en.pdf accessed on 18 July 2018.

¹¹ Mkandawire Thandika, 'African Intellectuals. Rethinking Politics, Language, Gender and Development' ed (2005).

the aspirations of its pan-African ‘heroes past’ in terms of unity and integration.¹²

It is against this background that this work assesses the prospects of the African Continental Free Trade Area (AfCFTA) towards meeting the goal of continental development. This research argues that the development integration approach is the most suitable option for the attainment of the ambitious goals of the initiative. In particular, the work explores the ways in which the AfCFTA can manage the asymmetrical developmental needs of various African States. The research also assesses the dispute settlement mechanisms which are necessary to resolve friction which may arise as deeper levels of integration are attained.

1.1. Research question

In the light of the above mentioned issues, the research question therefore is: what lessons can be drawn from the regional integration efforts in Africa for further negotiations and success of the African Continental Free Trade Area (AfCFTA)?

1.2 Objectives of the study

Against the backdrop of the central theme of this research, the aims of this study are four-fold. First, the study aims to examine the theory of regional integration generally, as well as its models and approaches which are significant to this study. Secondly, the study also evaluates the historical context behind the current integration efforts in Africa. It is envisaged, that it will aid a better appreciation of the central theme of this dissertation and its significance for the continent. Thirdly, aspects of the legal and institutional framework for the AfCFTA are examined.

Finally, the dispute settlement system created by the AfCFTA is evaluated against the backdrop of the dispute settlement experience of regional Courts in Africa. In this regard, an assessment is made of the compliance and enforcement preparedness of the AfCFTA dispute settlement system.

¹² Faizel Ismail, *‘Transformative industrialization and trade in the context of the CFTA: opportunities and challenges* (2018) 7.

1.3 Structure of Research and Research Methodology

The research employs a doctrinal methodology consisting of an examination of primary and secondary sources. While the primary sources include case law, treaties and official documents of key institutions and stakeholders involved in the process, the secondary sources comprise of books, journals, newspaper articles, conference papers, working papers and relevant internet sources.

This research is structured into five chapters as follows:

Chapter one provides a theoretical framework for the discourse. In it, the introduction to and background of the discourse is set out. The aim of the first chapter is to establish the foundation for the study by discussing the concept of regional integration. In this regard, the chapter considers the general theories and models of regional integration.

Chapter two embarks on a historical assessment of Africa's efforts on regional integration. This assessment is made against the backdrop of a theoretical categorization of the approaches to African integration, as well as the various frameworks for integration from the 1980s and 1990s. The integration initiatives of the new millennium, which was marked significantly by the formation of the African Union, is examined here especially within the context of specific initiatives that are significant to the central discourse of this study.

While chapter three delves into the crux of this dissertation the African Continental Free Trade Area, and considers its imperatives, projected gains for the continent as well as the legal and institutional framework in place for it, chapter four discusses the dispute settlement system under the AfCFTA. Chapter four is key because disputes are bound to arise in the free trade area and if improperly managed may prove to be fatal to the initiative. This chapter also provides insight into the pervasive issue of compliance and enforcement of regional economic communities, which could easily compromise the efficient management of disputes which arises between actors under the AfCFTA.

Finally, chapter five summarizes the entire research and makes recommendations.

1.4 Regional Integration: A Conceptual and theoretical analysis

The March 2018 Rwanda agreement which launched the continental free trade area marks a very significant step as far as African integration is concerned. It has consequently generated a myriad of discussions on the concept across many sectors including labour, business and among scholars and researchers. From Cape Town to Cairo, and Lagos to Nairobi, and to other parts of the African continent, Africans are questioning the underlying idea behind the Continental Free Trade Agreement. This segment discusses the theories of regional integration within which the concept of a free trade area is located.

Over the years, the concept of regional integration has lent itself to multi-disciplinary research. Most of the research points to the politics of international diplomacy post World War II as the historical roots of integration as a concept in its modern context.¹³ Some scholars argue for integration to be understood as an expression of the dynamics of the international political relationships between States.¹⁴ Fagbayibo, explains that this phenomenon was especially prompted by the realisation amongst States that certain domestic functions (as well as objectives) are transcendental and too multifaceted to be handled by them alone, therefore lending credence to a governance framework which involved the need for strategic partnerships with non-State actors.¹⁵

It must be stated, that integration is a process which varies in scope and application. A leading authority on international relations theory regarded as the founder of neo-functionalism, Ernst B Haas, defines integration as “the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national States. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones.”¹⁶ This definition focuses on the political angle to integration, which involves conscious political steps taken by decision-making institutions in a State, leading to a

¹³ Nam-Kook Kim, ‘Globalization and Regional Integration in Europe and Asia’ (2009). See also Paolo Giordano & Robert Devlin, ‘Regional Integration’ (2012). Haas Ernst, *The study of regional integration: Reflections on the joy and anguish of pretheorising*. (1970) 610.

¹⁴ Peter Hay, *Federalism and supranational organisation: Patterns of new legal structure*’ (1966) 1-2.

¹⁵ Biodun O Fagbayibo, ‘A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union’ (unpublished PhD thesis, University of Pretoria, 2010) 16.

¹⁶ Ernst B Haas, *The uniting of Europe: Political, social and economic forces*’ (1958) 15-16

functional shift in loyalties as well as expectations towards a new supranational entity, ultimately birthing a new political community.

From an economics point of view, British economist and pioneer of the new economic geography, Anthony Venables, explains that integration ‘occurs when countries come together to form free trade areas or customs union, offering members preferential trade access to each other’s markets’.¹⁷ His definition focuses on market access and trade as the main intentions of integration. A key aim of regional integration is the provision of economic gains such as job creation and economies of scale for States.

From a legal point of view, integration is first a product of law before it is anything else.¹⁸ Legal scholars in trying to contextualise the concept of integration, conclude that it involves a continuous progression of treaties and agreements, spelling out rights as well as obligations, and binding nation States to commitments intended to be beneficial to all of them. The legal framework for regional integration is more centred on the efficacy of treaty provisions and their implications for States who accede to them. It also focuses on the status of regional bodies under international law and the legal effects of laws they produce.¹⁹

According to Cantori & Spiegel, integration involves political unification predicated by similarities and complementarities between the parties involved.²⁰ This definition presupposes an element of sameness in tradition, economic ideology and political goals.²¹ This is largely true of the attempts at integration in most areas of the world. From the African experience, similarities in tradition, economic ideology, political goals and geography have played major roles in regional decisions to integrate. Sam Asante defines the process as one in which two or more countries in a particular area voluntarily unite to pursue common objectives in matters of general economic

¹⁷ Anthony Venables, ‘*International trade: Regional economic integration*’ (2000) *International Encyclopaedia of Social and Behavioural Sciences* (2000) 1.

¹⁸ Joseph Weiler, ‘*The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration*’. eds (1999) 221.

¹⁹ Ibid.

²⁰ Louis Cantori, & Steven Spiegel, ‘*The international politics of regions – A comparative approach*’ (1970) 10-11.

²¹ Fagbayibo op cit note 5 at 18

development or in a particular economic field of common interests to the mutual advantage of all the participating States.²²

The above-mentioned definitions of integration show that it is not one without technicalities. It can be described as a multi-layered process, which could become very complicated by political, legal, economic and even cultural concerns, as it attempts to reach its unique objective in a particular region, especially if not properly understood within that context. It is therefore imperative to not consider integration as a ‘big-bang’ occurrence, but rather as a process which happens gradually over a length of time, an approach which must take cognizance of the political, legal, economic and the cultural peculiarities of the parties involved.²³

At this point, it is important to draw a distinction between regional integration and regional cooperation. Regional cooperation “is a collaborative venture between two or more partners, with common interests in a given issue.”²⁴ Regional cooperation is often a precursor to regional integration. *Haarlow* provides insightful examples on the kinds of ventures which may be considered as areas of cooperation, such as, the execution of joint projects, technical sector cooperation, common running of services and policy harmonization, joint development of common natural resources, joint stand towards the rest of the world and joint promotion of production.²⁵ *Schmitter* argues that States find it more tactful to engage first in cooperation, in order to build up mutual trust among elites and sufficient interdependencies among broader publics, before plunging into the much riskier (and potentially rewarding) business of integration.²⁶ This insight is reflected in the next chapter of this research which shows that African States were inclined to cooperate first to deal with the intricate dynamics of the post-independence tsunami of Statehood before considering the integration option. It should be noted that these areas of cooperation stated above are by no means exhaustive but provide broad examples of areas of collaboration.

²² Sam K.B. Asante, ‘*Regionalism and Africa’s Development: Expectations, Reality, and Challenges*’ (1997) 20.

²³ Fagbayibo op cit note 5 at 19

²⁴ Naceur Bourenane, ‘*Theoretic and Strategic Approaches*’ in Réal Lavergne (ed) *Regional Integration and Cooperation in West Africa: A Multidimensional Perspective* (1997) 50-51. See also Margaret Lee ‘*Regionalism in Africa: A part of problem or a part of Solution*’ (2002) 9 *Polis / R.C.S.P. / C.P.S.R.* 3.

²⁵ Jens Haarlow, ‘*Regional Cooperation and Integration within Industry and Trade in Southern Africa: General Approaches, SADCC and the World Bank*’ 1997 Aldershot: Avebury 16. In; Lee op cit note 21 at 4

²⁶ Philippe C Schmitter, ‘*Regional Cooperation and Region Integration: Concepts, Measurements and a bit of Theory*’ (2007) 8.

1.5 Theories of Regional integration

The concept of integration has found appeal in virtually all areas of the world. Since the end of the Second World War, the international community has continuously witnessed an increase (often described as a proliferation) in attempts at integration. This trend especially increased after the Marrakesh agreement (which preceded and formed the WTO), came in to force. Today, the WTO has recorded about 449 attempts at integration post 1994, marking therefore, an exponential increase in the number of attempts at integration.²⁷ The various experiments at integration across the world have consequently provided avenues for increased multidisciplinary research. Theorists from various disciplines have therefore made attempts at propounding various theories on it based on their perceptions of its formation and effects as well as how its practice has evolved around the world, but especially in Europe. The next segment discusses theories from the fields of international relations, political science, law and economics.

1.5.1 Political and International Relations theories on integration:

The political theories on integration could be analysed across two broad spectra. The first being within the context of supra-nationalism which argues for the assignment of sovereignty to a transnational entity, devoid of the frailties, imperfections and limitations of nation States.^{28,29} The second spectrum for the analysis of integration within the context of politics and international relations is the State-centric or intergovernmental school of thought. This school argues that notwithstanding the development of transnational or supra-national entities, a nation State will remain dominant and relevant to the decision making on global affairs.³⁰

The functionalist perspective is another specific school on integration which, has leanings to politics and international relations. It falls under the broad theory of supra-nationalism which arose against the backdrop of the disastrous impact of World War I and II. Functionalism advocates for the creation of specialized technocratic institutions through integration which will take charge of the transnational socio-economic and public welfare issues of the society.³¹ This theory predicts

²⁷ Olasupo Owoeye, 'Regionalism and WTO Multilateralism: The Case for an African Continental Free Trade Area' (2016) Kluwer Law International 1085-1109.

²⁸ This theory questions the idea behind statehood in the wake of the deadliest wars in the history of humanity, World War 1 and 2, and the utter failure of the nation State to prevent the near annihilation of humanity.

²⁹ Fagbayibo op cit note 13 at 75

³⁰ Henry G. Schermers & Niels M. Blokker, 'International institutional law: Unity within diversity' 3 ed (1995) 40.

³¹ David Mitrany, 'The Functional theory of politics' (1975) 126.

that in the aftermath of the creation of this technocratic body will come attitudinal changes marked by a shift in loyalties from nation States to the bodies created. A key proponent of this school is political theorist, David Mitrany, who argued that the functional and technocratic agencies will be different from the normal international organisations in the sense that they will be detached and unaffiliated from individual nation States and have autonomous tasks and powers.³² The functionalist theory is however criticized for lacking an empirical basis and ignoring the highly political nature of international relations.

Reacting to the shortcomings of the functionalist school of thought is yet another political science-based theory of integration known as neo-functionalism. It also falls under the broad theory of supra-nationalism and it construes integration as a complex process in which a technocratic agency with autonomy attends to socioeconomic issues of nation-States.³³ A key feature of the theory is the concept of ‘spill over’, a situation where integration in an economic sector leads to further integration in other sectors, depending on the perceived successes in the management of the former. The theory predicts that continuous spill over will result in full integration in all sectors.³⁴ Notwithstanding the difference between this theory and the functionalist school, it is similar to it in that it is receptive of the notion of supra-national entities as the drivers of further integration rather than nation States.

Also within the context of politics and international relations, some other theories on integration are the realist and neo-realist perspective and also the liberal and neo-liberal perspective. The realist perspective explains integration within the context of the sheer will of States to continue to survive in a chaotic and anarchic world. It is argued that the will to survive, prompts States to collaborate with each other on the basis of their comparative advantages. Unlike the previously considered theories, nation-States rather than supra-national bodies are the principal actors within this scheme of integration.³⁵ The neo-realists on the other hand, argue that the international system should be seen as a structure, composed of units (States) with functional similarities but with varied

³² David Mitrany, *‘A working peace system’* (1966) 25-99.

³³ Ben Rosamond, *‘Theories of European integration.’* (2000) 51-52.

³⁴ Ibid.

³⁵ Geoffrey Godwin, *‘The erosion of external sovereignty? Government and Opposition.’* (1974) 63-64.

capabilities.³⁶ It argues that States can only maximise their possibilities of survival by cooperating.³⁷

1.5.2 The Legal theory on integration:

While the political approaches and theories focus on the socio-economic aims of integration, the legal theories focus on the means. Weiler, aptly notes that legal theorists assess the step by step implications of integration to member States.³⁸ To legal theorists, integration is first a function of law and therefore, rather than focus on assumptions in the analysis of integration, it is imperative to focus on the ‘continuous progress of integration’ itself, which is spelled out by laws, agreements or treaties.³⁹ Legal treaties are key in every integration process. This is because it spells out the limits, rights and the extent of the liabilities of nation States. These treaties establish clearly the levels of commitment of states to the integration process and legal theorists argue that integration cannot be understood outside this context.

A significant concept under the legal school of integration is the concept of ‘conservatory principles’ which aims at creating a dividing line between the powers of nation states and those of transnational organisations in an integration process. Also, it aims at preserving the position of a State as the primary structure of the integration process from which the transnational organisation derives its legitimacy, in a manner which prevents the submersion of interests of the State to the goals of the integration process which ideally should be secondary. In other words, it emphasises the protection of core national interests.⁴⁰

1.5.3 The Economic theory on integration:

Economic theorists examine integration within the context of trade liberalizations and expansion. Here, integration is a key tool in fostering trade, reducing inequalities and promoting economic development. Within the economic context, integration is propagated via trade liberalization which is anchored on the economic theory of comparative advantage.

³⁶ Kenneth Waltz, ‘Theories of international politics.’ (1979) 23-45.

³⁷ Fagbayibo op cit at 29

³⁸ Joseph Weiler, ‘The community system: The dual character of supra-nationalism’. (1981) 1 Yearbook of European Law 270.

³⁹ Ibid.

⁴⁰ Koenraad Lenaerts & Piet Van Nuffel, ‘Constitutional law of the European Union’ (2004) 100-1.

The theory of comparative advantage was developed by a 17th-century classical economist David Ricardo in an attempt at understanding the dynamics of trade relations between countries.³⁸ The theory of comparative advantage argues that a country would be better off, focusing its resources in the production (for trade purposes) of the commodity in which it is more efficient in (or in which there is a greater opportunity cost).⁴¹ This will lead to specialization, maximized outputs and promote mutually profitable division of labor (which greatly enhances the potential of a real national product for all nations) and poverty alleviation. The theory has however been criticized as a vastly exaggerated elitist scam, which attempts to dismiss the damning distributional effects of trade liberalization.⁴²

In the study of integration, economic theorists employ different approaches. The next phase of this chapter shall now consider the different economic models to integration.

