LEGAL TEXTS ON TRADE FACILITATION: COMPARATIVE ANALYSIS OF THE WORLD TRADE ORGANISATION AND THE AFRICAN CONTINENTAL FREE TRADE AREA

by

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DECLARATION

I, Willie Shumba (Student Number 6506798), declare that ***LEGAL TEXTS ON TRADE FACILITATION: COMPARATIVE ANALYSIS OF THE WORLD TRADE ORGANISATION AND THE AFRICAN CONTINENTAL FREE TRADE AREA*** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Willie Shumba

Signature 30th March 2023

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SUMMARY

Trade agreements are a common feature in international economic law as they govern trade relations between states. These agreements are anchored by a firm foundation of the requisite legal provisions to support trade. In this regard, the World Trade Organisation (WTO) and the African Continental Free Trade Area (AfCFTA) have each developed their own legal texts that acknowledge the significance of trade facilitation and would, when implemented, facilitate the movement of goods and services across international borders. The thesis was a comparative analysis of the legal texts on trade facilitation of the WTO and the AfCFTA whose aim was to identify the resemblances and divergences between the two. The WTO has a broader mandate of global trade and ensures that trade amongst its members is conducted in conformity with global rules. On the other hand, the AfCFTA is a trade agreement that has been negotiated by African member states pursuant to the political vision of the African Union (AU), and within the confines of WTO, specifically Article XXIV of GATT 1994. This research was therefore undertaken against the backdrop of these seemingly contradicting circumstances. The central research question for the study concerns the differences and similarities between the legal texts on trade facilitation of the WTO and the AfCFTA.

The study was qualitative involving a desktop review of primary and secondary sources of data. Among others, the thesis finds that the AfCFTA complies with the strategic goals of the AU, and at the same time, complements the multilateral trading system of the WTO. The thesis concludes that while there are certain similarities, the legal texts on trade facilitation of the WTO and the AfCFTA are different. The inherent dissimilarities in the texts are not contrary to the principles of the WTO. The thesis contributes to scholarly literature in trade facilitation with respect to both the AfCFTA and the WTO. It also identifies new areas for further studies and provides the necessary groundwork. The study recommends some improvements that can be made to the respective legal texts on trade facilitation.

KEY WORDS

AfCFTA Agreement; African Continental Free Trade Area (AfCFTA); comparative analysis; customs union, free trade area; General Agreement on Tariffs and Trade (GATT); global trade; international trade; legal texts; multilateralism; regionalism; Regional Economic Community (RECs); Regional Trade Agreements (RTAs); trade agreement; trade facilitation; Trade Facilitation Agreement (TFA); World Trade Organisation (WTO).

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LIST OF ABBREVIATIONS AND ACRONYMS

AB	Appellate Body
ACP	African, Caribbean and Pacific
AEC	African Economic Community
AER	The American Economic Revolution
AfCFTA	African Continental Free Trade Area
Afr Dev Rev	African Development Review
AJIL	American Journal of International Law
Am Econ Rev	American Economic Review
Am L Rev	American Law Review
AMU	Arab Maghreb Union / Union du Maghreb Arabe
Annu Rev Econ	Annual Review of Economics
APSR	American Political Science Review
ASEAN	Association of Southeast Asian Nations
ASYCUDA	Automated System for Customs Data ,
ATIGA	Asean Trade in Goods Agreement
AU	African Union
AUC	African Union Commission
BC Int'l & Comp L Rev	Boston College International and Comparative Law Review
BISD	Basic Instruments and Selected Documents
CBM	Coordinated Border Management
CCC	Customs Co-operation Council (official name of the World Customs Organisation)
CEMAC	Economic and Monetary Community of Central Africa
CEN-SAD	Community of Sahel-Saharan States
CEPGL	Economic Community of the Great Lakes Countries
CER	The Comparative Education Review
CET	Common External Tariff
CFTA	Continental Free Trade Area

CJE	Canadian Journal of Economics
CJIL	Chicago Journal of International Law
CM	Common Market
CoM	Council of Ministers
COMESA	Common Market for Eastern and Southern Africa
CRTA	Committee on Regional Trade Agreements
CSJ	Customs Scientific Journal
CU	Customs Unions
DDA	Doha Development Agenda
DG	Director-General
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAC	East African Community
EC	European Communities
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EPA	Economic Partnership Agreement
EU	European Union
FAL	Final Act of Lagos
Fordham Int'l LJ	Fordham International Law Journal
Fordham L Rev	Fordam Law Review
FTA	Free Trade Area
GATS	General Agreement on Trade In Services
GATT	General Agreement on Tariffs and Trade
GC	General Council

GDP	Gross Domestic Product
Geo J Int'l L	Georgetown Journal of International Law
Harvard Intl LJ	Harvard International Law Journal
HS	Harmonised Commodity Description and Coding System
I-CON	International Journal of Constitutional Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICT	Information and Communication Technology
IGAD	Intergovernmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
IMF	International Monetary Fund
IMO	International Migration Organisation
IO	International Organisation
IOC	Indian Ocean Commission
IT	Information Technology
ITC	International Trade Centre
ITO	International Trade Organisation
JAL	Journal of African Law
JAPSS	Journal of Alternative Perspective in the Social Sciences
JCR	Journal of Conflict Resolution
JEIF	Journal of Economics and International Finance
JIEL	Journal of Interational Economic Law
JWT	Journal of World Trade
LDCs	Least Developed Countries
LPA	Lagos Plan of Action for the Economic Development of Africa
Max Planck Yrbk UN L	Max Planck Yearbook of United Nations Law

MC	Ministerial Conference
MFN	Most Favoured Nation
Mich J Int'l L	Michigan Journal of International Law
MIJL	Melbourne Journal of International Law
MoU	Memorandum of Understanding
MRU	Mano River Union
NAFTA	North American Free Trade Area
NCTF	National Committee on Trade Facilitation
ND L Rev	North Dakota Law Review
NJILB	Northwestern Journal of International Law and Business
NT	National Treatment
NTBs	Non-Tariff Barriers
NTMs	Non-Tariff Measures
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
ORC	Other Regulations Of Commerce
ORRC	Other Restrictive Regulations of Commerce
OSBP	One-Stop Border Post
PAP	Pan-African Parliament
PCA	Post-Clearance Audit
PELJ	Potchefstroom Electronic Law Journal
PSD	Protocol on Rules and Procedures for Settlement of Disputes
PSI	Pre-shipment Inspection
PTA	Treaty Establishing a Preferential Trade Area
REC	Regional Economic Community

RKC	International Convention on the Simplification and Harmonisation of Customs Procedures / Revised Kyoto Convention
ROO	Rules of Origin
RTA	Regional Trade Agreements
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SADR	Sahrawi Arab Democratic Republic
SARS	South African Revenue Services
SAT	Substantially All the Trade
SCTFCCT	Sub-Committee on Trade Facilitation, Customs Cooperation and Transit
SDT	Special and Differential Treatment
SJICL	Singapore Journal of International and Comparative Law
SME	Small and Medium-Sized Enterprise
SPS	Sanitary and Phytosanitary Measures
STR	Simplified Trade Regime
TBT	Technical Barriers to Trade
TEU	Treaty on European Union
TFA	Trade Facilitation Agreement
TFEU	Treaty on the Functioning of the European Union
TFTA	Tripartite Free Trade Agreement
TPRM	Trade Policy Review Mechanism
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations

UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
Unif L Rev	Uniform Law Review
U Pa L Rev	University of Pennsylvania Law Review
US	United States of America
Vand L Rev	Vanderbilt Law Review
VCLT	The Vienna Convention on the Law of Treaties, 1969
WAEMU/UEMOA	West African Economic and Monetary Union
Wash U Global Stud L Rev	Washington University Global Studies Law Review
WB	World Bank
WCJ	World Customs Journal
WCO	World Customs Organisation
WTO	World Trade Organisation
WTR	World Trade Review
ZIMRA	Zimbabwe Revenue Authority
ZIMTRADE	Zimbabwe Trade Development and Promotion Organisation

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CHAPTER ONE

INTRODUCTION AND OVERVIEW OF STUDY

1.1 Introduction

1.1.1 General

The history of international trade dates back to ancient times. This entailed voyages of trade to sell and exchange goods across borders. One of the motivations of the early explorers was the search for new trading markets.[1] The Dutch East India Company became a dominant trader with India during the seventeenth century, resulting in the establishment of a refreshment station at Cape Town, which later brought European settlement to South Africa.[2] It was trade explorations that ultimately brought colonisation to the African continent, and that, centuries later, brought some of the African colonies as *de facto* participants to the General Agreement on Tariffs and Trade (GATT) of 1947. In the twenty-first century, trade has expanded to encompass the entire world and has become global.[3] Developments in economic, political, socio-legal and technological environments, such as access to information and improvements in communication networks, have made trade a global phenomenon.

Trade facilitation has always been linked to the expansion of international trade, and various activities have been used to achieve this.[4] Generally, it consists of a series of activities designed to make trade move easily and quickly across borders. Trade facilitation is therefore an important attribute in supporting global trade.[5] Countries would therefore benefit from globalisation if they implement trade facilitation measures.

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1 Simon Lester and others, *World Trade Law: Texts, Materials and Commentary* (Universal Law Publishing 2010) 66.

2 Simon Pooley, 'Jan van Riebeeck as Pioneering Explorer and Conservator of Natural Resources at the Cape of Good Hope' (1652-62)' (2009) 15(1) Environment and History 3.

3 Lester and others, *World Trade Law Text* 4-5.

4 Nirmal Sengupta, *The Economics of Trade Facilitation* (OUP 2007) 7-8.

5 Bernard Hoekman and Ben Shepherd, 'Who Profits from Trade Facilitation Initiatives? Implications for African Countries' (2015) 2(1-2) Journal of African Trade 52.

Countries enter into international treaties for various reasons, including socio-political and economic purposes. The most common reason for countries to enter into these treaties is to benefit from cooperation with others.[6] Trade agreements are unique in that they generate a supportive environment for international trade. Among others, trade agreements enable conducting of cross border business within a rule-based and legally binding international framework.[7] To reap the anticipated benefits from trade agreements, legal safeguards must be in place to ensure the timely delivery of goods across international borders. As a result, trade facilitation features as an urgent concern in world trade.[8]

1.1.2 World Trade Organisation

The end of the Second World War signalled a new world order in which countries pledged to boost economic development through cooperation and global trade liberalisation. This resulted in the adoption of several appropriate international agreements to oversee economic liberalisation and globalisation. Issues pertaining to cooperation in political and security matters were left to the United Nations (UN) whereas matters involving economic development were mandated to the newly established Bretton Woods institutions.[9] The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (later to be called the World Bank) were the first Bretton Woods institutions to be established in 1944.[10] The IMF was responsible for monetary issues and currency movements worldwide while the World Bank (WB) was to be a global bank whose focus was to support reconstruction, industrialisation and development in the rebuilding of war-ravaged economies.[11] The

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6 'Which States Enter into Treaties, and Why? (John M Olin Program in Law and Economics Working Paper 420 (*University of Chicago Law School, Chicago Unbound,* 11 July 2008). <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1622&context=law_and_economics> accessed 4 June 2021.

7 William Lyakurwa 'Introduction and Overview' in Ademola Oyejide and William Lyakurwa (eds), *Africa and the World Trading System* (Africa World Press 2005) 1.

8 WTO, *World Trade Organization Annual Report 2015* (WTO 2015) 34.

9 The Bretton Woods institutions, named after the 1944 conference, are the IMF, World Bank and GATT (later to be called World Trade Organisation).

10 Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) 9.