1.6 Models of Regional integration

While the most patronised economic model of integration is the market integration model, other models exist. In practice, it has been observed that some overlap occurs between the different models,⁴³ however this dissertation will focus on the economic models which are market integration, neo-functional integration and development integration.

1.6.1 Market Integration Model:

Also known as the customs union theory,⁴⁴ especially as seen in the early literature on the concept, the market integration model envisages a linear process of trade barrier elimination from the free trade area to the deepest levels of political union.⁴⁵ Commenting on this theory, Gibbs notes that it has the feature of being deterministically linear, and representative of a progression of increasingly more complex integrative steps towards full economic and political union.⁴⁶

⁴¹ William J. Baumol and Alan S, 'Blinder *Economics: Principles and Policy*' 11 ed (2009) 50

⁴² Paul Krugman, 'Bad Free Trade Arguments' available at www.krugman.blogs.nytimes.com/2016/03/09/a-protectionist-moment/, accessed on 10 May 2018

⁴³ T Ostergaard, 'Classical Models of Regional Integration: What relevance for Southern Africa?' (1993) 30.

⁴⁴ Ibid.

⁴⁵ 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(5) IJEMSS 133-155

⁴⁶ Richard Gibb, 'Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality' (2009) 30 Third World Quarterly 701-721.

Neo-classical international trade economist, Jacob Viner, is known as the father of the market integration theory and therefore developed it within the context of welfare or trade-creating effects. Viner argued that a linear approach to integration would be more trade creating than trade diverting and will result in significant welfare gains and therefore is a desirable integration model. It has been explained that trade creation results from the replacement of high cost domestic production by a lower cost option from another member, thereby entailing economic expansion of one-member (the lower-cost) country's industry at the expense of the other (the higher cost). Trade diversion on the other hand, represented a reduction in a region's external trade due to the diversion of a county's demand from the rest of the world.⁴⁷

Viner's linear and sequential approach was significantly expanded by the Balassa conventional analysis of economic integration and explained to occur in stages as states contemplate and then commit to progressively higher and more complex levels of integration.⁴⁸ Under this model, a trade advantageous integration approach is prescribed through a series of incremental steps, with each step or stage demanding a deeper level of commitment from the states in the integration process. 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, an economic union and ultimately to the creation of a political union.

Despite the fact that this model found intellectual appeal amongst many European economic scholars, it has also drawn a lot of criticisms in its applications in developing countries. On one end, Pascal Lamy, former WTO head, notes that the 'Viner approach' ignores the diversity in the economic landscape of the various regions of the world,⁴⁹ and Davis criticises the theory as being largely inadequate to attend to the demands of the African economic climate in all its peculiarities.⁵⁰ It is also argued that the various attempts at integration in Africa which follow the market integration approach have failed because they are underpinned by a desperate attempt to prioritise economic objectives whilst ignoring the non-economic State-centric objectives. Also the model is

⁴⁷ Ostergaard op cit at 34.

⁴⁸ Ibid.

⁴⁹ Pascal Lamy, '*Regional Integration in Africa: ambitions and vicissitudes*' in Ismail op cit at 35

⁵⁰ Davies R, '*Promoting Regional Integration in Africa: An Analyses of Prospects and Problems from a South African Perspective*' in Ismail op cit at 35.

undermined by its inability to recognise the individuality of the states involved.⁵¹ In place of this model, economic pundits advocate for the development integration model which is considered below.

1.6.2 Development Integration Model:

The development integration model emphasises the imperatives for both macro and micro co-ordination in a multi-sectoral programme which encapsulates production, infrastructure and trade.⁵² The model represents an interim shift in focus by economic theorists from a model concentrated on only trade and its barriers to one centred on production capacity, planning and cooperation for the propagation of development. The model arose in reaction to the inadequacies of the market integration approach and emerged as an integration strategy alternative, which took more cognizance of the peculiarities of the developing world. This model recognises the low level of industrialization in developing regions of the world and consequently, emphasises how to invigorate or catalyse the industrial capacity of those regions rather than focus on the efficient maximization of the existing poor capacity.⁵³

Development integration is characterised by the conscious intervention, by the regional partners to promote cooperation and interdependence by ensuring the equitable distribution of the gains of integration, using compensatory and corrective mechanisms.⁵⁴ Ismail notes that a key proponent of this approach is the UNECA, which has referred to it as development regionalism and is marked by the fostering of cross-border cooperation between countries in a region in not only trade but also in investment, research and infrastructural development.⁵⁵ The need for this approach comes in the wake of the realisation that the exposure of under-developed industries to competition could have devastating effects by leading to de-industrialisation rather than industrialisation.⁵⁶

⁵¹ Gibbs op cit at 706.

⁵² Ismail op cit at 36.

⁵³ Ostergaard op cit at 34.

⁵⁴ Ibid.

⁵⁵ Ismail op cit at 37

⁵⁶ UNECA *Economic Report on Africa 2015. Industrializing Through Trade* (2015) available at <http://www.uneca.org/publications/economic-report-africa-2015> accessed on 21 May 2018.

Development integration consequently combines a strong institutional capacity and architecture with clearly articulated goals including the facilitation of regional development and the assurance of peace and security towards the achievement of complementary and asymmetrical gains for all member states involved in the regional development project. It also involves the articulation of regional public goods and development priorities necessary for facilitating economic transformation in the region in various areas including infrastructure, trade, agriculture and food security, private sector development and industrialization, in a bid to evolve a bond of common regional citizenship and identity necessary for regional human capital mobilization.⁵⁷

1.6.3 Functional and Neo- Functional Integration:

The functionalist model of integration emerged in the wake of the Second World War. It argued for the development of a supranational organization to ensure that disharmony in states does not drive them towards aggression and war in the scale witnessed in the Second World War. Within the context of the functionalist model, integration was imperative not just for the propagation of trade-based growth and economic development (like the previously assessed models emphasised) but for the guaranteeing of social harmony by proffering solutions to the fundamental problem of international peace and security. Romanian-born British political theorist, David Mitrany is considered to be the foremost advocate of this model. He argued that areas should be identified through which states would understand the imperatives for cooperation. He also argued that the establishment of supranational organisations to develop international functional links and attend to basic functional needs (such as transportation welfare, trade and healthcare) would lead to the development of a transnational consciousness and greatly reduce the risk of war and aggression.⁵⁸

Neo-Functionalism on the other hand, emerged as a modification of functionalism in the wake of the Second World War. It was propounded by Ernst B. Haas who argued that the dominant players in an integration process were interest groups, civil societies and technocrats rather than governments. A key feature of the theory is the concept of ‘spill over’, which is a situation where integration in an economic sector leads to further integration in other sectors depending on the

⁵⁷ Adejumobi, S & Kreiter, Z ‘The Theory and Discourse of Developmental Regionalism’, Paper prepared for Presentation at a Regional Forum on: “Developmental Regionalism, Peace and Economic Transformation in Southern Africa” (2016) Swaziland. See also Ismail Faizel ‘*Advancing the Continental Free Trade Area (CFTA) and Agenda 2063 in the context of the Changing Architecture of Global trade*’ (2016) Working Paper 12 – 14.

⁵⁸ David Mitrany ‘*The Functional theory of politics*’ (1975) London School of Economics and Political Science 126.

perceived successes in the management of the former. The theory predicts that continuous spill over will result in full integration in all sectors.⁵⁹ The neo-functional model has however been criticized as impracticable in the third world because it ignores the fact that regions with low levels of economic development like most of the third world lack the appropriate environment for interest groups, civil societies and technocratic institutions to thrive; factors which the neo-functional model argues to be integral drivers of integration. In Africa for instance, the significant absence of interest groups in the 1960s and 1970s meant that governments were the decision-makers and therefore the drivers of integration.

1.7 Conclusion

Without prejudice to the profundity of the goals of the AfCFT initiative and the zeal showed by the continent's leaders in this regard, the need for caution exists in order to forestall a situation where the success of the initiative is interpreted in terms of 'more trade' instead of the growth and development it was created to spur. Joseph Stiglitz, a Nobel Prize winning economist, argues that this was the greatest tragedy of the integration efforts in Europe.⁶⁰ It is therefore exigent that in the negotiations to follow, Africa takes the right steps in its integration efforts to ensure its efficacy. In this regard, the model to be employed must pay attention to the individual needs of all stakeholders, so that the gains of the initiative will be equitable across the board.

This chapter provides the theoretical foundation for this dissertation centered on Africa's emerging integration paradigm- the AfCFTA. In order to efficiently do this, the chapter examined the conceptual framework as well as the theoretical and multi-disciplinary perspectives on integration. This was done to provide a fair understanding and framework for the research. The next chapter builds on the theoretical expositions above by examining the trajectory of African integration as well as key initiatives which molded Africa's integration narrative before the AfCFTA.

⁵⁹ Rosamond op cit 50 - 73

⁶⁰ Joseph Stiglitz, *The Euro and its Threat to the Future of Europe* (2016) viii-xix.

CHAPTER 2: REGIONAL INTEGRATION IN AFRICA: CLASSIFICATIONS AND HISTORICAL TRAJECTORY

2.1 Introduction

The idea of integration on the continent is by no means novel. Since colonial times, attempts have been made at building supranational entities through integration. A case in point was the federation of Rhodesia and Nyasaland, the federations in former French West and Equatorial Africa, albeit for administrative and legal convenience of the colonial government.⁶¹⁶² With independence, came a resurgence of integration as a way of consolidating the gains of independence and protecting the sovereignty of African states. Efforts were geared towards establishing integration initiatives at sub-regional levels to cater to the need for economic development across the colonially-defined territories.⁶³ Independent African countries pursued integration in order to stem the adverse effects of balkanization by the previous decades of colonialism and ease the constraints linked to the limited size of national markets.⁶⁴

This chapter provides a discussion of the historical trajectory of integration in Africa as a background to the continental free trade initiative. It does this by first outlining the approaches the continent has employed to integration and then evaluates key integration initiatives on the African continent, within the context of the events which informed them, the legal framework on which they were structured and the approaches by which they were propelled. A historical evaluation at this point should foster a better understanding of the changes that have occurred in the continent's integration narrative and show why the continent is on this present course.

⁶¹ Biodun O Fagbayibo, 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' (unpublished PhD thesis, University of Pretoria, 2010) chapter 3.

⁶² African Union & Economic Commission for Africa 'Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa' (2008)183-186.

⁶³ Fagbayibo Loc. cit. 75

⁶⁴ Kouassi R N, 'The itinerary of the African integration process: An Overview of the Historical Landmarks' (2007) 1; 2 African Integration Review 1.

2.2 Approaches to Regional Integration in Africa

The approaches which the African continent has taken towards integration over the years have been driven by both its compelling need to address under-development and fulfil of the pan-African mandate of political unity.⁶⁵ This pertinent need to drive development on the continent has led it to establish integration schemes modelled after the European integration agenda.⁶⁶ However, it has been argued that the market integration formula has not proved as successful as in Europe in solving the African integration equation.⁶⁷ Proponents blame its failure mainly on the fact that the model was not created to suit African realities.

In this light, several commentators advise towards a reconsideration of the market-based integration formula and urge that “actors ... should think very carefully about the fruitfulness of following the blueprint of the European Union or other regional schemes from the North.”⁶⁸ It is noted that “one thing African integration does not lack is a plethora of theoretical suppositions” which differ based on the ideological beliefs prevalent in the place from which they emerged.⁶⁹ The approaches to African integration have been classified under two broad headings- old regionalism and new regionalism. Akokpari identifies the WIDER alternative and the external guarantor alternative to belong to the ‘new regionalism’ class.⁷⁰

2.2.1 Old Regionalism:

As previously stated, regionalism is by no means a contemporary phenomenon. In a commentary on the same topic, Burfisher et al. explain that the historical disparities between the old and the new forms is marked by the varying depths, along a ‘continuum from shallow to deep’. While shallow integration (old) is simply marked by reduced barriers to trade in goods, deep integration (new) is so extensive that it covers even the harmonization of national policies, and internal factor

⁶⁵ Lee op cit 8.

⁶⁶ R Gibb ‘Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality’ (2009) 30; 4 Third World Quarterly 701-721.

⁶⁷ Gerrit Olivier & Michele Olivier, ‘Models of Regional Integration: The European Union and the African Union’ (2004) 19 SAPR/PL 362 – 363.

⁶⁸ Morten Boås, Marianne H. Marchand and Timothy M. Shaw, ‘The weave-world: regionalism in the south in the new millennium’ (1999) 20; 5 Third World Quarterly 1061. See Lee op cit note 21 at 18.

⁶⁹ Fagbayibo op cit note 56 at 44.

⁷⁰ John Akokpari, Angela Ndinga-Muvumba, and Tim Murithi, ‘The African Union and Its Institutions’ eds. (2008) 85.

mobility⁷¹. The old regionalism emerged in Europe and was inspired predominantly by the events occurring after the Second World War. As a result of the most devastating war in the history of mankind, it was only natural that in the integration process, priority was given to the aims of preferential trading arrangements and the formation of security alliances.⁷²

In Africa, the old approach to regionalism was mainly influenced by the need for economic security and was spurred by narrow ideological objectives.⁷³ Regional organisations formed between the 1960s and 1980s employed this approach, and being that the approach primarily emerged as an expression of the need to guarantee economic security against the backdrop of the intricate dynamics of independent governance, it was only natural that the principal actor under this approach was the State. Regional organisations formed in Africa before the end of the 1980s have been classified under the old regionalism category, not just because they were introverted in approach and State-centric in nature, but mostly because they employed the neo-classical theoretical assumptions which integration models in the cold war era employed. The narrative in Africa under this regime was influenced by the assumptions of the dependency theory, which blames African under-development on capitalist exploitation and on the plunder of its vast natural resources by external agencies.⁷⁴

Scholarly commentary regarding the old regionalism approaches to African integration is mostly negative. In justifying the commentaries on the failure of the old regionalism approach to yield results, Meagher mentions that the approach was riddled with many problems including the proliferation of moribund international organisations, the existence of over-ambitious treaties (compounded by the continent's characteristic failure to implement same), stringent commitment to European models of integration, inability to increase trade figures amongst African countries and the lack of political will.⁷⁵ With several failed attempts of the old regionalism approach to fit

⁷¹ Burfisher M, Robinson S and Thierfelder, K (n.d.). *Regionalism: Old and New, Theory and Practice* (2004) Paper no. 65 International Food Policy Research Institute.

⁷² Fredrik Söderbaum, *The political economy of regionalism: the case of Southern Africa* (2004) 37 – 114.

⁷³ Akokpari J. op cit 10.

⁷⁴ Akokpari J. Ibid.

⁷⁵ Kate Meagher, *Throwing out the baby with the bath water- informal cross border trade and regional integration in West Africa* in Nordiska Afrikainstitutet *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* ed (2001) 40 – 54.

into the outward décor of the postmodern era, the need to phase it out became a super-imposed imperative.⁷⁶

Regional organisations in Africa which notably employed this approach to integration (as evidenced from their programmes and initiatives) include the OAU which was formed in 1963 and the ECOWAS formed in 1975.