11 Cass, *Constitutionalization of the WTO* 9.

institutions' initial geographical area of focus was Europe, in the immediate post-war period, but with time the attention shifted globally to include developing economies.[12]

It was anticipated that the Bretton Woods Conference would also deliver an International Trade Organisation (ITO) to deal with trade liberalisation.[13] This could not take off due to the hesitancy of the United States.[14] Following engagements there was however a consensus to the signing of GATT in Geneva, Switzerland in 1947.[15] GATT was formed as a global trade agreement that any interested government might sign. Specifically, GATT of 1947 (hereafter GATT 1947) included provisions aimed at facilitating imports, exports and goods in transit, and these were part of the general undertakings adopted in order to liberalise global trade.[16] GATT joined the IMF and the WB as an additional pillar of the Bretton Woods institutions. These three institutions were governed by international treaties that bind the contracting parties. The operations of the IMF, the WB and GATT formed the international institutional framework for the rebuilding of the new world order.[17]

The original drafters of GATT viewed it simply as an international treaty, but it ended up assuming the mandate of an international organisation until 1994 when the World Trade Organisation (WTO) was established.[18] The creation of the WTO through the Marrakesh Agreement Establishing the World Trade Organisation (hereafter the WTO Agreement) in 1994 was a transformation in the administration and coordination of global trade.[19] GATT 1947, including the Ministerial Decisions and Declarations issued from 1948 to 1994, were consolidated into GATT of 1994 (hereafter GATT 1994) and

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12 P Dicken, *Global Shift: The Internationalization of Economic Activity* (Paul Chapman 1991) 14.

13 Douglas A Irwin, 'The GATT in Historical Perspective' (1995) 85(2) AER 323, 325.

14 Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2nd edn, OUP 2005) 1.

15 General Agreement on Tariffs and Trade, 1947 (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194 (GATT 1947).

16 General Agreement on Tariffs and Trade, 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 190 (GATT 1994).

17 Dicken, *Global Shift* 14.

18 John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press 1997) 59.

19 Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement) Art I.

as a component of the WTO Agreement and were to be administered by the new organisation, the WTO.[20] GATT 1994 was therefore incorporated into Annex 1A of the WTO Agreement.[21] The contracting parties of GATT 1947 became members of the WTO.[22] The provisions dealing with trade facilitation were to later gain prominence and became an agenda under the WTO's Doha Round.[23] The negotiations on trade facilitation resulted in the adoption of the WTO Agreement on Trade Facilitation (hereafter referred to as the Trade Facilitation Agreement or TFA), which entered into force on 22 February 2017 after two thirds of the WTO members ratified it.[24]

1.1.3 African Continental Free Trade Area

This study ascertains the linkages between the WTO and free trade areas (FTAs), in particular the African Continental Free Trade Area (AfCFTA). The WTO is the only intergovernmental global organisation tasked with enforcing trade rules among its members. It is therefore a custodian of both the global and international laws of trade. The AfCFTA, at the same time, is an FTA for African countries and it allows for the free movement of goods and services within the continent.[25] With an eligible membership of fifty-five countries of the African Union (AU), the AfCFTA is viewed as the largest FTA in terms of geographic size and number of member states.[26] The WTO, on the

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20 WTO Agreement Annex 1A, para 1.

21 WTO Agreement, The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 14, 33 ILM 1143 (Final Act of the Uruguay Round) para 1.

22 WTO Agreement Art XI.

23 WTO, 'The Doha Round' <www.wto.org/english/tratop_e/dda_e/dda_e.htm#development> accessed 1 May 2022.

24 Agreement on Trade Facilitation (adopted 27 November 2014, entered into force 22 February 2017) WT/L/940 (TFA). Some literature refers to the 'Agreement on Trade Facilitation' (ATF) as the 'Trade Facilitation Agreement'. This study will refer to it as the Trade Facilitation Agreement (TFA) as used by the WTO on its website: see WTO, 'Trade Facilitation' <www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> accessed 27 April 2022. The World Customs Organisation (WCO), whose membership is responsible for implementing most trade facilitation issues, also refers to it as the TFA. See WCO, 'WCO Implementing the WTO TFA' <www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/wto-agreement-on-trade-facilitation.aspx> accessed 11 August 2021.

25 Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) (2018) 58 ILM 1028 (AfCFTA Agreement) Art 4.

26 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' (2020) 51 Geo J Int'l L 753.

other hand, is a worldwide organisation that is open to all nations, in contrast to the AfCFTA, whose membership is restricted to African nations.

The AfCFTA represents a continental initiative towards the establishment of the grand African Economic Community (AEC) as envisioned under the 1991 Treaty Establishing the African Economic Community (hereafter the Abuja Treaty).[27] The Abuja Treaty was signed by member states of the Organisation of African Unity (OAU) as an agreement to support the political gains attained by urging all forms of development in an effort to integrate African economies in order to stimulate development and self-reliance on the continent.[28] It calls for a coordinated approach to Africa's agenda in economic integration while taking into account the foundation work achieved by its regional trade agreements (RTAs) and Regional Economic Communities (RECs).[29]

While not explicitly defining what the AEC entails, it is clear that the Abuja Treaty envisaged a level of economic integration beyond a customs union (CU) in which the continent would allow its people free movement and the right to pursue business activities in any of the countries.[30] The AEC's ultimate goal is to have a fully integrated continent by 2034, with diverse sectors administered under Pan-African institutions.[31] In economic theory, that depth of economic integration involves policies being managed by a supranational body that can make binding decisions on member states.[32] What the AEC desires is akin to an economic union in which social, taxation and fiscal policies are harmonised and administered by a supranational authority.[33] This involves members losing some sovereign rights. On this basis, the whole process of economic integration requires political commitment and has legal implications.

None of the RECs recognised by the AU had, as of October 2022, and according to their own agendas, attained the desired culmination of an economic community. The

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27 Treaty Establishing the African Economic Community (adopted 3 June 1991, entered into force 12 May 1994) (1991) 30 ILM 1241 (Abuja Treaty) Art 4:1.
28 Abuja Treaty preamble.
29 Abuja Treaty Art 2.
30 Abuja Treaty Art 6:2(f).
31 Abuja Treaty Art 6:2(f).
32 Bela Balassa, *The Theory of Economic Integration* (Allen and Unwin 1969) 2.
33 Robert J Carbaugh, *International Economics* (9th edn, Thomson South-Western 2004) 266.

author considers that the final stage of integration envisaged under the Abuja Treaty is achievable. For a mass of fifty-five African countries, the process would however be slow and gradual and would require strong political drive. Deeper economic integration, and ultimately total integration, involves the loss of sovereign rights and the ceding of power to a supranational organ. Such a status can be reached, if backed by the requisite political will.

During its colonial history, Africa had accomplished a certain level of integration in some regions, particularly in Eastern and Southern Africa. The Federation of Rhodesia and Nyasaland, which existed from 1953 to 1963 and achieved free movement of people, social and cultural integration, a common currency, a federal parliament, and other common institutions, is an example.[34] It had characteristics deeper than those found in an economic union and had elements of a political federation.[35] Both the formation and break-up of the Federation of Rhodesia and Nyasaland were due to political forces and decisions. The political element is therefore a key success factor to any form of integration among countries. The European Union (EU) and the East African Community (EAC) have made substantial progress in economic integration, and the author attributes this to the fact that these started as smaller groupings of six and three countries respectively. The countries which joined later were entering a running institution with laid down requirements for new entrants. With regards to the EU, history has witnessed the United Kingdom (UK) as a reluctant partner, evidenced by its late entry, then opting not to join the eurozone, and later refusing to lose sovereignty, and finally going for Brexit.

The Abuja Treaty makes no specific mention of a continental FTA. It specifies, however, that each of the RECs must attain and consolidate its own FTA.[36] The roadmap envisaged that the RECs would merge at the stage of creating a continental CU.[37]

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34 The federation was made up of three countries ie Nyasaland, now Malawi; Southern Rhodesia, now Zimbabwe; and Northern Rhodesia, now Zambia.

35 RL Cole, 'The Tariff Policy of Rhodesia, 1899-1963' (1968) 2(2) Rhodesian Journal of Economics 28.

36 Abuja Treaty Art 6:2(c).

37 Abuja Treaty Art 6:2(c).

Economic theory, however, identifies that a linear type of deeper economic integration proceeds through an FTA, CU, common market (CM) and economic union.[38] The creation of a CU without passing through an FTA stage is, however, not unusual and there were instances of that happening before. The Southern African Customs Union (SACU) was established as a CU in 1910 without having been an FTA.[39] The establishment of the European Economic Community (EEC) in 1958 created an arrangement which was deeper than an FTA, with elements which were more than those desired in a CU.[40] A major step towards the AEC is the creation of a continental FTA in which goods produced or manufactured in Africa are traded duty-free within the continent. The Abuja Treaty calls for the establishment of a greater vision of the AEC, which would involve building upon the successes of the existing RECs.[41] The AfCFTA is one of the flagship projects of the AU's *Agenda 2063: The Africa We Want,* and is a major achievement towards a Pan-African vision of an integrated and prosperous Africa.[42]

In order to support the trade agenda and expand intra-Africa trade, a need exists to invest in infrastructure to support communication and movement of goods. There is also a need to ensure the expeditious movement of imports, exports and transit. The fast movement of goods through borders must be supported by a flawless trade facilitation environment which includes modernising trade procedures. The objectives of the AfCFTA include enhanced Customs cooperation and the implementation of various measures for the fast movement of goods across borders.[43] Accordingly, the AfCFTA Agreement developed its own legal texts which are aimed at facilitating trade on the continent.

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38 Victor Murinde, 'Introductory Overview' in Victor Murinde (ed), *The Free Trade Area of the Common Market for Eastern and Southern Africa* (Ashgate 2001) 4-5.

39 Richard Gibb, 'The New Southern African Customs Union Agreement: Dependence with Democracy' (2006) 32(3) Journal of Southern African Studies 583.

40 Stephen Weatherill, *Law and Integration in the European Union* (Clarendon Press 1996) 5.

41 Abuja Treaty Art 6.

42 Agenda 2063 is a 50-year long-term strategic document of the AU for the period 2013 to 2063. Refer to AUC, *African Union: Agenda 2063, The Africa We Want: Framework Document* (AUC 2015) 107.

43 AfCFTA Agreement Art 4(e).

1.1.4 Context of the legal texts on trade facilitation

The WTO and AfCFTA legal texts on trade facilitation emerged from different contexts, which essentially prompt a comparison of global laws with continental laws designed to meet Africa's requirements. Despite the fact that they both aim for the same goal, there are differences in the specifics of the definition. The WTO uses a broad definition and states that trade facilitation is:

> […] the simplification, modernisation and harmonisation of export and import processes.[44]

The AfCFTA has a different definition, and describes trade facilitation as:

> […] the simplification and harmonisation of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data for the movement of goods in international trade.[45]

The legal texts on trade facilitation are derived from the above definitions. The two definitions show an open and elastic approach that can accommodate different interpretations. One disadvantage of an explicit and comprehensive definition is that, in its desire to be too definitive, it can become overly restrictive.[46]

This investigation identifies measures or actions, constituting trade facilitation, that are covered by both sets of legal texts.[47] The legal texts constructed these measures or actions into some broader themes. Based on the thematic areas used in both legal texts, this research then examines if and how the legal texts are similar or dissimilar. As discussed in section 5 below, this study is a comparative analysis of the legal texts on trade facilitation under the WTO and the AfCFTA.

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44 WTO, 'Trade Facilitation'.

45 AfCFTA Protocol on Trade in Goods (adopted 21 March 2018, entered into force 30 May 2019) (Protocol on TiG) Annex 4, definition of 'trade facilitation'.