2.2.2 New Regionalism:

The new regionalism approach has been noted to be everything the old approach is not. It is influenced by in-depth economic factors from within and below, outward-looking and largely driven by not only State actors but also non-State actors.⁷⁷ The new regionalism's approach is more comprehensive in seeking a balance between the different factors affecting security and development.⁷⁸ Speaking on its multi-dimensional form, Swedish author, professor and one of the most prominent pundits of the new regionalism approach- Björn Hettne, defines it as “a ... form of integration which includes economic, political, social and cultural aspects and thus goes far beyond the goal of creating region-based free trade regimes. Instead, the political ambition of establishing regional coherence and identity seems to be of primary importance”.⁷⁹

Several forms of the new regionalism approach to integration have been theorised. Akokpari identifies some forms of new regionalism which have suited the peculiarities of the African experiment at integration under four headings namely- open regionalism, the WIDER approach, regionalism from below and the external guarantor model.⁸⁰

2.2.3 Open Regionalism:

This variant is a strain of the neo-classical, market integration model. It emphasises trade liberalisation and the importance of fostering integration by employing policy measures which reduce barriers to trade. This variant calls for an outward-oriented approach to integration and like

⁷⁶ Ibid. at 15.

⁷⁷ Ibid.

⁷⁸ Gaudence Nyirabikali, *Promoting socio-economic development through Regional integration – the politics of regional Economic communities in Africa* (unpublished Master's thesis, Linköping University, 2006)

⁷⁹ Swatuk L, *Comparing regionalisms: Implications for global development* (2002) 10:2 Millennium-Journal of International Studies. 126-155.

⁸⁰ Akokpari J. op cit 89.

the classical theories, have as a basis of its arguments for openness, the theory of comparative analysis. The model has however been criticised as ignoring the peculiarities which inform the African reality and will therefore not serve its unique interest. Examples of notable initiatives in favour of this variant are NEPAD and the AU.⁸¹

The WIDER Model: This model emerged from the United Nations University's World Institute for Development and Economic Research (WIDER), located in Finland. The premise on which the variant is built is in diametric opposition to the previously mentioned variant which bears neo-functional features. It argues that neo-liberal globalisation as is driven in Europe will not suit the true demands of integration in developing continents like Africa.⁸² The WIDER approach, had in the early 1990s carried out a study of integration with its focus on the explanation of the role of socio-economic and political factors on the workability of the integration process and determined that "new regionalism is a multidimensional process that leads to hegemony in areas such as culture, politics, economics and diplomacy."⁸³ The model argues that the aim of interrelations and regional cooperation between states should be to counter globalisation and allow for regional interdependence. According to this model, globalisation is harmful to development in developing regions of the world.

Regionalism from below: Like the WIDER model, regionalism from below argues for the abandonment of neo-classical models of integration which worked in the west for models which incorporate non-State actors. It is argued that the neo-classical models of integration are out of touch with the realities of Africa.⁸⁴ Here, the role of civil society, pressure groups as well as the informal sector is key to the success of integration. The informal sector, in particular, is argued to be important because it has become enlarged due to the failure of African governments to provide for the basic needs of its population. It is argued therefore, that its large size could be advantageous if efficiently utilized in the integration process.⁸⁵ Commenting on the importance of the informal economy, Boas et al mentions that the informal economy needs to be re-attached to the formal

⁸¹ Ibid. 90.

⁸² Ibid. 91.

⁸³ Ibid.

⁸⁴ Lee op cit note 21 at 22.

⁸⁵ Ibid.

economy because it (the informal economy) has desirable (even though sometimes unsustainable) components such as imagination, entrepreneurship and innovation.⁸⁶

The External Guarantor model: This model was first proposed by Jeffery Fine and Stephen Yeo in their paper titled “Regional Integration in Sub-Saharan Africa: Dead End or a Fresh Start?” and argued for the supervision of the African integration process by external multinational bodies who will serve as ‘external guarantors’.⁸⁷ Their model was necessitated mainly by the fact that previous attempts to employ market integration-based models in Africa had proven unsuccessful. Supervision by this ‘external guarantor’ (such as the EU or IMF) was therefore necessary to provide technical support and also to ensure that programmes, schemes or policies which will not be beneficial to the ends of the integration process will be avoided. Commenting on this model Lee states:

“The argument for such an arrangement is premised on the notion that “previous attempts at regional integration, at least in Sub-Saharan Africa, have failed to realize even a modest part of their stated aims... renewed efforts along these traditional lines are not advisable, for two reasons. First, closer integration in terms of freer flows of goods and services is now more likely to result from unilateral tariff reduction that confers most-favoured-nation status on one’s neighbours. Second, there are unlikely to be any significant immediate economic gains (at least in the short run) from access to a larger local market and the removal of trade distortions. Certainly, such gains would not justify a major effort to shore up existing regional entities that, for reasons argued earlier, are inappropriately structured, since they were designed to pursue a very different approach to economic development”.⁸⁸

The West African Economic and Monetary Union (UEMOA) formed in 1994 to promote economic integration in West Africa by converging macroeconomic policies, favoured this model. The External guarantor in this instance was France.⁸⁹

2.3 A Trajectory of African Integration

The African consciousness on integration is evident from the historical initiatives it has taken to push the agenda. The approaches taken at each point, reflect the continent’s desire to employ new means to address the functional demands of its increasing population. Understanding these

⁸⁶ Ibid.

⁸⁷ Jeffrey Fine & Stephen Yeo, ‘Regional Integration in Sub-Saharan Africa: Dead End or a Fresh Start?’ (1997) in Lee op cit 19.

⁸⁸ Lee op cit 19.

⁸⁹ Ibid.

historical initiatives therefore, not only serves as the first step in appreciating the integration dynamics as it is evolving today, but also provides a useful instrument for predicting the course it might take in the future. Having examined the categorizations, some key landmarks in Africa's integration agenda are considered next.

2.3.1 The Organisation of African Unity

The formation of the Organisation of African Unity (OAU) was the culmination of the post-independence mission of African leaders to demonstrate the progressive attainment of sovereignty on the continent.⁹⁰ Of all the initiatives which were instrumental in defining the trajectory of integration in Africa, the Organisation of African Unity formed in 1963 was arguably the most significant. This is because it was the foundation and propellant for a series of other initiatives by the African people to chart the course of their existence. The Organisation of African Unity (OAU) is therefore significant to this work because it provided the building blocks to the structures for integration which today, has culminated in the formation of the largest free trade area in history.

The Organization of African Unity (OAU) was formed after a meeting was convened from the 22nd to the 25th May 1963 by 32 heads of states of independent African countries. Its creation was informed by the need for a supranational entity on the continent to promote unity and solidarity amongst African states⁹¹ and to coordinate efforts to achieve a better life for the people of Africa.⁹²

However, upon the realization that achieving a better life for African people would be impossible if some were still shackled by colonialism and the newly independent states still struggled to grasp the intricate dynamics of governing the colonially defined territories, the Organisation of African Unity's (OAU) role became geared towards agitating for independence of other colonized African countries, as well as providing a framework for the management of ugly trends such as military interventions and civil wars which were a direct demonstration of the socio-political contests that

⁹⁰ Joram Mukama Biswaro, '*Deepening Africa's Integration: From OAU to AU*' in 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) 12.

⁹¹ Constitutive Act of the African Union, 2000. Addis Ababa, Ethiopia: Organization of African Unity.

⁹² Nubong Gabila Fohtung, '*The applicability of the European process of regional integration to the African context: An analysis of institutional and policy frameworks in the European Union and in the African Union.*' (Unpublished LLM thesis, University of Pretoria, 2016) 57.

immediately surfaced in the newly independent countries.⁹³ The main avenues for the accomplishment of these objectives were policy coordination and cooperation in a number of spheres including, political, economic and diplomatic cooperation. It was no surprise therefore that in the periods immediately after the institution's formation, the integration agenda took somewhat of a back seat.⁹⁴

By the 1970s, the need for a shift in the focus of the Organisation of African Unity (OAU) became imperative. This necessity was imposed by a number of things including the fact that 48 per cent of the population of sub-Saharan Africa existed on less than \$1 a day.⁹⁵ Therefore the perceived bleakness in the economic outlook of the continent in the early 1970s was reason enough for the institution to consider a balance between its political aims and other economic objectives. The Organisation of African Unity (OAU) therefore redirected the integration project to the principles of mutual dependence, self-reliance and solidarity.⁹⁶

In this regard, Nubong explains that “several meetings, seminars and brainstorming sessions organized” in conjunction with the Professor Adebayo Adedeji-headed United Nation's Economic Commission for Africa (UNECA) was geared towards recommending *inter alia*... remedies to the economic disasters confronting the young continent.⁹⁷ Examples of these include the 11th extraordinary session of the Organisation of African Unity's council of ministers held in 1976 in which the Kinshasa Declaration was made as well as the 4th and 5th ECA Ministers Conference Kinshasa of 1977 (and 1979) and also the Monrovia Symposium of 1979. Many of the symposiums, workshops and seminars provided platforms for African states to articulate their individual goals of regional and sub-regional integration that would eventually constitute the building blocks for the scale of continental integration that is observed today. A most significant outcome of these events is the policy document on economic integration adopted as the Lagos Plan of Action (LPA).⁹⁸

⁹³ Nubong Ibid.

⁹⁴ Bujra, A, 'Africa: Transition from the OAU to the AU' Lecture delivered at ACARTSOD Tripoli, Libya' (2002) available at <http://www.dpjmf.org/meetings/From-OAU-AU.html> accessed on 13 May 2018.

⁹⁵ Elisa V Artadi and Xavier Sala-i-Martin, 'The Economic Tragedy of the XXth Century: Growth in Africa' (2003) available at <http://www.nber.org/papers/w9865> accessed on 23 May 2018.

⁹⁶ Nubong op cit at 28

⁹⁷ Kouassi op cit at 4

⁹⁸ See Adebayo Adedeji, 'From the Lagos Plan of Action to the New Partnership for African Development, and from the Final Act of Lagos to the Constitutive Act: Whither Africa?' (2002) Keynote address at the African Forum for

2.3.2 The Lagos Plan of Action (LPA)

The Lagos Plan of Action (LPA) was a development plan drawn up and signed by African Heads of governments in response to the economic crisis bedeviling the continent post-independence.⁹⁹ The LPA was a legal, economic and political statement by continental leaders, reflecting the compromises reached by African countries with diversified development options and economic philosophies.¹⁰⁰ It was a look inwards at what Africans could do to aid in restructuring its productive base and to chart a new course towards self-reliant development. It was regarded as a remarkable expression of the continent's willingness towards a critical conceptualization of its development pathway, laying therefore an intellectual foundation for building a new future.¹⁰¹

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.¹⁰² In a proactive bid to ensure that the recommendations of the Monrovia declaration were implemented, the 2nd Extraordinary Session of the OAU held in Lagos Nigeria from 28 to 29th April 1980, where the Final Act of Lagos was adopted. The UN Economic Commission for Africa (UNECA) was integral to plotting the plan and this was reflected in the considerable resemblance of its operational frameworks to the UNECA's annual reports.¹⁰³ Its adoption therefore, 'contributed to set the basis for a productive relationship between the UNECA and the OAU and consequently, endowed UNECA Secretary General- Professor Adedeji- with greater visibility.'¹⁰⁴

The Lagos Plan of Action was strategized based on the principles of self-reliance, mutual dependence and solidarity.¹⁰⁵ It focused on the integration of physical and social infrastructure on

Envisioning Africa. Nairobi, Kenya. 26-29 April In Nubong op cit. See Also Organization of African Unity, 'Lagos Plan of Action for the Economic Development of Africa 1980 – 2000'. (1980).

⁹⁹ JL Parpart, 'Women's Rights and the Lagos Plan of Action' (1986) 8;2 Human Rights Quarterly 180–196.

¹⁰⁰ A Benachenhou, 'South-South Cooperation: The Lagos Plan of Action and Africa's Independence' (1983)8; 4 Africa Development / Afrique et Développement 5–19.

¹⁰¹ David Fashole Luke and Timothy M Shaw, 'Continental Crisis: The Lagos Plan of Action and Africa's Future' eds (1984) 231.

¹⁰² 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) chapter 1. See also *Lagos Plan of Action*. (1979). Addis Ababa, Ethiopia: Organization of African Unity.

¹⁰³ Gruhn Isabel, 'The Economic Commission for Africa' in Daniel C. Bach 'Regionalism in Africa: Genealogies, institutions and trans-State networks' (2016) 50.

¹⁰⁴ Bach Ibid. at 50.

¹⁰⁵ Annex I Final Act of Lagos, *Lagos Plan of Action for the Economic Development of Africa*, 1980.

the continent, political stabilization and security for the guarantee of a steady economic environment, for the sustenance of economic initiatives and enterprise, and the integration of production structures based on the market integration model. A noteworthy feature of the plan was that it contained industrial development objectives with short, medium and long term goals.¹⁰⁶ The short-term industrial goal was to immediately “conduct studies that will establish the basic industries to be developed in the short run”, as well as those to be developed in the long run, in order to lay foundations for the formation of those basic industries essential for self-reliance.¹⁰⁷ The medium-term goal was to strengthen the short term goal by driving self-sustained industrialisation within 10 years and “do all within their power to attain self-sufficiency” in the food, building materials, clothing and energy sectors.¹⁰⁸ 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’.¹⁰⁹ In this regard industrial structures were to be created at national levels aimed at “establishing links between industry and other sectors” and also between industrial sub-sectors in order to promote interdependence amongst them and lead to over-all economic development.¹¹⁰

Without prejudice to the fact that the Plan aroused considerable skepticism from the international community and especially international institutions like the Bretton Woods for being imprecise and unduly political, it derived validation and strength from its endorsement by all African leaders.¹¹¹ The Lagos Plan of Action is therefore significant because it was a reflection of unyielding faith by African states in its united ability to advance its economic interest in development. The Plan is also crucial to the narrative of African integration because it was the first in a series of thrusts towards establishing an African Economic Community, in respect of which was signed in Abuja in June 1991.¹¹²

¹⁰⁶ S.61, *Lagos Plan of Action for the Economic Development of Africa*, 1980.

¹⁰⁷ S.67 Ibid.

¹⁰⁸ S. 66, Ibid.

¹⁰⁹ The Lima Target was a resolution at the second conference of the *United Nations Industrial Development Organization (UNIDO)* which established principles of industrialization and which defined terms under which the international community might engage and cooperate in matters of industrial development. See Lima Declaration and Plan of Action on Industrial Development and Co-operation, 1975. UNIDO.

¹¹⁰ S.61 Ibid. See also Ikome op cit at 37.

¹¹¹ Bach op cit. 75-79.

¹¹² Adedeji, Adebayo, ‘*From the Lagos Plan of Action to the New Partnership for African Development, and from the Final Act of Lagos to the Constitutive Act: Whither Africa?*’ (2002) Keynote address at the African Forum for Envisioning Africa. 26-29.

2.3.3 The Abuja Treaty: The New Paradigm

The Abuja treaty formally known as the ‘Treaty establishing the African Economic Community’, was specifically focused on the establishment of a fully economically integrated continent by 2028.¹¹³ Building on the agenda set by the LPA, it was adopted to organize a time frame of Africa's regional economic integration.¹¹⁴ The Treaty of Abuja was signed at a summit of the Organization of African Unity held in Nigeria in 1991 and it set the foundations for a scale of integration which was envisioned to be achieved in six phases. The Abuja treaty remains significant to African integration because it set a holistic strategy for achieving this goal.

The objectives of the treaty were to further the course of integration through endogenous and self-sustained development, as well as the establishment of a defined framework for the mobilization and utilization of the human and material resources of Africa. The Abuja treaty was also created to further promote pan-African cooperation in order to raise the standard of living on the continent, maintain economic stability, foster close and peaceful relations and contribute to the progress, development and the economic integration of the continent. The aims of the treaty would be achieved by the harmonization of policies among existing and future economic communities, whilst strengthening them in the hopes of gradually but eventually establishing an AEC.¹¹⁵ Ikome argues that before the signing of the African Economic Community Treaty, the existing RECs were “weak and largely paper organizations 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.¹¹⁶

The approach to integration as espoused by the Abuja treaty bore a semblance to the Eurocentric market integration formula and was to be linearly furthered through the utilization of the regional economic blocs, which it designated as its pillars. 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

¹¹³ Samuel O Oloruntoba, *Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations* (2016) 168.