46 The definition provided by the AfCFTA Agreement will be discussed in Chapter 5 of the study.

47 Refer to Chapter 5, in particular section 5.4 and Table 5.1.

1.2 Statement of the problem

The heart of any research is the problem, which must be identified in order for the study to be focused.[48] A clear research problem would also convey the limits or boundaries, as well as the purpose, of the study.[49]

The legal texts of the WTO and the AfCFTA on trade facilitation were developed to promote faster movement of imports, exports and transit goods, and thus to enhance trade.[50] As noted in section 1.1 above, the settings and contexts of trade facilitation in the WTO and AfCFTA are different, including the definition of the term, and yet the goal is broadly the same, that is, to simplify trade procedures. The two sets of legal texts were created by two different institutions whose nature, objectives and membership profile are not necessarily the same. The WTO handles multilateral trade relations and is a global institution. The focus of the AfCFTA is to deepen economic integration and facilitate intra-African trade among AU member countries in line with the aspirations of the political leadership of the continent.[51]

Article XXIV of GATT 1994 (hereafter Article XXIV) allows WTO members to establish and administer their own FTAs, within the provisions stipulated and outside the restrictions of the most favoured nation (MFN) rule. The AfCFTA is a continental FTA for AU member state. Not all members of the AU belong to the global WTO. It must be noted that as of 1 September 2022, eleven out of the fifty-five members of the AU were not members of the WTO.[52] Of these eleven non-members of the WTO, nine of them

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48 PD Leedy and JE Ormrod, *Practical Research: Planning and Design* (10th edn, Pearson 2013) 31.

49 SK Mangal and Shubhra Mangal, *Research Methodology in Behavioural Sciences* (PHI Learning 2013) 228.

50 TFA preamble and Annex 4, Art 2.

51 AfCFTA Agreement Art 3.

52 The eleven AU member states were not members of the WTO as of 1 September 2022 were Algeria, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, São Tomé and Principé, Somalia, South Sudan and Sudan. Refer to WTO, 'Understanding the WTO: Doha Development Agenda' <www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm> accessed 1 September 2022.

were in the process of negotiating their memberships with the WTO.[53] The WTO members in the AU find themselves bound by their obligations under WTO laws while also accommodating another African group of countries not obliged to follow the WTO rules, when entering into any regional or international trading agreement. It therefore follows that the trade facilitation laws of the AfCFTA were influenced by what is provided for under the WTO. Consequently, there are areas of convergence and divergence in the legal texts on trade facilitation of the WTO and the AfCFTA. As of 1 September 2022, all fifty-five AU member states, with the exception of Eritrea, had signed the AfCFTA Agreement while forty-three member states had ratified it.[54] This indicates a commitment by African states to create a single market and facilitate intracontinental trade. There is also a dimension that attributes low level of intra-African trade to poor implementation of trade facilitation measures.[55]

The two sets of legal texts were negotiated and concluded at different times. The assumption is that the legal texts developed later would draw lessons from those concluded earlier. The foundation legal texts on trade facilitation of the WTO were negotiated during the 1940s and signed by twenty-three countries in 1947.[56] The fact that GATT 1947 was established by a handful of countries and yet managed to referee global trade for forty-seven years, until the establishment of the WTO, shows that the founding countries were influential and powerful in global trade.[57] The AfCFTA is a recent phenomenon for the fifty-five African countries who signed the agreement in 2018, which entered into force in May 2019.[58] The AfCFTA Agreement therefore

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53 WTO, 'Third Regional Dialogue on WTO Accessions for Africa' <www.wto.org/english/thewto_e/acc_e/3rdreginaldialacc19_e.htm> accessed 17 July 2022. The remaining two are Eritrea and Sahrawi Arab Democratic Republic.

54 Refer to AU, Assembly of Heads of State and Government 35th Ordinary Session, Decisions & Declarations of the Assembly, 'Decision on The African Continental Free Trade Area (AfCFTA)' (5-6 February 2022) Assembly/AU/Dec. 831(XXXV). As of 6 February 2022, the following thirteen countries had not yet ratified the AfCFTA Agreement: Benin, Botswana, Comoros, Eritrea, Guinea Bissau, Libya, Liberia, Madagascar, Morocco, Mozambique, Somalia, Sudan and South Sudan.

55 AUC and UNECA, *Boosting Intra-African Trade* (AUC 2012) 30.

56 GATT 1994 preamble.

57 Greg Buckman, *Global Trade: Past Mistakes, Future Choices* (Zed Books 2005) 41.

58 AU Assembly of Heads of State and Government, 'Twelfth Extraordinary Session of the Assembly: Decision on the Launch of the Operational Phase of the African Continental Free Trade Area (AfCFTA)' (7 July 2019) AU Doc Ext/Assembly/AU/Dec.1(XII).

involved all members of the AU, and it follows that the legal texts on trade facilitation were developed and owned by the continent.

Each of the institutions, that is the WTO and the AfCFTA, has its own legal texts on trade facilitation. The WTO and AfCFTA's legal texts on trade facilitation have different settings, which results in a gap that is the focus of the current research problem. The analysis of the legal texts on trade facilitation aims at addressing this gap. This study thus analysed the legal texts on trade facilitation of the WTO and AfCFTA to identify the extent of their similarities and differences. The research also established if the trade facilitation measures under the AfCFTA comply with the global trade rules under the WTO.

1.3 Aims and objectives of the study

There have been arguments, informed by reasonable suppositions rather than research that the legal texts on trade facilitation contained in the AfCFTA Agreement could be a duplicate of the TFA.[59] Despite the lack of evidence from scholarly work, others have cautiously argued that the legal texts of the AfCFTA on trade facilitation are similar to those of the WTO.[60] This study therefore presents empirical evidence, obtained through research, to prove or disprove the gap. Accordingly, the study pursued three aims. Firstly, it compared the legal texts of the WTO and the AfCFTA in order to identify the areas of convergence or divergence, and in pursuit of this, sought the extent of compliance of the AfCFTA with WTO rules. Secondly, it analysed the legal texts to understand their intentions, interpretations and relevance in both continental and global trade. Lastly, it made recommendations regarding the legal texts and other issues pertaining to trade facilitation. This exercise thus assists both the WTO and the AfCFTA to draw lessons from each other's experiences. From these aims, the study makes a

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59 Asmita Parshotam, 'Implementing the TFA: Trade Facilitation Activities in Zambia (SAIIA Occasional Paper 298)' (South African Institute of International Affairs, June 2019) <https://saiia.org.za/research/implementing-the-tfa-trade-facilitation-activities-in-zambia/> accessed 22 October 2022 8-9.

60 Katrin Kuhlmann and Akinyi Lisa Agutu, 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' (2020) 51 Geo J Int'l L 753, 758.

major contribution to knowledge. To attain these, the study focused on the following specific objectives:

(a) outline the contemporary role of the WTO and the AfCFTA in global trade and in Africa, and discuss the impact and importance of these entities to trade;

(b) establish compliance of the AfCFTA with WTO rules based on Article XXIV;

(c) explore the relevance of trade facilitation in the trading regimes of both the WTO and the AfCFTA;

(d) critically examine and interrogate the legal texts on trade facilitation of the WTO and the AfCFTA. In this regard, it is necessary to identify and compare the similarities and differences in the legal texts and establish the possible reasons for that;

(e) critically examine if the AfCFTA instruments provide viable instruments for trade facilitation to advance continental economic integration; and

(f) draw conclusions and recommendations from the findings.

1.4 Research questions

Although numerous research questions can be derived from the stated aims and objectives, the thesis focused on a central enquiry that has rarely been addressed by existing academic literature. In this regard, the central research question is:

What are the differences and similarities between the WTO and the AfCFTA legal texts on trade facilitation?

To respond to the central question, the thesis addressed the following secondary questions:

(a) How do the objectives of the legal texts on trade facilitation of the WTO and the AfCFTA compare?

(b) What are the major features of the legal texts on trade facilitation under the WTO?

(c) What are the major features of the legal texts on trade facilitation under the AfCFTA?

(d) What similarities and differences exist between the legal texts on trade facilitation under the WTO and the AfCFTA and why?

(e) Based on Article XXIV, to what extent do the AfCFTA legal texts comply with the WTO legal texts? and

(f) What recommendations can be drawn from the study?

1.5 Research methodology

This study consisted of a desktop review of existing literature related to the legal texts on trade facilitation as developed by the WTO and the AfCFTA regimes. Trade agreements are not just relevant to Trade Law, but also to Economics and other subjects such as Politics, Diplomacy and International Relations. As a result, the research was multidisciplinary and influenced by various disciplines while still remaining primarily legal research. Inputs from the different subject areas were gathered to address the problem statement and meet the objectives of the study. The study consisted of qualitative research that applied mixed methodological approaches to address the research objectives and questions. The historical approach was used to trace the evolution of the legal texts while the descriptive approach was applied to provide the background for an analysis. The study was also prescriptive in that it evaluated issues and recommended solutions. Essentially, it was a comparative analysis of the legal texts employed by the WTO and the AfCFTA for the purpose of facilitating trade.

1.5.1 Sources of information

This type of research focused on the search, analysis and interpretation of the available relevant documents in order to address the research questions of the study.[61] This entailed reviewing other similar studies and related documentary analysis, including website-based information. The following sources of information were consulted:

Primary: The primary sources included treaties and agreements, protocols and annexes, case law and records of negotiations, legal writings and law reports, and other publications on trade and trade facilitation.

Secondary: The study utilised secondary sources including published and unpublished books, journals and other related papers and policy positions. Some data was drawn from trade facilitation programs being implemented in some countries, RTAs and RECs. The World Customs Organisation (WCO) was an important source of information since its membership is responsible for implementing trade facilitation programs.

Internet: The internet is recognised as a key repository of books, documents and various information of academic value. It was therefore a source of both primary and secondary data, in view of the fact that most international organisations use it to share latest developments, researched data and official information.

Participation at conferences**:** The researcher's professional background afforded him with opportunities to participate at relevant national and international conferences, workshops and academic symposiums dealing with the subject area. Between March 2020 and October 2022, the researcher either participated in or facilitated over forty such symposiums where he delivered papers and was able to debate some of the issues and concepts related to the study in informal set ups.[62] In addition, throughout the study, the author was a visiting lecturer in Customs Law[63] at the National University

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61 Mangal and Mangal, *Research Methodology in Behavioural Sciences* 213.

62 Refer to the Appendix of this thesis on pp 310-313 for details of some of the papers delivered.

63 The module covers the national and international legal framework within which Customs laws, involving the movement of goods across borders, operate.

of Science and Technology in Zimbabwe. This exposure allowed the author to meet scholars, researchers, practitioners and senor professionals involved in international trade law. The interaction also provided occasions to share and test findings, generate new ideas, and network with other experts. Further to accessing additional relevant information, the interaction with various practitioners helped to integrate theory and practical experiences while providing brainstorming forums to test and refine ideas.

1.5.2 Comparative study

The two sets of legal texts identified for this study have the same functionality of supporting trade and contributing towards the fast movement of goods. This provided the ideal context for a comparative investigation. Incomparables cannot be properly compared, and in law, the only entities that are comparable are those that perform the same function.[64] The comparative approach demonstrates any apparent similarities and differences. The analysis illustrated if the legal texts of the AfCFTA were compatible with those of the WTO, and if they attain the intended results. In view of the fact that the WTO is a multilateral organisation with a mandate to operate a global system of global rules between nations,[65] the comparison used the legal texts of the WTO as the point of reference. RTAs such as the AfCFTA Agreement, are created pursuant to Article XXIV, and would therefore be subordinate to the WTO.

1.6 Delimitation and limitations of the study

The study had its delimitations and limitations as follows.

1.6.1 Delimitation

The focus of this study was on trade facilitation in so far as it relates to trade in goods. It did not include trade in other areas such as in services. The study limited itself to trade facilitation matters involving the soft aspects of trade procedures, based on the legal texts identified in Chapter Six. Although the author acknowledge that trade

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64 Konrad Zweigert and Hein Körtz, *An Introduction to Comparative Law* (Weir T tr, 3rd edn, OUP 1998) 34.

65 WTO, 'The WTO in Brief' <www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 11 February 2021.

facilitation can be broadened to include hard infrastructural issues, such as efficient transport networks, the comparative analysis stayed within the definitions provided by the legal texts under study.