¹¹⁴ Article 4 (1), *Treaty Establishing the African Economic Community*, 1991. See also 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.

¹¹⁵ Article 4 (2), *Ibid.*

¹¹⁶ Ikome op cit in 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.

Regional Economic Communities. While the second phase, scheduled to last for a period of eight years, was dedicated to solidifying sectoral integration by reducing tariff barriers to trade, the third and fourth phases were dedicated to the formation of a continental free trade area and customs union by the harmonization of tariffs and imposition of a common external tariff within a total period of twelve years. The fifth phase (scheduled to take four years) was to be dedicated to the creation of an African common market. The sixth and final phase was dedicated to the formation of an economic and monetary union within five years, marking the zenith of the integration process.¹¹⁷

Contrary to arguments that the Abuja treaty was conferred with ambitions different from those assigned in the stalled Lagos Plan of Action,¹¹⁸ the framework that was created through the Abuja treaty had its foundations in the LPA. The Abuja treaty is especially significant because it was designed on the canvas of the Lagos Plan of Action which guided the integration process through to the formation of the African Union and beyond. It may be argued that the ‘Abuja treaty chapter of the African integration process is an expression of the progressive nature of Africa’s efforts at integration.

2.3.4 Integration in the democratisation Era: the African Union

The formation of the African Union marked the second wave of African integration. Its establishment was prompted by the need to accelerate the process of integration on the continent using a new institutional vehicle, a compass which recognized the pre-eminent demand of peace, unity, socio-economic stability and development on the continent over one founded with an objective of fighting colonialism which had at the time been defeated.¹¹⁹ The transformation of Africa’s supranational entity from OAU to the African Union (AU) was an incidence of the integration process, by which the continent repositioned itself to address the multifaceted socio-economic and political quandaries it was faced with as a fully independent regional bloc. The furtherance of principles such as democracy and the rule of Law, and the sustenance of peace, unity and development were high on the AU agenda.¹²⁰ Like its forerunner, the African Union is important to any account of integration on the continent because its initiatives have served the

¹¹⁷ Gatsinzi op cit at 18.

¹¹⁸ Bach op cit at 79.

¹¹⁹ In Fagbayibo op cit at 128

¹²⁰ Ibid.

purpose of oiling the wheels of integration and has today resulted in the formation of the largest free trade area since the World Trade Organisation.

The idea of forming the African Union emerged at the 35th Ordinary session of the OAU Assembly, held in Algeria. The Libyan leader, Muammar Gaddafi, proposed the convening of an extraordinary summit in Sirte, Libya in September 1999, to discuss ways in which the institution could be made more effective and responsive to the contemporary demands of development on the continent.¹²¹ At the Summit subsequently held on the 9th of September, 1999 in Sirte, Libya, a declaration was adopted by African leaders calling for the establishment of an African Union, without however specifying the form or shape the new entity would take. A team of legal experts was convened which came up with a draft legal text tabled at an Organization of African Unity ministerial meeting held in Tripoli between May and June 2000, at which the AU framework was finalized.¹²² The Constitutive Act of the African Union was adopted by the Assembly on July 11, 2000, in Lomé, Togo and by March 2001, all the member states of the Organization of African Unity had acceded to it, thereby bringing it into effect.¹²³

Even though the African Union bore considerable similarities to its supranational forerunner, the OAU, some structural changes were evident. For example, its central role was expected to shift to tackling the contemporary demands of development on the continent. According to Fagbayibo, other noteworthy features include its many sources of authority such as the Assembly of the Union, the Judiciary (Court of Justice) and Parliament (PAP) (unlike the former which derived its authority from only the Assembly of Heads of States and Governments), the creation of the right to intervention in member States in grave circumstances, and its more proactive approach to integration by absorbing the Treaty of the African Economic and its regional integration programme as its pillars.¹²⁴

Unlike the OAU Secretariat, which had no power to take initiative without agreement from the Assembly of Heads of States and Governments, the African Union Commission has specific powers with regard to taking initiative. This has secured the advantage of enabling the African

¹²¹ Decision AHG/Dec.140 (XXXV). Cited in Fagbayibo op cit 56 at 128.

¹²² Maluwa T, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa* (2003) 16;1 Leiden Journal of International Law 157–170.

¹²³ Fagbayibo Loc cit. Maluwa Ibid. au.int/en/au-nutshell

¹²⁴ Fagbayibo Ibid. 131

Union to lay out schemes for integration and development. As a result, it has in just 19 years, been able to expeditiously carve out a road map for the scale of integration being pursued at present. Some initiatives of the African Union leading up to the AfCFTA will now be considered.

2.3.5 The New Partnership for Africa's Development (NEPAD)

The New Partnership for Africa's Development (NEPAD) emerged after a resolution had been adopted to merge the Millennium Partnership for the African Recovery Programme (MAP) and the OMEGA Plan for Africa to form a 'New Africa Initiative (NAI) at the 5th Extra-ordinary Summit of the OAU held in Libya, in March 2001.¹²⁵ The strategic framework document for NEPAD was subsequently adopted in July 2001 at the 37th session of the Assembly of Heads of States and Governments held in Lusaka, Zambia. The founding countries were Nigeria, South Africa, Algeria, Egypt and Senegal.¹²⁶ NEPAD remains one of the most significant initiatives of the AU to drive the agenda of integration in the democratisation era of the continent. The central aims of NEPAD were eradicating poverty, integrating Africa into the global economy, women empowerment and establishing a stable environment conducive to peace, sustainable economic growth and development.¹²⁷

Having in mind the overall goal of integration, NEPAD was established with a holistic and comprehensive strategy for the revival of the continent.¹²⁸ Praising its profound approach, Algerian prime minister Ahmed Ouyahia noted that its establishment represented a new methodical approach to integration and a radical shift from the models employed by the OAU to one which would positively affect the architecture of African integration.¹²⁹ Its principles were targeted towards promoting good leadership and political participation as well as the conditions conducive for business and investment.

The NEPAD initiative also provides for the African peer review mechanism, which was a self-monitoring protocol and arrangement founded in 2003 to encourage conformity in terms of the

¹²⁵ Malcomson, D, Herbert, R Ramsamy, P Lintonen, K Challenor, H Leon, T Houghton, et al. 'Nepad' (2004) 11; 1 South African Journal of International Affairs 11–136 available at <http://search.proquest.com/docview/37956729/> accessed on 23 June 2018.

¹²⁶ NEPAD 'NEPAD in brief' (2013).

¹²⁷ Kouassi op cit note 59 at 15

¹²⁸ *Ibid.*

¹²⁹ ISS Today 'Nepad and the battle for the soul of the African Union' available at <https://www.dailymaverick.co.za/article/2018-02-12-iss-today-nepad-and-the-battle-for-the-soul-of-the-african-union/> accessed on 24 June 2018.

economic and corporate governance values and code. The founding of the African peer review mechanism amongst other things, expresses the developmental approach the NEPAD initiative was founded on and by which the clear intent to make reforms for increased investments on the continent in areas of agriculture, science, trade, health and governance was expressed. NEPAD is currently coordinated by a planning and coordinating agency (the NEPAD Agency), which was established in 2010 after the body was integrated into the AU structures.¹³⁰

2.3.6 Integration in the Democratization Era: The Tripartite Free Trade Area

The Tripartite Free Trade Area was an outcome of an initiative launched in Kampala, Uganda in 2008 for furthering the integration and cooperation agenda on the continent along the corridors of three of the existing Regional Economic Communities (RECs): COMESA, EAC and SADC.¹³¹ Sequel to the first tripartite summit which launched the initiative, a second summit was held in Johannesburg, South Africa in June 2011, which approved the tripartite strategy document for the initiative, thereby launching the TFTA negotiations. Also, a third tripartite summit was held in Sharm El Sheik, Egypt, in June 2015, where the TFTA was officially launched, and where 16 of the 26 countries which participated in the negotiations signed.¹³²

Like the AfCFTA, the Tripartite Free Trade Area was ambitious in its coverage as it brought together about 630 million people in 26 southern and eastern African countries, with a combined gross domestic product of more than US\$1.2 Trillion in 2013.¹³³ The TFTA's approach to integration followed the developmental regionalism model established on three main pillars namely; infrastructural development for connectivity along the North-South corridor, industrial development towards attending to productive capacity issues and the dictates of market integration.¹³⁴

The first tripartite initiative launched in 2008 and acceded to in 2012 by African Union Heads of States and Governments became the first of two initiatives, aimed at resolving the 'multiple membership conundrum' by uniting the RECs on the continent for the creation of a larger

¹³⁰ NEPAD op cit note 126

¹³¹ Brendan Vickers, *Handbook on Regional Integration in Africa- Towards Agenda 2063* (2017) 67.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

AfCFTA.¹³⁵ The tripartite Free Trade Area could be seen as a precursor to the AfCFTA, which makes it relevant to this work. Its creation was a significant technical step towards forming the Continental Free Trade Area and eventually, the African Economic Community envisaged by the Abuja Treaty.¹³⁶

2.4 Conclusion

This chapter of the research is divided into two broad segments through which the build-up to African integration was examined. While the first part discussed the classifications relevant to African integration, broadly classified by Akokpari into ‘old Regionalism’ and ‘New Regionalism’, the second part of the chapter assesses key historical initiatives which have defined the trajectory of integration on the continent.

The discussion on the history of integration in Africa in this chapter is useful to show how the continent progressed to the AfCFTA and provide a means through which the integration dynamics as they are developing can be understood. Having established the historical context on which integration in Africa was built, the next chapter shall undertake an in-depth evaluation of the AfCFTA.

¹³⁵ The Second tripartite bloc was envisaged to be created between the ECOWAS, SEN-SAD and UMA in emulation of the First TFTA, however due to the lack of progressiveness in the Second Tripartite framework, the step initially set was abandoned and the AfCFTA agenda made a shortcut into achieving continental liberalization. s Vickers loc cit. 56, 75.

¹³⁶ United Nations Economic Commission for Africa ‘*Harmonizing policies to transform the trading environment assessing regional integration in Africa VI: overview*’ (2013) available at http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf. Accessed on 28 June 2018.

CHAPTER 3:

THE AFRICAN FREE TRADE INITIATIVE: PROSPECTS FOR CONTINENTAL DEVELOPMENT

3.1 Introduction

The idea of the African Continental Free Trade Area (AfCFTA) was conceived not just with the aim of encouraging the formation of markets in regions through preferential trade but also to foster higher levels of intra-African trade and encourage competition on the continent. Competition is envisaged to foster development via the promotion of free movement of goods, services, investment and people.¹³⁷ Having considered previous African integration initiatives, this chapter examines the rationale and design of the AfCFTA, analysing selected aspects of the negotiation process and the legal text produced by it.

This chapter is divided into two sections. While the first section examines the AfCFTA in context and theory, within which the rationale and projected gains of the initiative are elaborated, the second section examines the technicalities, i.e. negotiation process and the legal provisions, through which the AfCFTA initiative's theoretical projections and aspirations may be made practical.

3.2 The African Continental Free Trade Initiative: Imperatives and Prospective Gains

The decision to establish a free trade area for the Continent was first officially adopted in Addis Ababa in 2012 at the 18th Ordinary Session of the African Union Assembly, in line with the aspirations long agreed upon under the Abuja treaty of 1991. The free trade area was envisioned to amalgamate the 55 African countries of over a billion people, with a combined GDP of about \$3.5 trillion Dollars.¹³⁸¹³⁹ Also at the summit, by virtue of an endorsed 'Action Plan on Boosting

¹³⁷ Ismail op cit note 10 at ch 1.

¹³⁸ UNECA op cit 3. See also Loes Witschge 'African Continental Free Trade Area: What you need to know' Al Jazeera America available at <https://www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html> accessed on 18 July 2018.

¹³⁹ United Nations Economic Commission for Africa 'Assessing regional integration in Africa V: towards an African Continental Free Trade Area' (2012). Available at https://www.unece.org/fileadmin/DAM/trade/TF_JointUNRCsApproach/ECA_RegionalIntegrationInAfrica.pdf accessed on 31 July 2018.

Intra African Trade' (BIAT), the continental integration and development framework was charged to pay special attention to the areas of trade infrastructure, trade facilitation, trade finance, trade policy, trade information, productive capacity and factor market integration.

In June 2015 at the 21st summit of the AU Assembly of heads of states and governments, negotiations were officially launched with a mandate to conclude a framework by 2017 for liberalisation with respect to trade in goods and services and consequently birth a continent wide free trade area.¹⁴⁰ By March 2018, the negotiations had yielded results, and at an extraordinary summit of the African Union Assembly convened in Rwanda, the Kigali Declaration (for the launch of the AfCFTA), the protocol relating to the free movement of people¹⁴¹ and most importantly a consolidated agreement establishing the AfCFTA were presented for signatures.¹⁴²¹⁴³ The AfCFTA Agreement comprises a protocol on trade in goods, a protocol on trade in services and a protocol relating to the settlement of disputes.¹⁴⁴ Forty-four countries signed the consolidated text at the summit and five other countries¹⁴⁵ signed at the 31st African Union summit later held in June 2018 in Mauritania .

The AfCFTA has four theoretical objectives. While the first is to create a continental market for goods and services which will be facilitated by free movement of business and investment, projected to pave the way for the establishment of a continental customs union, its second objective is the expansion of intra-African trade by coordinating trade facilitation and liberalisation frameworks. The third objective is to attend to the 'spaghetti bowl dilemma' or the issue of multiple memberships which has been an impediment to integration initiatives in the regional economic communities in Africa. The fourth objective is to drive industrial and entrepreneurial

¹⁴⁰ United Nations Conference on Trade and Development 'Modalities for tariff negotiations towards a Continental Free trade Area some key issues for consideration' available at https://unctad.org/en/PublicationsLibrary/ditc2015misc3_en.pdf accessed on 18 July 2018. See also, United Nations Conference on Trade and Development 'Assessing regional integration in Africa V: towards an African Continental Free Trade Area' (2012). Ibid

¹⁴¹ The Protocol on the free movement of persons is not a part of the AfCFTA suite of documents. It was negotiated under the Auspices of the AU and was adopted at the 30th AU summit in January 2018

¹⁴² Tralac op cit 3.

¹⁴³ Laura Páez, 'A Continental Free Trade Area: Imperatives for Realizing a Pan-African Market' (2016) 50;3 Journal of World Trade 533–562.

¹⁴⁴ Tralac loc cit.

¹⁴⁵ South Africa, Serria Leone, Lesotho, Burundi and Namibia

competition via the exploitation of opportunities of scale production and consequently lead to an equitable distribution of recourses.¹⁴⁶

The formation of the AfCFTA provides a platform for national and regional economic cooperation in order to spearhead Africa's implementation of the new development agenda.¹⁴⁷ It builds on the progress made by several integration initiatives and in line with the Abuja treaty, fast-tracks by two years, the completion of stage four with regard to Free Trade Areas.¹⁴⁸ The AfCFTA was given the mandate to pursue a development regionalism strategy.¹⁴⁹

It is envisaged that the AfCFTA initiative will mostly affect trade with the key beneficiaries being businesses, traders and consumers who will pay reduced tariffs on selected goods traded within the area. The arrangements are also structured with mechanisms for the reduction of non-tariff impediments to trade, such as onerous customs and technical regulations as well as sanitary and phyto-sanitary measures.¹⁵⁰ The AfCFTA also has ambitions for the most expansive levels of cooperation between customs authorities in the world, for the facilitation of unhindered trade across national boundaries.¹⁵¹ Through service, trade liberalization industries across the continent will have access to a wider pool of skilled professionals and other personnel on '*no less favorable*'¹⁵² terms than the domestic supply. Furthermore, under the AfCFTA initiative, regional value chains will be established in order to catalyze growth and development in the landscapes of investment and trade across the continent.¹⁵³

3.2.1 Imperatives of the African Continental Free Trade Initiative

Two main factors (within which the other rationales converge) make the AfCFTA imperative: cooperation and economic development. On the first note, the idea of integrating the continent in the manner and scale envisaged by the AfCFTA has been argued to be crucial for the enhancement

¹⁴⁶ Tralac loc cit.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ See Article 3(2), Article 8, Protocol on Trade in goods. *Agreement establishing the African Continental Free Trade Area* '2018.

¹⁵¹ Part IV. Ibid.

¹⁵² See Article 4, Protocol on Trade in Services. *Agreement establishing the African Continental Free Trade Area* '2018. See also World Trade Organization 'Analytical Index of the GATT' available at https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art18_gatt47.pdf accessed on 3 August 2018.

¹⁵³ Article 3, *Agreement establishing the African Continental Free Trade Area* '2018.

of economic and political cooperation.¹⁵⁴ After independence, the continent under the auspices of the newly formed Organization of African Unity made a commitment to collectively deal with the intricate dynamics of statehood; the AfCFTA is somewhat of a renewal of that pact on cooperation for growth, but this time in the era of globalization. Cooperation 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 harmonization as well as the joint development of common natural resources on the continent.¹⁵⁵

Attending to the demands of development on an increasingly expanding continent, is another reason which makes the AfCFTA pertinent. Since the Lagos Plan of Action set the terms for African integration, up until 2016, the continent's population trebled from its estimated 478 million to the current estimate of close to 1.2 billion and is projected to increase to 1.5 billion by 2025 and 2.4 billion by 2050.¹⁵⁶ With an annual average of 2% population growth, the continent today is ranked as the fastest growing continent in the world. In terms of urbanization, the continent also leads as urbanization on the continent is now 40%, compared to 27% in 1980. Despite the demographic increases, the development indices leave much to be desired. For example, 60% of the continent still lives without conditions amenable to development. Today, of all the people around the world living in extreme poverty, about 50% reside in sub-Saharan Africa,¹⁵⁷ and only a few selected cities on the continent can boast of adequate infrastructure to cater to the demands of sustainable development.¹⁵⁸

Economic and trade theorists posit that increased commercial activity will most likely lead to improved welfare across the board and then sustainable development.¹⁵⁹ However, because intra -

¹⁵⁴ Vickers op cit 11-35.

¹⁵⁵ Lee op cit 3. See Article 3 and Article 4, *Agreement establishing the African Continental Free Trade Area* 2018. See also Part IV of the AfCFTA's Protocol on Trade in goods

¹⁵⁶ Economic commission for Africa *'The Demographic Profile of African Countries'* (2016) accessed on 24 July 2018

¹⁵⁷ World Bank Group *'Poverty and Shared Prosperity 2016: Taking on Inequality'* (2016) available at <https://openknowledge.worldbank.org/handle/10986/25078> accessed on 24 July 2018. See also Almas Heshmati *Economic transformation for poverty reduction in Africa: a multidimensional approach* 1 ed (2017) ch 1.

¹⁵⁸ African Development Bank *'AFDB statistics Pocketbook. 2018'* (2018) available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AfDB_Statistics_Pocketbook_2018.pdf accessed on 25 July 2018.

¹⁵⁹ Jagdish Bhagwati, *'Termites in the trading system: how preferential agreements undermine free trade'* (2008) in also Ismail op cit ch 1. See also World Bank Group, op cit note 157. 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; Eric W. Bond,

African trade stands at less than 20%, mostly due to a deficit in key cross-border infrastructures, it is argued that hopes of continental development without attending first to the demands of integration will be like putting the cart before the ox.¹⁶⁰ In this new world of globalization as well as the global value chain phenomena, which has resulted in the East Asian miracle',¹⁶¹ by which over a billion people in South East Asia have escaped debilitating economic conditions, collectively utilizing opportunities from around the resource-abundant continent is an imposed necessity for development. Therefore, the imperative for the AfCFTA can be appreciated when viewed as a pathway to an 'African Miracle'. In the next segment, the discussion assess the prospective gains of the initiative.

3.2.2 Prospective Gains of the African Continental Free Trade Initiative

The AfCFTA will lead to the formation of the largest regional market since the WTO, which will foster competition amongst domestic enterprises and consequently lead to improved production and economies of scale. The initiative is designed to erase national borders which have over time served as barriers to trade by converting the continent, once comprising of 55 fragmented markets (most of which struggle to achieve economies of scale and export competitiveness) to a single market of over a billion producers and consumers. This single market will lead to the levels of competition, improved production and economies of scale which is responsible for the decline in poverty and rise in development as witnessed in South East Asia. On the benefits of a large market, the ICTSD projects that a large market attracts more FDI and "triggering a trade–investment nexus that supports Africa's structural transformation objectives."¹⁶²

African competition and growth will depend on labor mobility. However, according to the Africa Visa Openness Report 2017, still less than a quarter of all African countries provide liberal access at entry for all African citizens.¹⁶³ The AfCFTA comes with a promise of free movement of

Raymond G. Riezman and Constantinos Syropoulos, 'A strategic and welfare theoretic analysis of free trade areas' (2013) International Trade Agreements and Political Economy. 101-127.

¹⁶⁰ African Development Bank 'Intra-African trade is key to sustainable development - African Economic Outlook' (2017) 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 2018

¹⁶¹ Birdsall Nancy M et al, 'The East Asian miracle: economic growth and public policy: Main report (English)' (1993) available at <http://documents.worldbank.org/curated/en/975081468244550798/Main-report> accessed on 29 July 2018.

¹⁶² Vickers op cit 13.

¹⁶³ African Development Bank 'The Africa Visa Openness Report 2017' (2017) available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2017_Africa_Visa_Openness_Report_-

business people for economic purposes. To this effect, a protocol to the treaty establishing the African Economic Community, relating to the free movement of persons, rights of person and rights of establishment was adopted at the 30th ordinary session of the African Union to complement the AfCFTA, by guaranteeing mobility rights for economic purposes. According to the protocol, this is to be pursued in three phases- beginning with the abolition of visas in the first phase, the implementation of the right of residence in the second phase and the implementation of a right to establishment in the final phase.¹⁶⁴ It is expected that the protocol will complement the AfCFTA by increasing intra-African commercial activities by 52.3%.¹⁶⁵ By the year 2034, it is estimated that Africa will have a large working-age population of over 1 billion people.¹⁶⁶ The AfCFTA protocol on the free movement of people sets the stage for the optimization of this large labor pool by allowing unhindered access to regions where their skills will be most efficiently utilized.

It is envisaged that the AfCFTA will also aid in combatting and decreasing poverty on the continent. The World Bank estimates that more poor people live in sub-Saharan Africa today than when the framework for African development was set out in the Abuja Treaty.¹⁶⁷ This disturbing fact has been attributed to the high levels of unemployment, inequality and the lack of basic infrastructure.¹⁶⁸ By setting the stage for increased trade, the AfCFTA if appropriately coordinated can reduce unemployment, improve infrastructure and halt the pernicious effects of poverty. The bulk of the people who live in extreme poverty across Africa reside in the rural areas where constraints arising from communal conflicts, unhealthy customary practices, gender inequalities and illiteracy, impede their ability to break free from the shackles of poverty. It is envisaged that the AfCFTA will gainfully impact this demographic by linking the informal rural communities of Africa to the opportunities presented by an increased cosmopolitan market, leading to the exchange of ideas for upliftment, progress and prosperity. It will also provide a route for small rural

_Final.pdf accessed on 24 July 2018.

¹⁶⁴ Article 5, 'Protocol to the treaty establishing the AEC, relating to the free movement of persons, rights of person and rights of establishment'

¹⁶⁵ 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 24 July 2018

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ William Baah-Boateng 'The youth unemployment challenge in Africa: What are the drivers?' (2016) 27; 4 the Economic and Labor Relations Review 413–431.

businesses to grow and increase their capacity to leave the informal rural sector and participate in the larger economy.¹⁶⁹

The above-mentioned benefits are embedded in the other advantages of the AfCFTA, such as the facilitation of the provision of regional public goods which may lower trade costs and the enhancement of the scale of industrialization necessary to meet the continent's vision of sustainable development (VISION 2063). Other benefits include the creation of regional production networks for the continent's transformation objectives and also the creation of opportunities for cooperation, thereby increasing Africa's common voice and influence on global issues.¹⁷⁰

3.3 Negotiating African Development through the AfCFT Agreement

Negotiations for the AfCFTA were launched in June 2015 at the 21st summit of the African Union Assembly. Twelve key principles guided the two phases of the negotiations. These were: (i) most favourable nation (MFN) treatment (ii.) national treatment principle (iii.) reciprocity (iv.) special and differential treatment (v.) transparency (vi.) substantial liberalization (vii.) consensus (viii.) best practices (ix.) reservation of *acquis*¹⁷¹ (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.¹⁷²

The negotiations were structured to take place in two phases. The negotiating mandate for the first phase covered the areas of trade in goods, trade in services and dispute settlement, and was coordinated by the African Union Commission's department for trade and industry. The phase was negotiated over the course of three years, with official work beginning in February 2016, when the first meeting of the Continental Free Trade Area Negotiating Forum (CFTA-NF) held in Addis

¹⁶⁹ Paul Brenton and Gozde Isik, 'De-fragmenting Africa: Deepening Regional Trade Integration in Goods and Services' (2012) 1-52. See also Vickers op cit 18.

¹⁷⁰ African Continental Free Trade Area - Questions and answers. 2018. *African Trade Policy Centre*. United Nations Economic Commission for Africa. See also Vickers op cit 14-18.

¹⁷¹ That is building on existing levels of integration, tariffs must be lowered beyond what has already been agreed through multilateral system or EPAs

¹⁷² Regional Focus and Third World Network Africa 'The Continental Free Trade Area (CFTA): Process and Political Significance' (2016) available at <http://twnafrica.org/RR%20+%20TWN-A%20-%20CFTA%20Primer.pdf> accessed on 26 July 2018.

Ababa to consider all the “post-launch preparatory and essential process issues, as well as technical documents that will enable the efficient conduct of the negotiations”.¹⁷³

Over the course of ten sessions held in Addis Ababa, Niamey and later at Abuja, Senior Trade Officials (STO) of African Union member states, relevant experts from the recognised Regional Economic Communities (RECs), members of the Continental Task Force (CTF) which included institutions such as, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Africa (UNECA), the African Trade Policy Centre (ATPC) and the African Development Bank (AfDB),¹⁷⁴ met to review the progress of the various technical working groups set up to fashion the legal framework for the Agreement creating the AfCFTA. By the 8th session of the CFTA-NF held in Abuja Nigeria in November 2017, a draft text was ready for final review and after two final legal scrub up sessions, the legal text was submitted to the African Union Assembly in Kigali in March 2018.

Negotiations on tariff concessions are still ongoing and are expected to be tabled by January 2019. The tariff schedule negotiations have modest ambitions. It aims to get negotiating parties to agree within five years, to eliminate non-tariff barriers to trade with respect to 90% of all goods traded.¹⁷⁵ In line with the principle of special and differential treatment, cases are being made for some ‘relaxed commitments’ with respect to transitional periods for Least Developed Countries (LDCs) such as Djibouti, Ethiopia, Madagascar, Malawi, Sudan, Zambia and Zimbabwe. Those countries hope, on the entry into force of the AfCFTA (and on account of their level of development), to be allowed a lower ambition level of 85% for all goods to be reduced to zero tariffs, and after fifteen years, increased to the required 90%.

The AfCFTA Agreement contains a ‘*rendezvous clause*’,¹⁷⁶ stipulating that the second phase of the negotiations is only to commence after the adoption of the legal text produced pursuant to the first phase of negotiations. The second phase of negotiations, therefore, commenced in August 2018

¹⁷³ African Union ‘*The African Union Commission opens the two-day Capacity Building Workshop for CFTA member states prior to the 1st Continental Free Trade Area Negotiating Forum (CFTA-NF) on Wednesday*’ (2016) available at <https://au.int/en/pressreleases/20160222-0> accessed on 29 July 2018.

¹⁷⁴ African Union ‘*The Sixth Meeting of the Continental Free Trade Area Negotiating Forum (CFTA-NF) kicks off prior to the African Union Ministers of Trade Meeting*’ (2017) available at <https://au.int/en/pressreleases/20170608/sixth-meeting-continental-free-trade-area-negotiating-forum-cfta-nf-kicks> accessed on 29 July 2018.

¹⁷⁵ Tralac. Op cit.

¹⁷⁶ Article 7, ‘*Agreement establishing the African Continental Free Trade Area*’ 2018.

and the mandate of negotiators is to provide a working framework for other significant issues not covered by the first phase. These issues are on investment, competition and intellectual property and are expected to be submitted for adoption to the January 2020 Session of the African Union assembly.¹⁷⁷

The AfCFTA negotiations were not without challenges. These challenges were however envisioned to arise as an incidence of Africa's unique dynamics.¹⁷⁸ Being the largest continent in the world in terms of the number of countries (and the heterogeneity of cultures within them), negotiators were faced with the challenge of finding a way to capture the aspirations of all parties. Negotiators also had the challenge of finding an acceptable way to deal with the intricacies surrounding sensitive issues such as “the multitude of sub-regional and inter-sub-regional integration processes and handling asymmetric levels of integration already achieved in the issues relating to overlapping memberships, the economic issues of low income, least developed countries, undiversified economies and how to manage the issue of the huge tariff revenue reliance by various governments.

3.4 A Profile of the African Continental Free Trade Agreement.¹⁷⁹

3.4.1 The Agreement establishing the African Continental Free Trade Area: The Agreement establishing the African Continental Free Trade Area is made up of seven parts and is accompanied by three supplementary protocols. The three protocols are: the protocol on trade in goods, the protocol on trade in services and the Protocol on rules and procedures on the settlement of Disputes. While the supplementary protocol on trade in goods and the Protocol on rules and procedures on the settlement of Disputes are supported by annexes, the annexes to the protocol on trade in services are still being negotiated.¹⁸⁰

The agreement acknowledges that the underlying aim of the initiative is deepening economic integration through securing partnerships on the continent for the promotion of agricultural development, food security, industrialisation and structural economic transformation.¹⁸¹ This is a

¹⁷⁷ Tralac. Loc cit.

¹⁷⁸ UNECA op cit note 121 at 2.

¹⁷⁹ The Copy of the Agreement used for the purpose of this research is the November 2018 Update available at <https://www.tralac.org/documents/resources/african-union/2162-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html> as of the 29 November 2018

¹⁸⁰ Ibid.