1.6.2 Limitations

Whereas there is some published material in respect of GATT 1994 whose foundation goes as far back as 1947, this is not the case with the TFA and the AfCFTA Agreement, which are both recent phenomena, having come into operation in 2017 and 2019 respectively. At the time of commencing this study in 2020, the TFA had been in operation for less than four years whereas preparations to implement the AfCFTA Agreement were at an advanced stage but were then disrupted by the COVID-19 pandemic. As of April 2020, the TFA had not been implemented long enough while the AfCFTA was then not yet operational. It also meant that this study concerned relatively new international agreements with limited citations from both academic literature or case law, or references of resolved disputes. Case law fills in a gap in terms of legal rationale and interpretation while it provides precedence or guidelines for the future. While acknowledging the limitation in published literature or previous academic work on the TFA, AfCFTA Agreement and trade facilitation, the researcher would wish to underscore a positive in that the apparent setback made the study original, and hence, a contribution to knowledge and an opportunity for a say in shaping future jurisprudence. Further, the fact that this was a comparative study on legal texts implies that the researcher had to rely on two essential tools, namely, the legal texts themselves and the ability to conduct academic analysis.

1.7 Personal motivation to pursue studies

The researcher has been motivated to embark on this study for various reasons, the key being that there is relatively little academic work on trade facilitation from Africa, as researched within the context of the AfCFTA contrasted with the TFA. These were contemporary issues in which there were ongoing developments. In addition, the researcher has been a professional Customs and trade expert during his career. The researcher has practical experience in trade negotiations at national, continental,

international and global levels. The study therefore expands intellectual capacity in an area that the researcher has been involved in. The research was not only academic in nature but was also as practical as possible. Consequently, the findings would be useful to academia, international trade law, trade experts and those engaged in commerce. It is anticipated that the study will provide reference material and stimulate further research in trade facilitation, the WTO, AfCFTA and related areas.

1.8 Ethical issues

This study was based on literature research and analysis and did not involve the use of human participants through questionnaires or formal interviews or intrusions. Since the writer has been a practitioner in the subject, any engagement with individuals was, where necessary, through informal and collegial exchanges with colleagues and other professionals. In that respect the study met the ethical requirements and ethical clearance was obtained from the University of South Africa.

1.9 Literature review

Literature covering concepts such as GATT and WTO, treaties, free trade areas, trade facilitation and economic integration was reviewed as the study evolved. The approach adopted was to spread the review throughout the various elements of the study.[66] In qualitative research it is acceptable to integrate the literature review throughout the study in this manner.[67] The preliminary literature review examined issues surrounding Article XXIV, treaties, trade facilitation and dispute resolution.

Whereas RTAs increase trade among their memberships, they have been criticised as being inconsistent with the goals of multilateralism which looks at issues from a global perspective.[68] Those who contend that only multilateral forums should be used to deal with global trade reject the underlying tenet that there is a positive impact on world

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66 Boris Blumberg, Donald R Cooper and Pamela S Schindler, *Business Research Methods* (McGraw Hill 2008) 89.

67 Burke Johnson and Larry B Christensein, *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (4th edn, Sage 2012) 65.

68 YS Lee, 'Bilateralism under the World Trade Organization' (2006) 26(2) NJILB 357, 370.

trade when a group of countries join an RTA and agrees to reduce trade barriers among themselves.[69] There is also a strong thinking that RTAs serve as a means to expand or deepen trade between members, and from this angle, they become a tool towards liberalising global trade.[70] Article XXIV also makes it explicitly clear that these configurations are desirable. While these viewpoints are being exchanged by technical experts, the political level has pronounced itself clearly that global trade can be liberalised by building upon the achievements of the RTAs.[71] The AfCFTA itself is also based upon this philosophy, in that while it is building itself upon the RECs, it will be a leverage for the continent to compete with the global market.[72] The AfCFTA, as an RTA is therefore expected to expand trade among its members while operating in an environment that is governed by rules which must be consistent with WTO law.[73] One of the objectives of the AfCFTA, and which is the focus of its members is to boost trade in Africa.[74] Intra- Africa trade can however be expanded through eliminating barriers to trade and implementing trade facilitation measures.[75]

Although the definition of trade facilitation would appear to be easy, there is no generally accepted standard definition of the term.[76] The existing definitions are influenced by whether a broad or narrow approach has been adopted, or if the inclination is to use a soft or hard infrastructural perspective.[77] The WTO, has a narrow approach based on soft infrastructural issues and which considers trade facilitation as the simplification, harmonisation and modernisation of trade processes.[78] The WTO, and its predecessor GATT, have consistently applied this perspective since GATT

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69 Jackson, *The World Trading System* 165.

70 Jo-Ann Crawford and Roberto V Fiorentino, 'The Changing Landscape of Regional Trade Agreements (WTO Discussion Paper No 8)' (*WTO*, 2005) <www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf> accessed 24 October 2020.

71 Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (Understanding on the Interpretation of Article XXIV) preamble.

72 AfCFTA Agreement Art 3 (e).

73 AfCFTA Agreement preamble.

74 Protocol on TiG preamble.

75 AUC and UNECA, *Boosting Intra-African Trade* 16.

76 WTO, *World Trade Report, 2015* (WTO 2015) 35.

77 WTO, *World Trade Report, 2015* 35.

78 WTO, 'Trade Facilitation'.

1947.[79] Most RTAs adopted the WTO perspective with some variations to suit their own circumstances. The WB has an all-encompassing approach that is broad and includes hard infrastructural issues pertaining to the fast movement of goods along the supply chain.[80] Some authors have defined trade facilitation by placing focus on measuring it using the elements: efficiency of ports in handling cargo; efficiency of Customs processes; the demands from the regulatory environment in a country; and the use of ICT systems to improve the various processes in an economy.[81] The Asia-Pacific Economic Cooperation (APEC)[82] uses this tool emphasises on efficiency and cost-effectiveness as the key ingredients of trade facilitation.[83] While also underscoring the issue of reducing costs, another school has not been restrictive in identifying specific efficiency factors and has left it open.[84] Despite the different definitions the common denominator in trade facilitation is that it involves easing the movement of goods by adopting better systems and through reducing the cost of doing business.

The aspect of cost is increasingly getting attention in international trade. According to research, implementation of the TFA may reduce average trade costs by 14.3% and increase global trade by about $1 trillion per year, with the least developed countries benefitting the most.[85] The business communities across the world are a force to reckon with as they demand greater transparency, efficiency and simplified procedures.[86] Trade facilitation is therefore is not just the concern of developing

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79 GATT 1947 Art V, VIII and X.

80 World Bank, 'Connectivity, Logistics and Trade Facilitation: Facilitating Trade at the Border, Behind the Border, and Beyond' <www.worldbank.org/en/topic/trade-facilitation-and-logistics> accessed 18 September 2021.

81 John S. Wilson, Catherine L. Mann and Tsunehiro Otsuki, 'Trade Facilitation and Economic Development: Measuring the Impact (Policy Research Working Paper 2988)' (March 2003) <https://doi.org/10.1596/1813-9450-2988> accessed 18 October 2022.

82 APEC is an RTA for 21 countries in the Asia/Pacific region. Refer to official website https://www.apec.org/.

83 Asia-Pacific Economic Cooperation (APEC). *APEC's Second Trade Facilitation Action Plan* (APEC 2007) 1.

84 Moïsé E, Orliac T and Minor P, 'Trade Facilitation Indicators: The Impact on Trade Costs' (*OECD Trade Policy Papers,* 22 August 2011) <https://doi.org/10.1787/5kg6nk654hmr-en> accessed 27 September 2021.

85 WTO, 'Trade Facilitation'.

86 Robert T Lisinge and Fabrizio Carmignani, 'Trade Facilitation to Integrate Africa into the World Economy (ATPC Work in Progress No 4)' (*UNECA African Trade Policy Centre*, September 2004) <https://repository.uneca.org/handle/10855/5548> accessed 22 October 2022.

countries since traders belong to either side. Because of the benefits arising from trade facilitation, the subject has attracted the attention of a number of organisations, including the IMF; Organisation for Economic Co-operation and Development (OECD); WB; and RTAs all over the world such as Association of Southeast Asian Nations (ASEAN), East African Community (EAC), American Free Trade Area (NAFTA) and EU.[87] While Wolffgang and Kafeero noted that the multiplicity of regulators and actors in trade facilitation can lead to duplication and redundancy and, ultimately, complicate the implementation of trade facilitation, they also emphasised the collaborative role which the WTO and WCO can play in driving the trade facilitation agenda forward.[88] The WCO and the WTO are therefore complementary to each other in the implementation of trade facilitation issues. The WCO is known for the Customs expertise that it has and for being an agency in the uniform implementation of the TFA and other trade facilitation measures under other regimes.[89]

In trade law, trade facilitation occupies space in international agreements. Both the WTO and the AfCFTA, have separate legal instruments that address trade facilitation in detail in order to benefit trade. McNair considers a treaty as a written agreement by which two or more States or international organisations establish or intend to establish a relationship under international law.[90] What is of significance is that this form of agreement is done by states or international organisations. Unlike an ordinary contract, a treaty must be formalised in writing. Shaw acknowledges that, despite their superficial resemblance to contracts, treaties bind States and create substitute legislation in the process.[91] The impact of treaties therefore goes beyond national boundaries, but extends to cover international levels as well. The ultimate definition of this term in international law is given in the Vienna Convention on the Law of Treaties, 1969

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87 Nitya Nanda, 'WTO and Trade Facilitation: Some Implications' (2003) 38(26) Economic and Political Weekly 2622, 2653.

88 Hans-Michael Wolffgang and Edward Kafeero, 'Legal Thoughts on How to Merge Trade Facilitation and Safety and Security' (2014) 8(1) WCJ 1, 4.

89 WCO, 'WCO Implementing the WTO TFA: Message from Secretary General' <www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/message-from-sg.aspx> accessed 4 June 2022.

90 Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 4.

91 Malcolm N Shaw, *International Law* (5th edn, CUP 2007) 94.

(hereafter the VCLT)[92], which states that a treaty is an express agreement which creates binding obligations between States.[93] The meaning of the word 'treaty' is therefore wide and includes various types of international agreements.[94] The definition from the VCLT identifies three key elements of a treaty which are: the principals must be States; the agreement must be in writing; and it must be implemented in accordance with international law.[95] From this it can be drawn that the WTO Agreement, GATT 1994, TFA, AfCFTA Agreement, together with their protocols and annexes are all treaties even if their titles do not begin with the prefix 'treaty'.

A variety of other terms such as Act, Charter, Convention and Protocol are also used to refer to treaties or international agreements.[96] A convention is negotiated and concluded under the direction of an international organisation.[97] The VCLT, which was negotiated under the auspices of the UN and the WCO's International Convention on the Simplification and Harmonisation of Customs Procedures (the Revised Kyoto Convention, abbreviated RKC) are examples of conventions.[98] Treaties can also take the form of protocols. In line with international law, a protocol, as is the case with the Protocol on Trade in Goods of the AfCFTA Agreement (hereafter the Protocol on TiG), is a legal instrument which elaborates a main treaty.[99] A protocol therefore has the same legal effect as the agreement or treaty which it supplements. When a conference or a series of negotiations result in several agreements, the summary of proceedings are grouped into a Final Act or a General Act.[100] Sangroula noted that although the

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92 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 41:1.

93 VCLT Art 2:1 defines a treaty as "An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

94 Mark W Janis, *An Introduction to International Law* (4th edn, Aspen 2003) 15.

95 VCLT Art 2:1.

96 Shaw, *International Law* 812.

97 Ray August, Don Mayer and Michael Bixby, *International Business Law: Texts, Cases, and Readings* (5th edn, Pearson Prentice Hall 2009) 6.