¹⁸¹ Preamble, ‘*Agreement establishing the African Continental Free Trade Area*’ 2018.

reiteration of the sentiments expressed in the Abuja Treaty. The agreement progresses into nine sub-parts, the first of which attends to definitional issues. Noteworthy in this section is the reference to ‘the *Vienna convention on the law of treaties*’, ‘the *general agreement of trade in services*’ and ‘the *general agreement on trade in goods*’ thereby making apparent the negotiating principle of ‘best practices’ and leading to the inference of external influence in the drafting of the text.¹⁸²

Parts two and three broadly makes provisions on core establishment, objectives, guiding principles, scope and the administrative aspects. While Article 2 establishes an African Continental Free Trade Area, to be known simply as ‘the AfCFTA’, Article 9 sets up the framework for its implementation, facilitation and monitoring. This framework consists of the African Union Assembly,¹⁸³ a council of ministers,¹⁸⁴ a committee of senior trade officials,¹⁸⁵ all of which are to be headquartered at the Secretariat and described as an autonomous body with an independent legal personality within the African Union.¹⁸⁶ While part four emphasises the imperatives of openness and transparency, part five secures preferential treatment for all states in the AfCFTA. Pursuant to Article 19, parties are to “accord each other preferences on a reciprocal basis that are not less favourable than those given to third parties when implementing this Agreement”. The Dispute settlement mechanism established in the agreement only apply to disputes between State parties and is to be administered in accordance a separate protocol in regard to same.¹⁸⁷ Part four adopts the most favourable nation models as contained in the World Trade Organization’s general agreement for tariff & trade. The last part of the main agreement deals with the dispute resolution mechanisms and finalisations.¹⁸⁸

The agreement and the supplementary protocols enter into force 30 days after the 22nd instrument of ratification is deposited. However, the agreement becomes enforceable against any State party on the date that party deposits its accession instrument.¹⁸⁹ The AfCFT Agreement is subject to review every five years,¹⁹⁰ however, amendments may be proposed to the secretariat by State

¹⁸² Article 1 *Ibid.*

¹⁸³ Article 10 *Ibid.*

¹⁸⁴ Article 11 *Ibid.*

¹⁸⁵ Article 12 *Ibid.*

¹⁸⁶ Article 13 *Ibid.*

¹⁸⁷ Article 20 *Ibid.*

¹⁸⁸ Part 6 *Ibid.*

¹⁸⁹ Article 23 (3) *Ibid.*

¹⁹⁰ Article 28 *Ibid.*

parties, which, after facilitating a review and a broad consultation process, may submit the amendment to the assembly for adoption by a consensus.

3.4.2 The Protocol on Trade in Goods:

The protocol on trade in goods is the first protocol to the AfCFTA Agreement and its central objective is to supplement the AfCFTA by setting up a liberalized market for the trade in goods. The protocol is the most extensive document in the AfCFTA suite of documents. It is comprised of eight parts and nine annexes, with some of the annexes,¹⁹¹ additionally comprising schedules, guidelines and appendices. Like the AfCFTA Agreement, and in the same fashion as the World Trade Organization's general agreement for tariff & trade, the protocol reiterates the most favourable nation and national treatment principles, reinforces the significance of non-discrimination to the facilitation of an open and liberalized market for goods trade.¹⁹² While some tariff is permitted to be levied at reduced rates, quantitative restriction and non-tariff barriers are expressly prohibited.¹⁹³ Part four of the protocol encourages customs cooperation,¹⁹⁴ trade facilitation¹⁹⁵ and transit.¹⁹⁶ The protocol also makes provision for trade remedies.¹⁹⁷ Noteworthy, is the provision which stipulates that the imposition of remedies within the AfCFTA will be in accordance with Article XIX of the General Agreement for Trade & Tariff and the World Trade Organization's agreements.¹⁹⁸ Product standards and measures to attend to the sanitary and phytosanitary condition of goods traded within the free trade zone are permitted under the protocol to be imposed by State parties, however subject to the conditions spelled out by the protocol's annexes six and seven.

Like the General Agreement on Trade and Tariffs (GATT), the protocol also provides for exceptional instances in which a State may deviate from its commitments amongst which include: for purposes of preserving public morality, protecting health and life, relating to gold or silver

¹⁹¹ such as the annex on transit as well as the annex on trade remedies

¹⁹² Part 2 Ibid.

¹⁹³ Articles 9 and 12. Protocol on Trade in Goods. 'Agreement establishing the African Continental Free Trade Area 2018'.

¹⁹⁴ Article 14 Ibid.

¹⁹⁵ Article 15 Ibid.

¹⁹⁶ Article 16 Ibid.

¹⁹⁷ Part 5 Ibid.

¹⁹⁸ Article 18 Ibid.

exports and for the conservation of national resources.¹⁹⁹ Other exceptions include security²⁰⁰ and balance of payment issues.²⁰¹ Another noteworthy provision in the protocol is the special and differential treatment allowance,²⁰² under which flexibility is required to be given to parties at different levels of economic development, including but not limited to special consideration and additional transition period in the implementation of the agreement. This provision is to allow for an even distribution of benefits attainable under the AfCFTA arrangement. Monitoring of the protocol is to be carried out by a committee for trade in goods, which is overseen by the council of ministers.²⁰³ The protocol contains comprehensive annexes on the schedule of tariff commitments,²⁰⁴ rules of origin, customs cooperation, trade facilitation, non-trade barriers, technical barriers to trade measures, sanitary and phytosanitary measures and transit and trade remedies.

3.4.3 The Protocol on Trade in Services:

The protocol on trade in services is not as exhaustive as the protocol on trade in goods. It contains six parts of twenty nine articles and six annexes which are still being negotiated. The broad objective of the protocol is to create a single liberalised market for service trade by eliminating barriers to trade in services.²⁰⁵ Within the context of the protocol, ‘*services*’ exclude those supplied in the exercise of government authority²⁰⁶ and the term ‘*trade in services*’ means “the supply of service from the territory of one State party into the territory of any other State party or from the territory of one State party to a service consumer of any other State party or by a service supplier of one State party, through commercial presence in the territory of any other State party or by a service supplier of one State party, through the presence of natural persons of a State party in the territory of any other State party”.²⁰⁷ The protocol allows leverage to State parties to “regulate and introduce regulations on services and service suppliers within its territory in order to meet national policy objectives,” in so far as those regulations do not disturb the commitments under the

¹⁹⁹ Article 26 Ibid.

²⁰⁰ Article 27 Protocol on Trade in Goods. ‘Agreement establishing the African Continental Free Trade Area 2018’.

²⁰¹ Article 28 Ibid.

²⁰² Article 6 Ibid.

²⁰³ Article 31 Ibid.

²⁰⁴ This is still being negotiated and is to be finalized by January 2019

²⁰⁵ Article 3, Protocol on Trade in Services. ‘Agreement establishing the African Continental Free Trade Area, 2018’.

²⁰⁶ Article 2(3)(c) Ibid.

²⁰⁷ Article 1 Ibid.

protocols²⁰⁸ and are administered reasonably, objectively, transparently²⁰⁹ and reflect non-discrimination principles.²¹⁰ The protocol also stipulates the recognition of the education licenses, certifications or experience obtained in one State by another State party for the purposes of the fulfilment of national standards or criteria.²¹¹ In this respect a State party may not accord recognition in a way which constitutes a means of discrimination between State parties in the application of its standards of criteria for authorisation, licensing or other certifications obtained.²¹²

3.4.4 The Protocol on Rules and Procedures on the Settlement of Dispute:

The third protocol is on rules and procedures on the settlement of disputes and it covers any disagreement between State parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations.²¹³ The protocol is aimed at creating the framework for the transparent, accountable, fair, predictable and consistent settlement of disagreements arising from the interpretation of the provisions of the AfCFTA.²¹⁴ The protocol comprises 31 articles creating the panel and stipulating the methods of dispute resolution and three annexes on the working procedures of the Panel. A more detailed assessment of the protocol and its unique method of dispute resolution will be conducted in the next chapter.

3.5 Conclusion

This chapter assessed the AfCFTA, considered as the most extensive step towards African integration yet. The AfCFTA is built on the need to foster development through economic cooperation and also to drive increased trade by establishing a single market for goods and services in which investment and labour mobility are encouraged, ultimately leading to rapid development. The second part of the chapter appraised the rule-based context of the AfCFTA Agreement and also the negotiation process through which it was produced. The comprehensiveness of the legal text and the principles which guided its formulation are a pointer to the level of commitment by most

²⁰⁸ Article 8 Ibid.

²⁰⁹ Article 9 Ibid.

²¹⁰ Article 4 Ibid.

²¹¹ Article 10 Ibid.

²¹² Article 10(3) Ibid.

²¹³ Article 3. Protocol on Rules and Procedures on the Settlement of Dispute. ‘Agreement establishing the African Continental Free Trade Area 2018’.

²¹⁴ Article 2 Ibid.

African countries not just to increasing trade but also to ensuring that there is asymmetrical distribution of benefits to address the continent's asymmetrical pattern of development.

However, in most multilateral arrangements with ambitions like the AfCFTA, factors are likely to arise which lead to misinterpretation of obligations and ultimately broken promises. This makes a dispute settlement and legal interpretation system imperative. Against this background, the next chapter of this research focuses on the third protocol to the AfCFTA on rules and procedures on the settlement of disputes especially in the light of the continent's trends towards regional dispute settlement. The next chapter starts with a brief discussion of existing regional Courts.

CHAPTER 4:

THE CONTINENTAL FREE TRADE AREA, DISPUTE SETTLEMENT, AND COMPLIANCE

4.1 Introduction.

This research recognizes that the achievement of the aims set out in any supranational initiative is dependent on its component parts operating with some degree of efficiency. A dispute settlement system guarantees this needed efficiency by providing a means through which disputes are settled, and it is against this background that African integration initiatives have always provided for a functional system for conflict management.²¹⁵

This chapter considers the mechanisms through which disputes which arise in the course of deeper integration under the continental free trade initiative will be resolved.²¹⁶ This is considered important to this research because the continental free trade initiative must have the ability to manage the intricate dynamics arising from deeper integration and also to ensure its success.

This chapter first examines the notion of dispute settlement within an African integration context. In so doing it identifies existing dispute resolution institutions on the continent and discusses the nature of dispute settlement faced by African regional Courts. This section also examines the issue of compliance and enforcement which are some of the persisting challenges facing selected regional Courts in Africa. This appraisal provides the necessary context for assessing the continental free trade initiative's dispute settlement system and the adequacy of the provisions of the Protocol on Rules and Procedures on the Settlement of Disputes.

4.2 Dispute Settlement in a Regional Context

The emergence of regional dispute settlement systems to ease the friction associated with integration, was an expression of the increasing appreciation of the significance of cooperation in legal and judicial matters for the proper functioning of regional processes and institutions.²¹⁷ Alabi

²¹⁵ Protocol on Rules and Procedure on the Settlement of Disputes. *'Agreement establishing the African Continental Free Trade Area'* 2018.

²¹⁶ Phillip Raworth, *'Introduction to the legal system of the European Union'* (2001) In Fagbayibo op cit at 216, 241

²¹⁷ Mojeed O A Alabi, *'Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa'*

notes that this emergence of Courts as a supranational judicial arm was perceived as valuable to the reform agenda to reposition the continent to play a dynamic role in contemporary international relations.²¹⁸ It was also regarded as a central element for providing security and predictability in a system to which State parties would commit some degree of their sovereignty.²¹⁹ An institution for the preservation of the rights and obligations of all State parties, as well as for the clarification of existing provisions of the Agreement (in accordance with customary rules of interpretation of public international law), was perceived to be imperative for easing tensions arising from deeper integration.

In this regard, the ECOWAS Court blazed the trail in activating judicial dispute settlement mechanisms in 1991. Similar steps were taken by the *Union Économique et Monétaire de l'Afrique de l'Ouest* (UEMOA) in 1994,²²⁰ the *Communauté Économique et Monétaire d'Afrique Centrale* (CEMAC) in 1994, by COMESA in 1998 and also by the East African Community (EAC) in Arusha (Tanzania), in 2002.²²¹ The members of the Southern African Development Community (SADC) had signed a protocol on a Tribunal in Windhoek in 2000. However, it faced challenges in the wake of the *Campbell v. Zimbabwe* case which proved fatal to the existence of the Tribunal.²²² A new protocol on the Southern African Development Community's Tribunal was however signed in August 2014 in Zambia.

Over the years, regional Courts have served as interesting examples of the impact of regional systems often projected against a background of less than perfect democratic systems in their member states. These Courts, despite the wide reach of their powers, often fall short of expectation.²²³ The reason for this has been broadly attributed to the compliance-based nature of international law and the impracticality of having a supreme executive take on the task of enforcing

(unpublished PhD thesis, University of Leicester, 2013) 29.

²¹⁸ Ibid.

²¹⁹ Trudi Hartzenberg, *WTO dispute settlement : an African perspective* (2008). See also Georgios I Zekos 'The Case for giving to Private Parties Access to the WTO Dispute Settlement System' (2007) 8; 3 *The Journal of World Investment & Trade* 441–451.

²²⁰ Article 16 *UEMOA Treaty* available at <http://www.uemoa.int/Documents/TraitReviserUEMOA.pdf> accessed on 29 May 2018.

²²¹ Article 9(1) (e) and 27(2) *East African Community Treaty* 1999. See also Swart, Mia 'Judicial independence at the regional and sub-regional African Courts' (2014) 29; 2 *South Africa Public Law* 275–407.

²²² Majatame, James, '*Legal analysis of the challenges and prospects of the SADC Tribunal*' (Unpublished, LLM thesis, University of Cape Town, 2014) chapter 3.

²²³ Joseph Sinde Warioba, '*Monitoring Compliance with and enforcement of binding decisions of International Courts*' (2001) 5 *Max Planck UNYB* 41-52.

judicial decisions, against the enforcement-based nature of domestic laws.²²⁴ Therefore, the absence of a clear framework to guarantee compliance and enforcement presents the most prominent affront to the efficiency of African regional Courts, and creates the foundation on which the other challenges of the Courts are predicated.

4.3 An Appraisal of the third protocol to the African Continental Free Trade Agreement on Dispute Settlement

The African continental Free trade Initiative's dispute settlement framework bears similarities with the World Trade Organization's Dispute settlement framework. This comes as no surprise as the World Trade Organization's system is regarded as the most sophisticated legal framework for multilateral relations.²²⁵ This is because since the World Trade Organization's dispute settlement system's formation in 1995, it has operated with relative efficiency, settling close to six hundred disputes and garnering the confidence of the international community.²²⁶ While the parties appealed nearly every panel report in the early years of the dispute settlement system, the appeal rate has significantly decreased over the past few years. The dispute settlement system has only in seven instances, granted authorization to a complainant to suspend its obligations, and in all seven cases, arbitration took place because the respondents disagreed with the complainants' proposal for suspension.²²⁷

The African continental free trade initiative aims to attain that level of proficiency and therefore models its dispute settlement system in like fashion, to be administered in accordance with a protocol on rules and procedures on the settlement of disputes (dispute settlement protocol).²²⁸ The protocol establishes a dispute settlement body (DSB) to serve the role of securing the predictability of the regional trading system; by preserving the rights and obligations of State

²²⁴ 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.

²²⁵ Alemanno Alberto, 'Private parties and WTO Dispute Settlement System' (2004). Cornell Law School Inter-University Graduate Student Conference Papers, Paper 1. Available at http://scholarship.law.cornell.edu/lps_clacp/1 accessed on 3 September 2018. See also Zekos, Georgios I, 2007. Ibid. 441–451.

²²⁶ Arie Riech, 'The effectiveness of the WTO dispute settlement system: A statistical analysis' (2017) EUI Working Paper LAW 2017/11 available at http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1 accessed on 28 August 2018

²²⁷ Ibid.

²²⁸ See Articles 21 (1), (2), & (3) Agreement establishing the African Continental Free Trade Area. 2018.

parties and clarifying the existing provisions of the Agreement in accordance with customary rules of interpretation of public international law governing dispute settlement between State parties.²²⁹

The scope of the DSB's mandate to govern disputes between State parties, reflects the intention of the initiative to focus on harmonizing governmental trade policies while treating the disputes arising from it as incidental and not to further the interests of the individual trader.²³⁰ This means that according to existing protocols and agreements relating to the initiative, private and individual rights cannot be directly asserted before the scheme's dispute settlement body.²³¹

The dispute settlement body is vested with the authority to establish dispute settlement panels and an appellate body. These are to be like a Court of first instance and an appellate Court within domestic judicial systems, and are to be composed of representatives from State parties.²³² The role of the dispute settlement body with respect to the panels and appellate body is therefore to establish their procedural rules to guarantee their efficiency, adopt reports from them and also to perform other supervisory roles.²³³ The decisions of the dispute settlement body in this regard are to be made by consensus.²³⁴ The parties to a dispute under the Agreement are at liberty to refer their disputes for arbitration as the first dispute settlement avenue,²³⁵ in which case the use of the dispute settlement body is foreclosed, till the arbitration option is exhausted.²³⁶

Like the World Trade Organization's dispute resolution system, the dispute settlement process of the continental free trade initiative is initiated by a request for consultations.²³⁷ The aim of the consultations is to find an amicable settlement option for the dispute using means such as good offices, conciliation and mediation, as provided under the protocol. This is laudable because it embraces the contemporary, non-hostile approach to dispute settlement. Where an amicable

²²⁹ Articles 21(3); Article 2 Protocol on Rules and Procedure on the Settlement of Disputes, Agreement establishing the African Continental Free Trade Area. 2018.