98 VCLT; International Convention on the Simplification and Harmonisation of Customs Procedures (adopted 18 May 1973, entered into force 25 September 1974) 950 UNTS 269, as amended by the Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures (adopted 26 June 1999, entered into force 3 February 2006) 2370 UNTS 27 (Revised Kyoto Convention / RKC)

99 Geoff R Berridge and Alan James, *A Dictionary of Diplomacy* (2nd edn, Palgrave 2003) 108, 217.

100 McNair, *The Law of Treaties* 23-24.

terminology varies, what is of importance is that the substance which remains the same.[101] The WTO captures the legal texts on trade facilitation in 'agreements' whereas the AfCFTA spread the provisions in the 'Agreement', 'Protocol' and Annexes'. These are all international treaties with legal obligations that bind nations.[102]

VCLT explains that international agreements can be brought into effect through various methods such as signature, ratification and accession.[103] The VCLT states that the signing of an international treaty signifies consent to what has been negotiated and creates an endorsement not to undermine the objectives of the treaty.[104] Where a treaty is implemented subject to ratification, a signature is therefore a formality indicating willingness to abide by the requirements of the treaty after fulfilment of the required domestic process.[105] An international agreement or treaty, such as the AfCFTA Agreement, must be ratified before implementation, which is a major step by a State towards making a treaty enforceable at national level.[106] Ratification is undertaken by a country which participated in the negotiation of an agreement or treaty and has signed the text.[107] Closely related to ratification is the process of accession. Although accession has the same legal implication as ratification, it applies to those who seek to be parties to an existing treaty, already signed by others, with which they were not involved during the negotiations.[108]

The WTO took about four years to be operational after adoption and ratification, whereas the AfCFTA took about a year.[109] Although the prerequisites for entry into force vary with each treaty, research has revealed that there are many reasons why these treaties take time to be ratified and enter into force. Lupu demonstrated that the

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101 Yubaraj Sangroula, 'International Treaties: Features and Importance from International Law Perspective' (10 January 2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359978> accessed 31 March 2023.
102 Sangroula, 'International Treaties'.
103 VCLT Art 11.
104 VCLT Art 18.
105 Shaw, *International Law* 812.
106 McNair, *The Law of Treaties* 129-130.
107 Janis, *Introduction to International Law* 21.
108 Berridge and James, *Dictionary of Diplomacy* 1.
109 Refer to sections 4.8.2, 4.8.3 and 6.2.3.

extent to which countries participate in global trade is related to their desire to be party to it.[110] Compared with other African treaties the AfCFTA has received a high response in respect of signatures and ratifications.[111] This could have been due to the close affiliation between the AU and its members, together with the perceived economic benefits of the treaty when weighed against the binding obligations.[112] The speed with which treaties are signed can be a measure of the eagerness by the parties to implement it.

Studies have shown that the interpretation of international treaties can cause difficulties since the language used is a result of mutual concessions reached during negotiations and the fact that the negotiating envoys are influenced by their own national laws.[113] The VCLT requires, however, that international treaties be construed in accordance with the common meaning of the words as well as the context and objectives of the agreement.[114] The context includes the treaty's preamble and annexes.[115]

The VCLT lays down the fundamental principle that a treaty is legally binding and must be observed in good faith.[116] Since the establishment of the UN, it has become customary for international treaties concluded between States to include a dispute resolution clause outlining the mechanisms to be used by State Parties in the case of a disagreement over the interpretation or implementation of the treaty.[117] The objective is to ensure that disputes are resolved amicably and transparently. Research shows that trade disputes can be contentious and politicised.[118] As a result, astute negotiators

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110 Yonatan Lupu, 'Why Do States Join Some Universal Treaties but not Others? An Analysis of Treaty Commitment Preferences' (2016) 60(7) JCR 1219, 1235-1237.

111 Refer to section 4.8.3.

112 Uta Oberdorster, 'Why Ratify? Lessons from Treaty Ratification Campaigns' (2019) 61(2) Vand L Rev 681, 684, 685, 686.

113 Asif H Qureshi and Andreas Zieglar, *International Economic Law* (3rd edn, Sweet and Maxwell 2011) 25.

114 VCLT Art 31(1).

115 VCLT Art 31 (2).

116 VCLT Arts 31, 46 and 69.

117 Anais Kedgley Laidlaw and Shaun Kang, 'The Dispute Settlement Mechanisms in Major Multilateral Treaties (National University of Singapore Centre for International Law Working Paper 2018/02 (October 2018)' <https://cil.nus.edu.sg/wp-content/uploads/2018/10/NUS-CIL-Working-Paper-1802-The-Dispute-Settlement-Mechanisms-in-Major-Multilateral-Treaties.pdf> accessed 21 October 2022 1, 2.

118 Lester and others, *World Trade Law Text* 153.

will anticipate disagreements and make appropriate provisions to account for them. Both the WTO and AfCFTA regimes have dispute resolution systems for their respective regimes. The current WTO rules on dispute resolution represent improvements from the Uruguay Round of GATT 1994.[119] Although the AfCFTA dispute settlement mechanism has not yet experienced any case of dispute, it has been found that WTO members have gained confidence with the operation of their dispute settlement mechanism.[120]

1.10 Theoretical framework

The thesis deals with economic integration and the stipulation that RTAs can develop their own trade facilitation laws within the context of GATT.[121] There are various theories on regional integration and among these are intergovernmental institutionalism, neo-functionalism and multi-level governance.

Proponents of intergovernmentalism consider national governments as key players in regional integration and view the whole process at state-centric.[122] As national governments typically start the integration process, intergovernmentalism is a relevant philosophy, particularly during the early stages of integration. As integration gets deeper, other players emerge and governments would then not be the sole player. Another theory is neo-functionalism, which emerged from functionalism and focuses on integration in certain sectors, and eventually leads to the various functions spilling over to one other.[123] One of the advantages of neofunctionalism is that the spill overs lay ground for the integration to multiply into other sectors. An analysis of the progression of the European integration which started in the 1950s as cooperation on coal and steel illustrates that it has experienced measures from each of the theories. Both

119 Shaw, *International Law* 939.
120 Qureshi and Zieglar, *International Economic Law* 431.
121 GATT Art XXIV:4.
122 Neill Nugent, *The Government and Politics of the European Union* (7th edn, Palgrave Macmillan 2010) 425.
123 Teodor Lucian Moga, 'The Contribution of the Neofunctionalist and Intergovernmentalist Theories to the Evolution of the European Integration Process' (2009) 1(3) JAPSS 796, 797-799.

intergovernmentalism and neofunctionalism also have relevance to integration in Africa and liberalisation under WTO.

In the 1990s a new model, the multi-level governance model, surfaced.[124] Key to this theory is the principle that decision-making is not exclusive to governments, but is shared, or in certain cases, taken over by supranational authorities.[125] This study involved the relationships between the WTO and the AfCFTA and their respective international agreements on trade facilitation. The parties to both the WTO and the AfCFTA have ceded the interpretation of their international agreements to the provisions governed by international law.[126] Further to this, the study entailed interwoven relationships involving bilateral and multilateral relationships between the AfCFTA, RECs, RTAs and the WTO. The study was therefore based on the multi-level governance model, while at the same time acknowledging that the intergovernmentalism and neofunctionalism approaches both have certain relevant aspects to the various stages in economic integration.

1.11 Definitions of major concepts

The following terms will be frequently used in the study. It is therefore important to explain and contextualise the meanings in which the terms are used.

1.11.1 AfCFTA Agreement

In this thesis, the abbreviation 'AfCFTA' is used for the African Continental Free Trade Area, but sometimes it also refers by implication to its legal text, the AfCFTA Agreement. The AfCFTA Agreement includes its Protocols, Annexes and Appendices, all of which form an integral part of it.[127]

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124 Arjan H Schakel, 'Applying multilevel governance' in Hans Keman and Jaap J Woldendorp (eds), Handbook of Research Methods and Applications in Political Science (Edward Elgar Publishing Limited 2016) 98.

125 Liesbet Hooghe and Gary Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield Publishers 2001) 3-4.

126 VCLT Art 31.

127 AfCFTA Agreement Art 1.

1.11.2 Customs

The study has adopted the meaning accorded by the WCO which defines Customs as the governmental agency mandated with enforcing various laws and rules pertaining to the import, export and transit of goods as well as the administration of customs legislation and the collection of tariffs and taxes. It is also used adjectivally in relation to Customs officials and duties.[128]

1.11.3 Global trade versus international trade

The author used the term 'global trade' to refer to issues and concerns that affect the entire world, whereas 'international trade' referred to issues and concerns that affect two or more countries. 'International trade' therefore refers to a narrower range of countries whereas 'global trade' is wider and involves the level of the WTO.

1.11.4 Legal texts

These are legally binding instruments or laws providing details of what has been agreed to or what the parties undertake to do. As examples, these can be treaties, agreements, annexes or any supporting legal instruments or documents. The legal instruments examined during the studies, and which are binding international agreements, have been referred to as legal texts.

1.11.5 Regional Economic Communities

In this thesis, Regional Economic Communities (RECs) has been used to refer to eight of the RTAs in Africa. The AU has identified eight of the RTAs which it recognises as RECs, and these are: Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS),

128 See WCO, *Glossary of International Customs Terms* (WCO 2013) 8.

Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).[129]

1.11.6 State Parties

A State Party refers to a member country of the AU that signed the AfCFTA Agreement, ratified it and then deposited its instrument of ratification.[130] The term has been used to distinguish the AU member states who have ratified the AfCFTA Agreement.

1.11.7 Section

In addition to its ordinary meaning, the term 'section', where appropriate, has also been used to identify specific parts in the chapters of this thesis.

1.12 Framework of the thesis

The study has eight chapters as outlined below.

Chapter One sets out the background of the research. It presents the statement of the problem, the objectives and the research questions of the thesis.

Chapter Two explores the evolution of the rules and parameters governing global trade, first under GATT and later as part of the WTO system. It analyses the role of the WTO and its relevance to global trade.

Chapter Three is a continuation of Chapter Two, but it specifically deals with Article XXIV. It analyses the relationships between Article XXIV and FTAs in general, but with special attention to the AfCFTA. Both Chapters Two and Three puts the theory and the relevance of the WTO and FTAs into the context of the study.

Chapter Four presents an overview of the African vision of continental economic integration and the establishment of the AfCFTA. It evaluates the political context in

129 AU, 'Regional Economic Communities' <https://au.int/en/recs> accessed 5 July 2020.
130 AfCFTA Agreement definitions.

which the AfCFTA Agreement was founded. The analysis is conducted from political, economic and legal perspectives.

Chapter Five examines trade facilitation as a concept being implemented in global trade and in FTAs. The evaluation of the concept will be conducted from various perspectives, and, within the framework of the WTO and the AfCFTA. Chapter Five also synthesises the areas discussed in Chapters Two and Three. It introduces important foundational issues for the comparative analysis of the legal texts in Chapter Seven.

Chapter Six identifies and presents the legal texts on trade facilitation for the WTO and AFCFTA respectively. It provides an overview, structure and contents of the legal texts on trade facilitation, which are the subject matter of the study. It is also fact-finding in nature and the outcome provides groundwork for the legal analysis.

Chapter Seven is a detailed comparative analysis of the two sets of legal texts on trade facilitation of the WTO and the AfCFTA. The analysis is based on certain themes identified during the study.

Finally, Chapter Eight summarises the main findings of the study. It concludes the thesis by drawing recommendations and proposing areas for further study.