²³⁰ Charnovitz Steve, *The WTO and the rights of the individual* (2001) 36; 2 *Intereconomics* 98–108.

²³¹ Article 4(1) Protocol on Rules and Procedure on the Settlement of Disputes, 'Agreement establishing the African Continental Free Trade Area. 2018'.

²³² Article 5 (2) Protocol on Rules and Procedure on the Settlement of Disputes, 'Agreement establishing the African Continental Free Trade Area. 2018'.

²³³ *Ibid.* Articles 5 (4) & 5 (5)

²³⁴ *Ibid.* Articles 5 (6)

²³⁵ *Ibid.* Articles 6(6)

²³⁶ *Ibid.* Articles 27

²³⁷ *Ibid.* Articles 6

settlement proves abortive, a complainant may proceed to notify the other party in writing of its intention to refer the matter to the dispute settlement body.²³⁸ The dispute settlement body responds to such a referral by establishing an impartial and qualified dispute settlement panel within fifteen days,²³⁹ along with its rules of procedure and its terms of reference, after which the parties are promptly notified of the composition.²⁴⁰

The main role of the panel is to assist the dispute settlement body in discharging its responsibilities by objectively assessing the matter before it and making its impartial and just recommendations known to the dispute settlement body, after the parties have been given equal opportunity to be heard.²⁴¹ The dispute settlement body may consider the report of the panel twenty days after it was submitted to it.²⁴² This is to afford each party the opportunity to decide whether it is interested in objecting to the report in an appeal,²⁴³ in which case, the report shall not be considered, but rather an appellate body is constituted by the dispute settlement body for the review of the panel's report.²⁴⁴ The report of the appellate body is not subject to further appeal by the parties and is binding. It is however subject to a consensus decision of the dispute settlement body.²⁴⁵

As far as the dispute settlement process is concerned, the Secretariat of the African continental trade initiative plays a secretarial role. In addition to assisting panels on the legal, historical and procedural aspects of matters dealt with, the secretariat is to facilitate the constitution of panels in all matters. To this end, the protocol stipulates that the Secretariat should avail the panel with experienced international trade law experts to assist with the dispute resolution process. Also, the Secretariat is responsible for all relevant notifications to and from the dispute settlement body and State parties.²⁴⁶

Although the AfCFTA's dispute resolution enabling protocol system is yet to be operational, some of its features which may have a positive effect on the operation of the AfCFTA and which should

²³⁸ Ibid.

²³⁹ Ibid. Articles 9 (4)

²⁴⁰ Ibid. Articles 6 (4), art 9

²⁴¹ Ibid. Articles 12

²⁴² Ibid. Articles 19

²⁴³ Ibid. Articles 19

²⁴⁴ Ibid. Articles 19 (4)

²⁴⁵ Ibid. Articles 22 (9)

²⁴⁶ Ibid. Articles 29.

be safeguarded include its enforcement system which was designed to guarantee compliance by allowing for the suspension concessions by complaining parties to other State parties who default in implementing the recommendations and rulings of the DSB.²⁴⁷ Also, the protocol's framework for monitoring the implementation of the recommendations handed down by the Panel or Appellate body and also for the recourse to arbitration which may decide on stipulated compliance and enforcement issues are commendable.²⁴⁸ This WTO style framework for enforcement provides a more elaborate guarantee for compliance than other systems existing in the African RECs.

With respect to the dispute settlement protocol's WTO-style framework, it is also laudable that in the attempt to replicate the efficiency of the WTO's dispute settlement system by adopting the latter's design, caution was exercised to evade the 'sequencing dilemma' issue (as it is commonly known by international trade law theorists)²⁴⁹ inherent in the WTO's Dispute settlement system.²⁵⁰ Explaining this problem, Novakovic comments:

“Article 22 (of the Dispute Settlement Understanding) allows a prevailing party to request authorization to retaliate within 20 days after a compliance period ends, while Article 21.5³⁴ (also of the Dispute Settlement Understanding) provides that disagreements over the existence or adequacy of compliance measures are to be decided using WTO dispute procedures, including resort to panels. A compliance panel's report is due within 90 days after the dispute is referred to it and may be appealed. However, the DSU does not integrate the Article 21.5 procedure into the 30-day Article 22 deadline, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue retaliatory action under Article 22. ... Suppose the respondent takes the full 'reasonable period of time' before announcing a reform of the offending policy measure. If the complainant believes the reform is insufficient to make the policy WTO consistent, there is the opportunity to refer the matter to a Panel (again, preferably the original one). The Panel in turn must report within 90 days of that request (DSU Article 21.5). If the respondent is unhappy with the Panel's ruling, another 45 days could be required for the Appellate Body to consider the matter. The apparent dilemma is that even if the Panel or Appellate Body finds the reformed policy still WTO-inconsistent, the 20 days after the 'reasonable period of time' for a

²⁴⁷ Ibid. Article 25. This is discussed in more detail in chapter 4.5, where this research identifies *inter alia* a reason for the pervasive condition of non-compliance with the decisions of other regional courts to be the inadequacy of their respective implementation frameworks.

²⁴⁸ Ibid. Article 24.

²⁴⁹ See also Van den Bossche Peter, 'The Law and the Policy of the World Trade Organization, Texts, Cases and Materials.' 2008.

²⁵⁰ *Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas*, 1992 WT/DS27RW/ECU.

complainant to lodge a request to retaliate will have expired. This interpretation of DSU Articles 21.5 and 22 suggests there could be an endless loop of litigation.”²⁵¹

With respect to when a complaining party may retaliate against a party in default whose measure is deemed inconsistent with AfCFTA obligations, the AfCFTA provides that within 20 days (of an inability to negotiate a mutually acceptable solution to implementation), the complaining party may request authorisation from the DSB to suspend the application of concessions or other obligations to the party in default²⁵² and the DSB shall grant or reject the authorisation in 30 days.²⁵³ The protocol was careful in not fixing a time limit within which a party may apply for authorisation thereby escaping the sequencing dilemma issue as in the Dispute Settlement Understanding of the WTO.

The Protocol is not without its imperfections, one of which is that it rules out the settlement of disputes in sectors like the informal cross-border trade. The informal economy is the largest employer of labour in Africa, contributing an average of 40% of intra-African Trade.²⁵⁴ Considering this, a framework for settlement of disputes therein should not be ignored. This does not translate to a recommendation that informal traders gain unhindered access to the DSB. Rather what should be provided is a framework for accessible, decentralised semi-formal alternative dispute resolution mechanism and for settlement of disputes in the informal trade economy.

4.4 The Compliance Quandary of Regional Obligations in Africa

The ratification of international instruments is generally an expression of a commitment towards respecting and complying with decisions of judicial bodies empowered to adjudicate over disputes arising from those protocols and instruments. However, in the case of African regional Courts, partial compliance or no compliance at all seems to be the general rule,²⁵⁵ resulting in the

²⁵¹ Sergei Gorbylev and Milica Novakovic, ‘Retaliation under the WTO Agreement: The “Sequencing Problem”’ (2013) *The Estey Centre Journal of International Law and Trade Policy* 14(2) 118-132. Available at <https://ageconsearch.umn.edu/record/159562/files/gorbylevnovakovic14-2.pdf> accessed on 30 November 2018. See also Anderson, Kym. ‘*Peculiarities of Retaliation in WTO Dispute Settlement.*’ (2002) *World Trade Review*, 1.

²⁵² Article 25(4) Protocol on Rules and Procedure on the Settlement of Disputes, ‘Agreement establishing the African Continental Free Trade Area. 2018’.

²⁵³ *Ibid.* Article 25(8).

²⁵⁴ Lily Sommer, Chris Nshimbi ‘*The African Continental Free Trade Area: An Opportunity for Informal Cross-Border Trade*’ 7(4) *Bridges Africa*. Available at <https://www.ictsd.org/bridges-news/bridges-africa/news/the-african-continental-free-trade-area-an-opportunity-for-informal> accessed on 25th November 2018.

²⁵⁵ 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

undermining of the dispute settlement processes as well as the entire progressive framework of the regional scheme. Most perplexing about the enforceability dilemma is, why African states bind themselves to treaties and regional Courts' protocols if it is not a true expression of their will to comply with its decisions. Therefore, the most prominent challenge experienced by regional dispute settlement mechanisms in Africa is the non-compliance and enforcement issue.

In no regional Court on the African continent has the compliance problem manifested more prominently than in the SADC Tribunal. Even though the SADC treaty made provision for the existence of the Tribunal in 1992 when it came into force,²⁵⁶ the institution only considered actually developing the Court eight years after its formation. The Tribunal was elaborately established as a framework for the settlement of disputes arising from its working protocols.²⁵⁷ The Tribunal was charged with the duty to ensure the proper interpretation of the provisions of the SADC treaty and its subsidiary instruments, to adjudicate on the disputes referred to it and to ensure adherence to its decisions.²⁵⁸ The Tribunal was created with features which made its decisions binding, enforceable against the disputants and not subject to appeal,²⁵⁹ thereby demonstrating the confidence of SADC in the efficacy of the Tribunal to ease the frictions emanating from the system. This confidence however withered when the Tribunal's decisions against Zimbabwe could not be enforced against it mostly for political reasons.²⁶⁰ The most prominent of these decisions was the *Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe*,²⁶¹ which resulted in the Tribunal's collapse in 2010.

Between 2002 and 2008, the government of Zimbabwe had taken measures to expropriate land from white farmers regardless of their Zimbabwean citizenship, status, length of residence and proper use of their land.²⁶² On application to the SADC Tribunal by the white farmers, the

Humanitarian law. RWI publications available at <http://rwi.lu.se/app/uploads/2017/02/Compliancewithjudicialdecisions.pdf> accessed on 13 September 2018

²⁵⁶ Article 9 *Treaty of the Southern African Development Community* 1992.

²⁵⁷ *Ibid.*

²⁵⁸ Article 16(1) *Treaty of Southern African Development Community*. Gaborone: SADC.

²⁵⁹ Article 24 *Protocol on SADC Tribunal* 2000. Also see the rules of procedure *on SADC Tribunal*.

²⁶⁰ Zimbabwe was headed at the time by Robert Mugabe who was the longest serving and most influential leader in the SADC region. See also *The Economist*, 'Robert Mugabe off the hook as usual; Africa's diplomacy over Zimbabwe' (2009) available at <https://www.economist.com/middle-east-and-Africa/2009/09/10/robert-mugabe-off-the-hook-as-usual> accessed 25 September 2018

²⁶¹ (2008), SADCT 2/2007

²⁶² *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe* 2008 SADCT 2/2007; *Government of the Republic of Zimbabwe v Fick and Others* 2013 ZACC 22, 2013 (5) SA 325 (CC).

expropriation drive was denounced as an indirect act of racial discrimination repugnant to the SADC Treaty and many other international conventions.²⁶³ The Tribunal went on to uphold the entitlement of the farmers to the land and ordered fair compensation for any expropriation already done, ordering further, the protection of possessions, occupation and ownership of applicants from any interference by the Zimbabwean government.²⁶⁴ The Tribunal's judgment was dismissed by the Robert Mugabe-led Zimbabwe as an "exercise in futility", while going ahead with the expropriations.²⁶⁵ In response to this, the applicants applied to the Tribunal to declare the actions of the government of Zimbabwe as contemptuous, which succeeded. In 2009, the government of Zimbabwe unilaterally withdrew from the Tribunal's protocol, setting in motion a chain of politico-legal events which, in the silence and acquiescence of other SADC governments, led to the collapse of the Tribunal in 2010.

This flagrant disrespect for legal commitment and Court rulings is however not unique to the SADC, as other regional Courts have also had their legitimacy and authority threatened by the flagrant disregard of its decisions by State parties. Examples are, the ECOWAS Community Court of Justice's decision with respect to the 2016 case of *Sambo Dasuki v. The Federal Republic of Nigeria*,²⁶⁶ in which the Court condemned the arbitrary detention of the applicant as contrary to Article 6 of the African Charter on Human Rights and Article 9 (1) of the International Order on Civil and Political Rights (in defiance of Nigerian Courts) and consequently ordered his release with N15 million Naira damages;²⁶⁷ the Nigerian Government simply refused to comply with this judgment.

Also, in the East African Community case of *Anyang' Nyong'o & Ors. v. The Attorney-General of Kenya*,²⁶⁸ after the East African Court of Justice (EACJ) issued a ruling interdicting certain individual from Kenya who had been elected as Kenyan representatives to the East African

²⁶³ Ibid. Article 6(2) *SADC Treaty* prohibits discrimination on grounds of race and other biological and social factors.

²⁶⁴ *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe* (supra)

²⁶⁵ 'Mugabe Says Tribunal Ruling on White Farms "Exercise in Futility,"' (2008) in Laurie Nathan 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35; 4 Human Rights Quarterly 7.

²⁶⁶ suit no ECW/CCJ/APP/01/16

²⁶⁷ ECOWAS Community Court of Justice 'Ecowas Court orders Nigerian government to release former National security adviser, pay N15m in damages for the violation of his human rights' (2016) available at http://www.Courtecowas.org/site2012/index.php?option=com_content&view=article&id=344 accessed on 8 September 2018.

²⁶⁸ *Anyang' Nyong'o & Ors v. The Attorney general of Kenya* EACJ Ref No. 1 of 2006.

Legislative Assembly (EALA), the East African Community member states proceeded to undermine the judgment by amending the East African Community Treaty. Even the protocol to the Establishment of the African Court which created the African Court in 2004,²⁶⁹ has not been insulated from the enforcement challenges facing African supranational and regional Courts. Its judgment in *Tanganyika Law Society v Mtilika*²⁷⁰, decided in 2013 remains yet to be enforced.

4.5 Reasons for Non-Compliance with Regional Obligations and the African Continental Free Trade Agreement's Dispute Settlement System

The above cases are only a few of the instances in which State parties have ignored judgments of regional Courts. This clearly expresses the hierarchical priorities of parties to regional integration arrangements, in which the political commitment to, and demands of sovereignty rank higher than the formal imperatives of justice, fairness and the rule of law.²⁷¹ Amongst African leaders, a system of block protectionism exists, in which leaders are more inclined to protect each other whilst hiding under the veil of non-interference.²⁷² This results in the erosion of credibility of Courts,²⁷³ which if sustained would result in the eventual collapse of the dispute settlement system, putting the entire regional arrangement at the risk of failure.

To fully grasp the reasons for non-compliance, an understanding of what compliance itself entails is insightful. Von Stein makes an argument for two orders of compliance, the first being the adherence to international rules and the second order being the adherence to international rulings.²⁷⁴ This research embraces both orders as relevant to the compliance issue of regional Courts' decisions. Furthermore, the context within which the notion of compliance is viewed in

²⁶⁹ Court was established by Article 1 *Protocol to the Establishment of the African Court*

²⁷⁰ App. Nos. 009&011/2011

²⁷¹ Hafner-Burton, Emilie M & Tsutsui Kiyoteru, 'Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most' (2007) 44; 4 *Journal of Peace Research* 407–425.

²⁷² Afadameh-Adeyemi, Ashimizo, Evance Kalula, 'Securing Compliance with African Economic Integration Treaties.' (2013) 3-8. See also Kathleen Mpfu, 'Enforcement of judicial decisions in regional Courts: lessons for the CFTA'. Presentation made in a Law and Regional Integration Course Seminar. (2018). See also James Gathii 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 245–283.

²⁷³ Ibid.

²⁷⁴ 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 'International Law, Understanding Compliance and enforcement' (2010) *International Studies Compendium*. 1 - 25

this research is the degree to which State behavior conforms to the terms of international agreements entered into by it.²⁷⁵

The prominent factors attributed for compliance with multilateral obligations, within which all other factors may be collapsed are the fear of sanctions, the respect for the rule of law²⁷⁶ and the presence of monitoring mechanisms for enforcement.²⁷⁷ This, therefore, means that in the absence of sanctions, the political will to respect international commitments and enforcement mechanisms to guarantee compliance, non-compliance will be recurrent. Conversely, where there are clearly stipulated clauses in international agreements which provide for sanctions and enforcement frameworks for those sanctions in default of performance, the political will which is usually existent at the time those agreements are ratified would be sustained. A relevant question within the context of the discourse on African regional Courts is therefore, to what extent does the now defunct Southern African Development Community Tribunal's protocol, as well as the East African Court of Justice (EACJ) protocol and the ECOWAS Community Court of Justice (ECCJ) protocol, provide measures to attend to the compliance issue?

The Southern African Development Community Tribunal's protocol provides that the foreign judgment enforcement laws of the State where its decision is to be enforced is to govern the enforcement of its decisions and any failure to so enforce is to be reported to the Summit for 'appropriate action'.²⁷⁸ No mention is made of what an 'appropriate action' entails. This weak framework for enforcement was what allowed Zimbabwe to get away with its affront to the legitimacy of the SADC Tribunal in the *Campbell Case*.²⁷⁹ Similarly, a weak framework for the enforcement of the regional Courts' judgment is also present in the East African Community's treaty, which merely imposes the responsibility of enforcing judgments on the State in which the

²⁷⁵ Oran Young, 'Compliance and Public Authority' (1979) 1-32.

²⁷⁶ Edmund tweedy Flanigan, 'Do we have reasons to obey the law' available at https://scholar.harvard.edu/files/eflanigan/files/law_reasons.pdf accessed on 20 September 2018. See also HLA Hart 'Essays on Bentham' ed (1982) 15 - 54; see also Noam Gur 'Actions, Attitudes, and the Obligation to Obey the Law' (2012) 21; 3 Journal of Political Philosophy 326-46. See also William A Edmundson 'State of the Art: The Duty to Obey the Law' (2004) Legal Theory 215-59.

²⁷⁷ Ibid.

²⁷⁸ Article 32, SADC Tribunal Protocol. Ibid.

²⁷⁹ Ibid.

judgments are to be enforced.²⁸⁰ Also in the case of the ECOWAS Community Court of Justice (ECCJ), there is an uncertain enforcement framework. Pursuant to a supplementary protocol,²⁸¹ the method of implementing the judgment of the Court is by serving a writ of execution to the registrar of the member State in which the judgement is to be executed.

In all the cases stated above, the responsibility for enforcing the judgment of the Court as spelt out in the protocols and agreements are inadequately assigned. Once states become part of a regional body, the regional body must not only be responsible for enforcing its rules (and the judgments emanating from its Courts) but must, in addition, show a willingness to implement sanctions against defaulters. However, since an institution cannot act outside the scope of the law which creates it, where the law does not clearly provide the requisite framework for enforcement, the institution cannot validly act.

Unlike the framework for regional Courts on the continent, The AfCFTA initiative's dispute settlement framework attends to compliance and enforcement issues differently and with a lot less uncertainty. Where the panel or appellate body decides that a measure is inconsistent with obligations under the initiative, (and the dispute settlement body by a consensus endorses this decision), the party which imposed the measure is advised to bring its measure into conformity with the trade agreement protocol breached.²⁸² State Parties are required to fully implement the recommendations and rulings of the dispute settlement body.²⁸³ Aggrieved parties are entitled, on a temporary basis, to compensation and suspension of concessions or other obligations if the recommendations and rulings of the dispute settlement body are not implemented within a reasonable period of time.²⁸⁴ If the State party in breach fails to comply with the Panel or appellate body's decisions and rulings within a reasonable period of time, such State party shall, if so requested, enter into negotiations with a complaining party with a view to developing a mutually acceptable compensation. If this fails, a complaining party may request authorization from the

²⁸⁰ Article 44, *East African Community Treaty* 1999. See also Rule 74 *Rules of procedure East African Court of Justice* available at <http://eacj.org/wp-content/uploads/2013/09/EAC-Rules-of-Procedure-2013.pdf> accessed 25 September 2018.

²⁸¹ This is provided for in the *supplementary protocol a/sp.1/01/0* which amended the preamble and Articles 1, 2, 9, 30 of *Protocol a/p.1/7/91* relating to The Community Court of Justice. Also See Article 6 amending Article 24

²⁸² *Ibid.* Article 24

²⁸³ *Ibid.* Article. 24

²⁸⁴ *Ibid.* Article. 25

dispute settlement body to suspend the application to the State party concerned, of concessions or other obligations under the Agreement.²⁸⁵

4.6 Conclusion

In this chapter, it was highlighted that dispute settlement institutions in Africa have increased with deepening integration in the 1990s. However, because of the inadequate framework for compliance and enforcement, regional Courts in Africa have not been very effective in advancing deeper cooperation and integration. Using examples from the SADC Tribunal, the EACJ and the ECCJ, this chapter gave instances of legal disputes illustrating the compliance quandary bedeviling Africa's regional Courts. This provided a context for assessing the possible reasons for non-compliance and benchmarking the levels of preparedness of the AfCFTA's dispute settlement mechanism to handle non-compliance.

An assessment of the innovations in the dispute settlement protocol of the African Continental Free Trade Agreement (which bears similarities to the World Trade Organization's dispute settlement mechanism) highlights the difference in approach, especially with regard to compliance. The framework for the AfCFTA's dispute settlement system was shown to include post-adjudication mechanisms to monitor compliance and to allow for repercussions in instances of default. The presence of a properly spelled out framework for compliance and enforcement is an indication that the AfCFTA's dispute settlement system is more equipped, than any previous regional dispute system on the continent, to handle the vagaries of integration and guarantee the initiative's efficiency.

²⁸⁵Ibid. Article 25 (4)

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

In three phases, this research examined the economic integration efforts in Africa. First the study discussed a number of integration theories, then a historical evaluation of African integration was made, beginning from the early independence period till date.²⁸⁶ After several decades of experimenting with different integration initiatives built on different economic ideologies and hypotheses, the continent finally negotiated the framework for a continental free trade area.

The study has shown that the aspirations of the AfCFTA is to achieve the increment of the continent's intra-African trade indices from less than 20 percent presently, to above 50 percent by the year 2063, and also to cater to the demands of the levels of development, expressive of pan-Africanist ideals and the visions of an African renaissance. With the Continent's population expected to hit the 2 billion mark in 2050,²⁸⁷ the study shows that a continental pact of this nature is timely.

Also in this study, the AfCFT Agreements were evaluated. The agreements includes protocols on trade in goods, trade in services and relating to the settlement of disputes. From the legal framework, the study identified four areas which the AfCFTA initiative considers a priority. The first, is the creation of a continental market for goods and services, facilitated by free movement of business and investment. The second, is the expansion of intra-African trade by coordinating trade facilitation and liberalisation frameworks. This is followed by the need to attend to the impediments and issues associated with multiple memberships in the regional economic communities and lastly, to drive industry and competition by exploiting opportunities of scale production.

This study indicates that the scheme is employing the trade route to sustainable development. In this regard, the key beneficiaries are businesses, traders and consumers who will pay reduced

²⁸⁶ The first phase provided theoretical and historical backgrounds to the research, the second and third phases assessed the recent Integration and sustainable development drive and the dispute settlement protocol respectively.

²⁸⁷ Ibid.

tariffs on selected goods traded within the area. This framework reflects the requisite clarity of purpose, which is needed for the successful implementation of the initiative.

Given the ambitious nature of the initiative, the possibility of misinterpretation of obligations and ultimately broken promises, the dispute settlement protocol of the AfCFTA was also discussed. This assessment was necessary especially due to the continent's chequered history with dispute settlement and compliance with dispute resolution mechanisms.

In evaluating the dispute resolution system created under the AfCFTA, the study acknowledged the theoretical uniqueness of the system as far as African integration is concerned. The resolution mechanism included frameworks for alternative dispute resolution such as mediation, conciliation, good offices and arbitration, indicating its embrace of a contemporary, non-hostile approach to dispute settlement. Furthermore, the dispute settlement protocol contains an elaborate framework for dispute resolution including a compliance and enforcement system which is similar to the WTO's, and unlike the framework for other regional Courts on the continent.

5.2 Recommendations

This research has established that the long-standing imperative of economic development as well as the political mandate of African unity had informed the adoption of the market integration approach. This is why an assessment of the trajectory of integration on the continent reflected more theoretical frameworks for integration without the actual tangible results. Even after the adoption of the Abuja Treaty in 1991, which set ambitious aims for integration and sustainable development, the continent's potential for real growth was still unrealised. It is perhaps for this reason that the AfCFTA had made an assessment of both the market integration (which had been favoured at the earlier stages of African integration) and the development-driven models of integration and concluded that the latter is more suited to African realities.²⁸⁸ Accordingly this section of the research makes a number of recommendations.

Firstly, the implementation of the AfCFT Agreement will require internal strategic effort.

²⁸⁸ Preamble, Article 3, *Agreement establishing the African Continental Free Trade Area* 2018.

Challenges related to cost,²⁸⁹ the continent's multilingual nature²⁹⁰ absence of infrastructure and also the initial short term losses associated with the uneven distribution of wealth and resources between countries with varying production capacities, are expected to arise. Therefore it is recommended that the framework for its implementation be strategic in anticipating and attending to these issues. Here the responsibility will lie most with the AfCFTA Secretariat to devise an internal strategy for implementation and also for monitoring member State reactions (and engagements) with AfCFTA obligations. This is necessary to prevent, as Owoeye argues, "the criticism of... being like the Orwellian animal farm with equal animals and with others more equal than the others". With a strategic framework for implemented and monitoring comes a promise of success, an assurance of fair treatment, and a guarantee of equal distribution of benefits.

Secondly, this research recommends the adoption of a external trade and investment policy with respect to non-parties to AfCFT Agreement across the world. In this research one of the theoretical incidences of a Free Trade Area was identified to be trade diversion (i.e. from the more expensive external markets to the markets within the free trade zone).²⁹¹ Therefore it becomes important to adopt a trade policy detailing harmonized terms of trade engagement with respect to especially Africa's previous external trade hegemony such as the US, China and the EU, from whom the most significant trade diversion is expected. In the same way there always existed Trade policies of these hegemony on Africa, a foreign trade strategy of the AfCFTA to the hegemony will serve as a strategy statement which shall be founded on principles agreed by member States and which will define the terms of engagement of the AfCFTA on its external trade partners and foreign investors, on strategic support and cooperation leading to a stronger position in international trade negotiations and lead to a more controlled framework for external trade going forward.

Thirdly, attention must be paid to the informal economy. This research identified that Africa's informal economy is its largest employer of labour contributing an average of 40% of the total intra-African trade. This makes the informal economy integral towards achieving the aims of diversifications, structural transformation, reduced poverty and income generation.²⁹² Therefore

²⁸⁹ The UNCTAD estimates that the implementation of the AfCFTA will cost about \$1.4b

²⁹⁰ Besides Africa's approximately 2000 indigenous languages, national languages include, English, French, Portuguese, Arabic and Spanish.

²⁹¹ Ostergaard op cit at 34. This is explained in Chapter 1.6.1.

²⁹² Lily op cit note 254.

with respect to the informal economy the following recommendations are made. In the light of the fact that the informal economy suffers the deficiency of inadequate data to aid its monitoring and lead to the formulation of appropriate policies in the regard, a framework for monitoring should be a priority. In addition to devising a monitoring system there should be a strategic framework for cross border infrastructures development, capacity building, trade finance and trade facilitation with respect to the informal economy. furthermore a framework for more simplified trade rules must be created which will be more relatable to the informal trader thereby aiding rather than serving as a barrier to small-scale cross border trade activities.

On a fourth note, more trade would not necessarily lead to development, unless a framework for improving the value of what is traded itself is devised. State parties to the AfCFTA must consider the upgrading of commodity sectors and develop a priority list of sectors with higher productivity for the manufacturing of value added or higher end services. To this end, attention must be given to the industrial policy space. There must be a framework for accelerated industrial development to run with the framework for trade integration.²⁹³ The literature on economic development provide apposite proof that the chances of sustainable development are slim, without an industrial policy designed to attend to the issues of trade facilitation, productive capacity, trade-related infrastructure, trade finance and trade information and transformation. Therefore, African economic players must prepare industrial policy arrangements in that regard.

Furthermore, the industrial policy for States within the AfCFTA must aspire towards structural transformation. This is because the evolving dynamics of continental trade and business will impose economic transformation as an imperative for African States to sustainably develop under the AfCFTA.²⁹⁴ Transformation within this context is stated to be the utilization of properly ‘structured’ and ‘targeted’ industrial policy to cause a shift from an economy based on primary products and unskilled labor to one driven by knowledge based skilled labor. There has to be a shift in the aggregate economic ideology (across the continent) on industrial policy towards structural transformation. A responsive industrial policy for transformation (and development) requires a balance of forces within States, therefore the need for industrial policy players to have

²⁹³ Ismail op cit note 10.

²⁹⁴ Lindsey Whitfield, Ole Therkildsen, Lars Buur, & Anne Mette Kjær, ‘*The Politics of African Industrial Policy: A Comparative Perspective*’ (2015) 1-34; see also Wim Naudé, Adam Szirmai & Nobuya Haraguchi, ‘*Structural change and industrial development in the BRICS* 1 ed (2015) Pt 2.

an appreciation of the political economy of industrialization as well as the dynamics surrounding this ‘balance’ cannot be over-emphasized. Here, all industrial policy makers must have both a theoretical and an empirical knowledge of the industrial policy space in which they operate.

On a fifth note the importance of strategic monitoring cannot be overemphasized. The policies put in place under the AfCFTA will have profound effects on the socio- economic and political space of the continent unlike any initiative. This research identified the AfCFTA to be developed with very ambitious aspirations, therefore getting it wrong may prove very costly to the pan Africanist goals discussed in this research. In the third chapter of the research, the Assembly of heads of States and governments, the Council of African Ministers of Trade, the Committee of Senior Trade Officials and the AfCFTA Secretariat, were identified as the institutions put in place for monitoring the developments of the AfCFTA. Of these bodies, the secretariat, which is established with the legal status of a “functionally autonomous institutional body within the AU with an independent legal personality” is charged with the most active administrative roles under the provisions of the AfCFTA.

However, what is concerning is not only the absence of a clear operational framework for the performance of the monitoring role of the AfCFTA, but also the absence of a stipulation of the experience and quality of staff to be employed there. The monitoring of the AfCFTA initiative would require individuals from across the continent with a clear understanding of the rudiments of economic policy, trade law, regional integration and other related areas and it would be best for the AfCFTA to clearly state this. In the absence of this, the AfCFTA must be careful to prevent State politics from interfering with appointments to the secretariat, by permitting the employment of less qualified personnel in the AfCFTA secretariat. Furthermore, capacity building after employment would be an imperative.

The discussions in this research are by no means new, however they represent ideas more relevant to the discourse on African integration now that the continent is at the cusp of its most profound leap for development to date. At this point, what is most important is not the ideas themselves but how efficiently they are implemented.

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