CHAPTER TWO

RULES FOR GLOBAL TRADE: FROM GATT TO THE WTO

2.1 Introduction

It is a generally accepted historical fact that one of the major causes of the two World Wars was a lack of cooperation in economic and trade policy matters.[131] From the 1920s to the 1940s the world witnessed the prevalence of protectionist and misaligned economic policies, both of which degenerated and contributed to the Second World War.[132] The war revealed that lack of rules to govern multilateral trade and resolve the resulting disputes can be a source of economic and political conflicts, potentially leading to war. The world therefore learnt from the causes of the war, and this led to negotiations aimed at establishing treaties and principles governing global trade and resolving any disputes that would arise when nations trade. The outcome of the negotiations was GATT 1947 whose major objective included the removal of trade barriers and closer cooperation in increasing the volumes of world trade.[133] World trade law therefore came as an aftermath of the Second World War in that Britain, the United States (US) and their allies signed GATT 1947 as recognition that economic cooperation was necessary in order to prevent another war.[134]

Building upon the foundation of GATT 1947, the WTO came up with a wider trade liberalisation regime whose objectives included the creation of a wider multilateral trading system that recognised the different levels of development amongst its members.[135] These efforts to foster collaboration and promote orderly trade have helped to prevent trade wars from turning into armed conflicts.[136] Both GATT and the WTO, have ensured that multilateral trade is based on rules.[137] The author considers

131 Nugent, *Government and Politics of the EU* 4-5.
132 Jackson, *The World Trading System* 36.
133 GATT 1947 preamble.
134 Thomas A Pugel, *International Economics* (McGraw-Hill 2012) 144.
135 WTO Agreement preamble.
136 Carole Murray, David Holloway and Daren Timson-Hunt, *The Law and Practice of International Trade* (12th edn, Sweet and Maxwell 2012) 943.
137 Jackson, *The World Trading System* 59.

that the implementation of agreed rules of trade has obviously contributed to the existing relative orderliness in international trade.

This chapter provides background information regarding the emergence of global rules of trade in order to recognise the context of the relationship between the laws of the WTO and the AfCFTA in driving the trade agenda. It will examine the functions of the WTO and provide a descriptive and analytical overview of the key principles governing world trade. It will thus outline the role and impact of the WTO to world trade. The overview will allow for an informed analysis of the legal texts as well as provide an understanding of the legal mandates of both the WTO and the AfCFTA.

2.2 From GATT 1947 to the WTO

GATT 1947 came into effect in 1948 with twenty-three founding contracting parties.[138] The agreement was principally driven by the developed countries which also dominated the process.[139] Except for Southern Rhodesia and the Union of South Africa, African countries were conspicuously absent from the list of original contracting parties.[140] In contrast to other British colonies, Southern Rhodesia, along with Burma and Ceylon, had autonomy in foreign trade relations and thus participated in the negotiations as independent contracting parties.[141] Despite being a member of the British Empire, the Union of South Africa sought to project itself to the rest of the developed world as an independent and civilised player in world matters.[142] Most of the African countries were colonies with their trade policies aligned with those of their European powers. The practical implication was that the territorial application of GATT at inception was wider

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138 The founding contracting parties are listed in the preamble to GATT 1947 and these were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States. Following the Uruguay Round of negotiations and the establishment of the WTO in 1995, the contracting parties to GATT were then referred to as members.

139 Dilip K Das, *International Trade Policy: A Developing Country Perspective* (Macmillan 1990) 42.

140 Southern Rhodesia is now Zimbabwe whereas Union of South Africa is now South Africa.

141 Tatsuro Kunugi, 'State Succession in the Framework of GATT' (1965) 59(2) AJIL 268, 270.

142 Faizel Ismail, 'An Empirical Analysis of Apartheid South Africa's Ideas and Practices in the GATT: 1947 to 1994' (PhD thesis, University of Manchester 2015) 177.

than the twenty-three countries and it actually affected 105 territories.[143] The author considers that GATT 1947 was a global agreement in that, even based on counting the original twenty-three principal signatories, the contracting parties were spread across all continents. As discussed in Chapter One, GATT 1947 had no legal status as an organisation but was an agreement, whose goals included reducing trade barriers and liberalising world trade.[144]

From the list of the contracting parties to GATT 1947, it can be observed that African countries were not fully represented.[145] The coming of the AfCFTA Agreement was therefore of significance to Africa. It was an outcome of negotiations by African countries to meet their own aspirations. It is therefore an agreement that is designed to meet the African agenda on matters of trade.[146] Although the AfCFTA Agreement would be expected to draw lessons from the seventy years' experience of GATT and the WTO, it would miss its desires if it were to be a carbon copy of the WTO global trade agreements. The focuses of the WTO and the AfCFTA are different.

2.3 Establishment of the WTO

Prior to the Uruguay Round, the creation of a formal trade organisation had been discussed several times but had failed to garner sufficient support.[147] International organisations have a legal personality and operate independently of their members.[148] Despite being an international treaty with contracting parties, GATT evolved and assumed the additional role of a *de facto* international organisation with its own secretariat, responsible for facilitating consultations, negotiations and enforcement of rules regarding global trade.[149] Although a formal institution was never established in

143 Gerald Curzon and Victoria Curzon, 'GATT: Traders' Club' in in Cox RW and Jacobson HK (eds), *The Anatomy of Influence: Decision Making in International Organization* (Yale University Press 1974) 305.
144 GATT 1947 preamble.
145 GATT 1947 preamble.
146 AfCFTA Agreement preamble.
147 Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, OUP 2010) 58.
148 Nigel D White, *The Law of International Organisations* (Manchester University Press 1996) 27.
149 Jackson, *The World Trading System* 59.

1947, by default, GATT endured as an organisation.[150] The contractual rules of trade overshadowed the element that it was not an organisation. The fact that GATT was a pact of trade laws contributed to its survival.[151] The members let such an irregularity prevail between 1947 and 1994, until the establishment of the WTO as a formal organisation in 1995.[152] The WTO was established as an intergovernmental organisation with a mandate over the world trading system.[153] The WTO is an international organisation, established by an international treaty and with a international legal personality.[154] The Final Act of the Uruguay Round brought with it a comprehensive collection of trade agreements that went beyond the scope of GATT 1947.

GATT, and its successor the WTO, have both played important roles in promoting global trade and ensuring that trade rules are complied with. The WTO is the premier global organisation for monitoring and supervising the world trading system.[155] It establishes norms that regulate the functioning of free trade and these are backed up by an agreed dispute resolution process.[156] Unlike the GATT 1947 era, the parties to the WTO Agreement are members of an international organisation regulated by an international treaty rather than parties to a contract on trade in goods.[157] As of 1 September 2022, the WTO had 164 members, twenty-four observer countries and several international intergovernmental organisations as observers.[158]

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150 Kossi Ayenagbo and others, 'Analysis of the Importance of General Agreement on Tariffs and Trade (GATT) and its Contribution to International Trade' (2011) 3(1) JEIF 13.

151 David Palmeter, 'The WTO as a Legal System' (2000) 24(1/2) Fordham Int'l LJ 444, 453.

152 Jackson, *The World Trading System* 59.

153 Marrakesh Declaration of 15 April 1994 paras 2 and 6; WTO Agreement Arts I and VIII.

154 Anthony Aust, *Handbook of International Law* (CUP 2005) 197.

155 T Ademola Oyejide, 'African Agriculture in the WTO Framework' in T Ademola Oyejide and William Lyakurwa (eds)*, Africa and the World Trading System, Vol 1: Selected Issues of the Doha Agenda* (Africa World Press 2005) 107.

156 Hoekman and Kostecki, *Political Economy of the World Trading System* 2.

157 WTO Agreement Art VIII.

158 WTO, 'Understanding the WTO: Members and Observers' <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 1 September 2022.

2.4 Functions of the WTO

States create international organisations and grant them legal personality and mandates to attain given objectives.[159] The above historical account shows that the WTO was established to liberalise global trade and ensure that it is conducted in accordance with the agreed rules.[160] The functions and structure of organisations such as the WTO must thus support their *raison d'être* to ensure that global trade is not only liberalised but also adhers to agreed rules. The WTO was therefore a major reform in the administration of global trade rules. The legal framework of global trade rules was reformed in that GATT 1947 and its amendments were incorporated into GATT 1994 as part of the WTO Agreements.[161] The WTO assumed a broader role in global trade. The WTO Agreement specifies four functions of the WTO, namely: trade negotiations, dispute resolution, review of members' trade policies, and cooperation with other organisations.[162] All these functions demonstate the WTO's role as a custodian of global trade rules. This thesis has identified the aspect of capacity building as an additional function required in order to support the agenda of the WTO.

2.4.1 Trade negotiations

WTO negotiations are core to the multilateral trading system, and these would include issues pertaining to liberalisation of global trade.[163] The WTO administers multilateral trade negotiations and trade relations amongst its members and monitors the implementation of decisions by its members.[164] This function is not entirely new since it was also being conducted under the GATT 1947 during the pre-1995 dispensation. It should be noted that the WTO does more than performing the secretariat functions and facilitating trade negotiations; it ensures that its members implement the various agreements.[165] The role of the WTO was therefore distinct and included facilitating the

159 Peter Malanczuk, *Akehurst's Introduction to International Law* (7th edn, Routledge 1997) 92-93.
160 WTO Agreement Art III:1.
161 WTO Agreement annex 1A of Art II:4.
162 WTO Agreement annex 3.
163 Hoekman and Kostecki, *Political Economy of the World Trading System* 131.
164 WTO Agreement Art III:2.
165 WTO Agreement Art III:1.

implementation of GATT 1994, its other agreements, and any future negotiations. The major negotiating conferences or sessions of GATT and the WTO are conducted through 'Rounds' and these take the name of the place where the negotiations were launched or of a political figure in whose term the talks commenced.[166] A Round can take place over many years and in various locations. These Rounds represent a series of multilateral trade talks by members according to an agreed agenda.[167] Table 2.1 lists the eight Rounds that have been held since 1947.

Table 2.1: GATT and WTO Rounds held since 1947

Name of Round	Year	Countries	Major subject(s) covered during negotiations
Geneva	1947	23	Tariffs; Signing of GATT
Annecy	1949	13	Tariffs
Torquay	1951 to 1952	38	Tariffs
Geneva II	1956	26	Tariffs
Dillion	1960 to 1961	26	Tariffs
Kennedy	1964 to 1967	62	Tariffs; Anti-dumping measures
Tokyo	1973 to 1979	102	Tariffs; Non-tariff measures
Uruguay [168]	1986 to 1994	123	New subjects were introduced such as: Non-tariff barriers; Intellectual property Rights; Textiles; Establishment of the WTO.
Doha[169]	The negotiations were launched in 2001; but began in 2004. The Round has not yet been officially concluded.	All members	Trade Facilitation; Tariffs; Non-tariff measures; Intellectual property rights; Competition; Investment.

Adapted from WTO, 'The GATT Years'.

According to Table 2.1, tariff reductions have been a consistent agenda item in all the Rounds. The first Round of negotiations, the Geneva Round, resulted in the signing of GATT in 1947 and led to 45,000 tariff concessions affecting US$10 billion of trade, which represented approximately a fifth of the world's total trade at the time.[170] Following this were the Annecy, Torquay, Geneva II and Dillion Rounds, all of which

166 Cass, *Constitutionalization of the WTO* 10.
167 WTO, 'Understanding the WTO: The GATT Years: From Havana to Marrakesh' <www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 28 July 2022.
168 Refer to discussions in section 2.4.1.1.
169 Refer to discussions in section 2.4.1.2.
170 WTO, 'The GATT Years'.

focused on tariff cuts. It must be observed from Table 2.1 above that the post-Dillion Round era marked a new dispensation in which the agenda for trade liberalisation steadily broadened to include other areas, apart from tariff reductions. The Kennedy and Tokyo Rounds achieved an average of 35% and 33% tariff reductions respectively, in addition to other subject areas, which was a significant step towards liberalising world trade.[171] All these issues show that the contracting parties were dedicated to free trade. Due to their influence on the way the WTO system has operated since 1994 and the prominence of trade facilitation, the Uruguay and Doha Rounds will receive special consideration.

2.4.1.1 Uruguay Round

The Uruguay Round, which lasted eight years, was historic in that its agenda expanded beyond the usual topics related to tariff reductions to encompass other areas, for example, the WTO and trade in services. It resulted in the Final Act of the Uruguay Round, which was signed on 15 April 1994, and comprises all the legal texts of the Uruguay Round as well as Ministerial Decisions and Declarations that explain specific provisions in some of the agreements.[172] The Uruguay Round introduced rules to govern trade in new subject areas.[173] The agreements are essentially contracts that provide rules for international trade and bind the members to adhere to the agreed-upon parameters in their trade policies.[174]

Apart from the ongoing or suspended Doha Round, the Uruguay Round was the longest at the time, producing results that had long-term implications for global trade. It also dealt with a gap on whether environmental issues should have any bearing on world trade. A 1990 case, *United States – Restrictions on Imports of Tuna*, highlighted the importance of environmental issues in world trade.[175] The case was deemed to be outside the jurisprudence of GATT 1947, resulting in it being settled by the concerned

171 Carbaugh, *International Economics* 193-194.
172 Final Act of the Uruguay Round para 1.
173 Jackson, *The World Trading System* 305.
174 WTO, *Annual Report 2020* (WTO 2020) 8.
175 *United States – Restrictions on Imports of Tuna: Report of the Panel* (circulated 3 September 1991, but not adopted) DS21/R - 39S/155.

parties through mutual consent. This concern regarding the environment was later incorporated into the preamble of the WTO Agreement.[176]

The reforms brought by the Uruguay Round inspired fresh confidence in world trade.[177] In addition to meeting the expectations of the trading community, it equipped the WTO with modern agreements and rules for the prevailing times. The outcome from the Uruguay Round also prepared the global trading community to confront the new century with new business opportunities. The outcome included the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU); and some Plurilateral Trade Agreements.[178] It can be observed that the Uruguay Round realised that global trade relations had gone beyond the mere goods component of 1947. It therefore incorporated new areas that had emerged during the preceding five decades. The Uruguay Round was characterised by a broad and inclusive approach. The broadening of the scope of trade and the general achievements from the Uruguay Round were a milestone compared to the Doha Round, whose negotiations commenced in 2004 but has been slow and marked with disagreements and controversies.

2.4.1.2 Doha Round

The Uruguay Round was followed by the Doha Round, which was launched in 2001, but with its negotiations only starting in 2004. Due to its focus towards developmental issues in world trade, the Round is also denoted as the Doha Development Agenda (DDA).[179] It addressed over twenty agenda items with the goal of lowering trade barriers and reviewing trade rules, including Services, Agriculture, Non-agricultural market

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176 WTO Agreement preamble, states: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to […] expanding the production of and trade in goods and services…in accordance with the objective of sustainable development, seeking both to protect and preserve the environment…".

177 Alan Oxley, 'The Achievements of the GATT Uruguay Round' (1994) 1(1) Agenda: A Journal of Policy Analysis and Reform 45.

178 WTO Agreement Art II.

179 WTO, *The Doha Round Texts and Related Documents* (WTO 2009) 5.

access, Trade and environment, Trade facilitation, and the DSU.[180] The trade facilitation agenda was prominent due to the need for members to commit to easing trade flows.[181] The TFA, which was signed in December 2013, was the first agreement to be concluded under the DDA and since the establishment of the WTO.[182] Chapter Five will provide a comprehensive discussion on trade facilitation.

As of October 2022, the DDA had not yet delivered on its agenda list and the perception has been that the negotiations either slowed in progress or stalled.[183] At the time of the study, there were varying interpretations as to whether the DDA was on recess or deceased. Some WTO members considered the DDA dead.[184] In as much as impressions might be created that the Round is still ongoing, indications are that it has failed and is beyond resuscitation. Compared with the eight-year Uruguay Round, the DDA remained in intensive care for nearly two decades with the TFA as the only marked outcome. An analysis of Table 2.1 above shows that the twenty-year period of the DDA was as long as the period from 1947 to 1967, during which six successful Rounds were conducted.[185] Not only has the DDA been long, but there has not been much activity during its duration. Without any official statement from the WTO, there would however be no basis to assume that the negotiations have died. The WTO needs to be bold enough to acknowledge that the Doha Round has failed.

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180 The full agenda list is available at WTO, 'Subjects Treated Under the Doha Development Agenda' <www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm> accessed 1 September 2020.
The agenda included: Agriculture; Market access for non-agricultural products (NAMA); Trade-related aspects of intellectual property rights (TRIPS); TRIPS, biological diversity and traditional knowledge; Relationship between trade and investment; Interaction between trade and competition policy; Trade facilitation; Transparency in government procurement; Anti-dumping (GATT Article VI); Subsidies; Regional trade agreements; Dispute settlement understanding; Trade and environment; Electronic commerce; Small economies; Technical cooperation and capacity building; Special and differential treatment; Aid for trade; Sanitary and phytosanitary measures; Technical barriers to trade; Customs valuation (GATT Article VII); Rules of origin.

181 WTO, 'Briefing Notes, Trade Facilitation' <www.wto.org/english/tratop_e/dda_e/status_e/tradfa_e.htm> accessed 23 May 2021.

182 WTO, 'WTO's Trade Facilitation Agreement Enters into Force' (22 February 2017) <www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm> accessed 28 August 2020.

183 WTO, 'Doha Development Agenda'.

184 Anonymous, 'The Doha Round Finally Dies a Merciful Death: Governments Must Now Pursue Trade Multilateralism Piece by Piece' *Financial Times* (London, 21 December 2015) <www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879> accessed 1 September 2020.

185 These were the Geneva, Annecy, Torquay, Geneva II, Dillion and Kennedy Rounds.

There are several reasons for the lack of progress under the DDA. Riding on the success of the Uruguay Round, the WTO had developed an ambitious agenda whose length and breadth contributed to the breakdown of the process. Although not opposed to the DDA, African countries had been skeptical and considered that the Doha Round came too soon before the outcomes from the Uruguay Round was consolidated and fully implemented.[186] The fact that the agenda for the DDA was developmental, highlighted the growing influence of developing countries in the WTO.[187] Developing countries had increasingly become a force to reckon with in world affairs and they could no longer accept a situation where their exports to developed countries and imports from the same would not compete on level ground. During the start of the negotiations the LDCs demanded special and differential treatment (SDT) but the developed countries were reluctant to concede.[188] The provisions on SDT conceded in the TFA illustrate that international treaties need to be mutually beneficial to all parties, and in this case, both the developed and the LDCs. Without the SDT provisions in the TFA, it is the authors contention that the TFA would have been part of the parked legal scrolls in draft form.

Africa therefore also contributed to the breakdown in that it disproportionately emphasised demands for other markets to open rather than in coming up with its own collective offer.[189] This did not help to bridge the gap. The AU is member state driven, and it accordingly supported its members during WTO negotiations. During the Tenth WTO Ministerial Conference held in Nairobi, Kenya in December 2015, the AUC urged

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186 Oxfam International, 'Africa and the Doha Round: Fighting to Keep Development Alive' (2005) <https://policy-practice.oxfam.org/resources/africa-and-the-doha-round-fighting-to-keep-development-alive-114077/> accessed 14 November 2021.

187 Bernard M Hoekman 'The WTO and the Global Economy: Contemporary Challenges and Possible Responses' in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (CUP 2015).

188 Andrew Charlton, 'The Collapse of the Doha Trade Round' (2006) Autumn CentrePiece 21 (note); See also the discussions on SDT in Section 2.7.5.2 and Chapters 5 and 7

189 Maika Oshikawa, Ukamaka Anaedu and Vicky Chemutai, 'Trade Policy Trends in Africa: Empirical Evidence from Twenty Years of WTO Trade Policy Reviews' in Patrick Low, Maika Oshikawa and Chiedu Osakwe (eds), *African Perspectives on Trade and the WTO: Domestic Reforms, Structural Transformation and Global Economic Integration* (CUP 2016) 155, 156.

the WTO not only to recognise differential treatment, but also to facilitate economic development for Africa and the less developed world.[190]

The lack of meaningful progress in the DDA for over a decade, offered an opportunity for Africa to accelerate its own ambitious economic integration agenda under the 1991 Abuja Treaty. This created an opportunity for Africa to launch its own negotiations and fast track its own AfCFTA in June 2015.[191] A lot of progress towards the operationalisation of the AfCFTA was therefore made between 2012 and 2022. The stalled events of the DDA had a positive impact in motivating the continent to decisively act on its own developmental issues, with lessons being drawn from the international scene. With the signing of the AfCFTA Agreement in 2018, Africa is automatically reorganised to henceforth speak with one voice at global trade forums, including on SDT issues.

The stalemate has worked to the advantage of developing countries who are usually expected to give in to the developed Africa has taken advantage of the impasse to demand a more level playing field.[192] There has also been a view that the DDA has been skewed in favour of the developed countries and that it is high time that a new Round was introduced.[193] It is however clear is that there is a need for a breakthrough. As a way forward the WTO need to develop a new Round and abandon the DDA. It must identify a manageable and non-controversial agenda which can easily get consensus from its membership. Based on this approach, the WTO would be able to resuscitate the Rounds and bring life to the history of global trade. The approach can

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190 Fatima Haram Acyl, 'African Union Priorities at the WTO' in Patrick Low, Maika Oshikawa and Chiedu Osakwe (eds), *African Perspectives on Trade and the WTO: Domestic Reforms, Structural Transformation, and Global Economic Integration* (CUP 2016) 15-17.

191 African Union, 'Declaration on the Launch of the Negotiations for the Establishment of the Continental Free Trade Area (CFTA)' (15 June 2015) Doc Assembly/AU/11(XXV) which can be viewed on African Union, 'Decisions, Declarations and Resolution of the Assembly of the Union Twenty-Fifth Ordinary Session' (2015) <https://au.int/sites/default/files/decisions/9664-assembly_au_dec_569_-_587_xxiv_e.pdf> accessed 28 May 2021; The AfCFTA will be covered in detail in Chapter 4.

192 Yilmaz Akyüz, William Milberg and Robert Wade, 'Developing Countries and the Collapse of the Doha Round: A Forum' (2006) 49(6) Challenge 6, 10.

193 Akyüz, Milberg and Wade, 'Developing Countries and the Collapse of the Doha Round' 14-19.

build upon the changed environment which saw the appointment of a new WTO Director General from Africa.

2.4.2 Dispute settlement

The credibility of multilateral trade is enhanced if there is a framework of rules to resolve disputes. A major task of the WTO is the administration of a dispute settlement system for its members.[194] The dispute settlement system is a key pillar of the WTO system that has made a substantial influence to a stable environment for global trade.[195] The importance of disputes in the WTO is evidenced by the number of cases presented to the Dispute Settlement Body (DSB). According to an analysis by the WTO there were 235 disputes from 1947 to 1989 and 295 disputes from 1989 to 1994.[196] Between 1995 and 2020, under the WTO, a minimum of 596 disputes were brought to the WTO and over 350 rulings were issued.[197] One possible explanation for this increase is the confidence by countries that the system will be fair and produce well-reasoned rulings.

The WTO mechanism of resolving disputes was originally provided for under GATT 1947, but these were re-negotiated and improved upon during the Uruguay Round, resulting in more elaborate procedures.[198] The Uruguay Round developed a separate agreement, that is the 'Understanding on Rules and Procedures Governing the Settlements of Disputes' (hereafter the DSU), with manageable procedures for the handling of disputes.[199] Under GATT 1947 the system had no time frames and it was easy for any interested party to block the process. The DSU is a rule-based procedure

194 WTO Agreement Art III:3.

195 WTO, *Understanding the WTO* (5th edn, WTO 2015) 55.

196 WTO, *GATT Disputes: 1948-1995 - Volume 1: Overview and One-Page Case Summaries* (Geneva 2018) 14. A total figure for the period 1948 to 1994 could not be established, and the researcher avoided coming up with it to avoid double counting for the year 1989.

197 WTO, 'Dispute Settlement' <www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 20 August 2020.

198 Jackson, *The World Trading System* 124; Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 106.

199 Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401, 33 ILM 1226 (Dispute Settlement Understanding / DSU).

with specific time frames to resolve and implement rulings.[200] The DSU therefore improved upon the weak rules of GATT and developed a system which is unambiguous, transparent and user-friendly for the members of the WTO.[201]

However, it must be noted that international law does not adhere to the common law principle of *stare decisis*, or precedent, and as a result, the system is not strictly bound by previous decisions.[202] International law is dynamic and a product of political realities, changes in technology and socio-economic developments. The economic environment in 1947 is different from what prevails in the twenty-first century. Where appropriate and in practice, the dispute resolution mechanism cannot disregard the guidance from previous rulings on the interpretation and implementation of WTO legislation and jurisprudence.[203] The WTO Agreement indeed recognises the pursuasion derived from previous decisions and practices.[204] Such recognition brings predictability and it is generally acknowledged that the decisions from the dispute settlement system have formed a respected body of case law.[205] This is illustrated in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* where the panel made repeated reference to a previous case, resulting in Malaysia raising objections.[206] In this case, the Appellate Body (AB) authoritatively justified to Malaysia the importance of precedence, when it stated:

> The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our

200 WTO, 'Understanding the WTO: Settling Disputes: A Unique Contribution' <www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 26 August 2020.

201 Craig VanGrasstek, *The History and Future of the World Trade Organization* (WTO 2013) 51.

202 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) Art 59 reads: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'

203 Peter Sutherland and others, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO 2009) 52.

204 Article XVI(1) reads: 'Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.'

205 VanGrasstek, *History and Future of the WTO* 241.

206 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (circulated 22 October 2001, adopted 21 November 2001) WT/DS58/AB/RW [107-109]. The case is also shortened as *United States – Shrimp.*

> Report … Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case.[207]

A case which shows respect for precedence in WTO jurisprudence is the *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* wherein the AB issued a decision addressing the principle of burden of proof by the parties.[208] This case has been used as a precedent in subsequent disputes with similar facts such as *European Communities – Customs Classification of Certain Computer Equipment*[209] and *Japan – Measures Affecting Consumer Photographic Film and Paper*.[210]

The AfCFTA has created its own system of resolving disputes, with both similarities and differences from that of the WTO.[211]

2.4.3 Trade Policy Review Mechanism

The 164 members of the WTO all need to share their individual trade policies and related information.[212] The need for transparency under the WTO is evident in various agreements, and Article X of GATT 1994 obliges members to make trade regulations public and to ensure that information on trade is easily accessible. In 1989 GATT created a template, the Trade Policy Review Mechanism (TPRM), to gather trade information from contracting parties and exchange it among the parties in order to improve transparency in global trade.[213] It is an information sharing tool to ensure that trade is undertaken in a transparent evironment rather than a mechanism designed to compare data or determine who is ahead of others. The TPRM was adopted as part of

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207 *United States – Shrimp* [107-109].

208 *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India:* Report of the Appellate Body (circulated 25 April 1997, adopted 23 May 1997) WT/DS33/AB/R [IV].

209 *European Communities – Customs Classification of Certain Computer Equipment:* Report of the Appellate Body (circulated 5 February 1998, adopted 22 June 1998) WT/DS62/11, WT/DS67/9 and WT/DS68/8 [8.34]-[8.35] and [8.39]-[8.40].

210 *Japan – Measures Affecting Consumer Photographic Film and Paper:* Report of the Panel (circulated 31 March 1998, adopted 22 April 1998) WT/DS44/R [10.30].

211 Refer to Chapters 6 and 7 for discussions on dispute settlement.

212 WTO, 'Members and Observers'.

213 Speech by the WTO Director General, Roberto Azevêdo, available at Azevêdo R, '30 Years of the Trade Policy Review Mechanism' (*WTO*, 27 November 2019) <www.wto.org/english/news_e/spra_e/spra296_e.htm> accessed 14 November 2021.

the WTO system and the Uruguay Round incorporated it as Annex 3 to the WTO Agreement.[214] Members are therefore obliged to supply information as required by the WTO.[215] The information collected through the TPRM is also used for facilitating negotiations, implementation and enforcement.[216] The TPRM is therefore a tool to monitor the extent to which members are complying with their international obligations in trade.[217] It is also used for surveillance of the economic environment in a country and as a way for members to understand the trade policies of other members.[218] It is thus a key function of the WTO to conduct periodic reviews of policies and to offer the necessary expert advice to its members on issues of global trade in order to prepare and assist members in implementing various measures.

The AfCFTA Agreement contains comparatively weak clauses demanding regular reviews of the implementation of the AfCFTA[219] as well as transparency in the administration of laws.[220] The provisions in the AfCFTA Agreement fall short of the TPRM in that AfCFTA members are not held accountable to one another. A strong mechanism like the TPRM would have been ideal for the AfCFTA since it enhances transparency and allows State Parties to better understand each other's perspective.

2.4.4 Cooperation with other organisations

As noted in section 2.2, the WTO has a relationship with other Bretton Woods institutions. One of the functions of the WTO is to foster cooperation with the IMF and the WB together with its affiliate agencies.[221] This umbilical cord-type of relationship amongst the three institutions can be traced from the fact they were all created by the same principles, as complementary cogs in establishing a stable global economic

214 Emil P Bolongaita and Maika Oshikawa, 'The Future of Asia: Unleashing the Power of Trade and Governance' in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (CUP 2015) 182.
215 WTO Agreement annex 3:D.
216 Arunabha Ghosh, 'Developing Countries in the WTO Trade Policy Review Mechanism' (2010) 9(3) WTR 419, 420-426.
217 WTO Agreement annex 3:D.
218 VanGrasstek, *History and Future of the WTO* 279.
219 AfCFTA Agreement Art 12:2
220 AfCFTA Agreement Art 16.
221 WTO Agreement Art III:4.

environment. The WTO has also cooperated with international organisations such as the International Trade Centre (ITC) and the WB in developing a work programme to assist the LDCs.[222] A common area of interest in which the three institutions intervenes is in the field of trade facilitation, covered in Chapters Five and Seven of this study.

In addition to the IMF and the WB, the WTO has strong working relationships with about 200 other organisations.[223] The IMF and WB also work closely with the AU on issues pertaining to economic development, including trade liberalisation. The WTO has partnered with various organisations which contribute to the furtherance of its objectives on issues such as trade liberalisation, trade facilitations and the removal of tariff barriers. Amongst these are the WCO and UN agencies such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Economic Commission for Africa (UNECA or ECA). This section illustrates the partnership between the WTO and some selected UN agencies together with the WCO and ITC, all of which relates to both the WTO and the AfCFTA on issues regarding trade and trade facilitation.

2.4.4.1 United Nations agencies

The operations of the WTO cannot be separated from the UN and its agencies, since they are both intergovernmental organisations with different and yet complementary objectives of maintaining stability in the world. The UN was created in 1945 and its most important guiding principles include upholding of world peace and security.[224] The UN is decentralised into a number of specialised agencies and programmes which operate as independent international organisations, each with its own governance structures.

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222 Thomas J Schoenbaum, 'The WTO and Developing Countries' (2005) (54COE Special edn) The Journal of Social Science 7, 7-8.

223 WTO, 'Work with Other International Organizations: Intergovernmental Organizations Working with the WTO Secretariat', <www.wto.org/english/thewto_e/coher_e/igo_divisions_e.htm> accessed 11 September 2020. Also refer to the WTO Agreement Art V, which reads:
'1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.
2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.'

224 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Art 1.

UNECA and UNCTAD have established offices in Addis Ababa, Ethiopia, from where they also coordinate support for AU programs.[225] UNECA is the UN representation for Africa and other continents also have their own commissions.[226] These economic commissions were established to, amongst other functions, promote economic development and foster intra-regional integration.[227]The UNECA has a history of collaborating with the AU and economic integration in the continent.[228] Some of the key areas of collaboration are trade facilitation, economic integration and Africa's development.

UNCTAD is an agency that was founded following a trade dispute in 1961. Uruguay complained about the developed countries for taking measures against 576 of its products, adversely affecting its participation in global trade.[229] The case led to a conference and the subsequent establishment of UNCTAD in 1964 to support developing countries so that they can benefit from the globalised economy by providing technical assistance in developmental issues such as economic integration, trade, investment and finance.[230] UNCTAD also ensures that developing countries, including those participating in the AfCFTA, get assistance to implement programmes (eg trade facilitation) instituted by other UN special agencies such as the IMF and the WB.

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225 The Headquarters of the AU is in Addis Ababa, Ethiopia. The AU also has other programs with their own headquarters outside Ethiopia, eg the AfCFTA Secretariat is based in Accra, Ghana and the New Partnership for Africa's Development (NEPAD) has headquarters in Midrand, South Africa.

226 The other UN regional commissions are: Economic Commission for Europe (ECE), Economic Commission for Latin America and the Caribbean (ECLAC), Economic and Social Commission for Asia and the Pacific (ESCAP) and Economic and Social Commission for Western Asia (ESCWA).

227 United Nations Economic Commission for Africa, 'Overview' <www.uneca.org/pages/overview> accessed 27 August 2020.

228 African Union, 'Speech by the Deputy Chairperson at the Commemoration of the 60th Anniversary of the United Nations Economic Commission for Africa' (18 December 2018) <https://au.int/en/speeches/20181218/over-past-60-years-uneca-has-partnered-africa-oau-and-now-african-union-deputy> accessed 14 November 2021.

229 *Uruguayan Recourse to Article XXIII*: Report of the Panel (3 March 1965) L/1923 - 11S/95, GATT BISD (11th Supp) 95; (30 October 1963) L/2074, GATT BISD (13th Supp) 25; (27 October 1962) L/2278, GATT BISD (13th Supp) 45.

230 United Nations Conference on Trade and Development, 'About UNCTAD' <https://unctad.org/en/Pages/aboutus.aspx> accessed 27 August 2020.

UNCTAD has supported WTO members, AfCFTA and RECs in the implementation of trade facilitation meassures.[231]

There are complementarities between UNCTAD and the WTO. They collaborate on issues of common interest involving trade and development, one example being on SDT.[232] Both UNCTAD and the WTO work with the AfCFTA in developing the trade agenda. Further, the developing countries have always coagulated around UNCTAD in canvassing for a common front during trade negotiations involving developing and developed countries.[233]

2.4.4.2 World Customs Organisation

One of the organisations with a strong impact in implementing some WTO instruments is WCO whose evolution can be linked to GATT. GATT 1947 referred to Customs issues but there was no formal body responsible for Customs matters.[234] The need for Customs to support trade became evident and thirteen European Customs administrations established the Customs Cooperation Council (CCC) which came into being in 1952.[235] The CCC was to grow into an international body which represented countries from all continents. In 1994, the CCC adopted WCO as its working name to reflect itself as a world body. As of the 1st September 2022, the WCO had a membership of 184 Customs administrations across the globe and was the only international organisation representing expertise in Customs issues.[236] All AU member states, except Sahrawi Arab Democratic Republic, are members of the WCO.

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231 United Nations Conference on Trade and Development, *Trade Facilitation and Development: Driving Trade Competitiveness, Border Agency Effectiveness and Strengthened Governance* (UNCTAD 2016) 5.

232 See section 2.7.5 of this chapter for a discussion on SDT.

233 Joseph S Nye, 'UNCTAD: 'Poor Nations' Pressure Group' in Robert W Cox and Harold K Jacobson (eds), *The Anatomy of Influence: Decision Making in International Organization* (Yale University Press 1974) 334, 336.

234 Examples are Art VII on valuation; Art IX on rules of origin; and Arts V, VIII and X on trade facilitation.

235 Edward B McGuire, *The British Tariff System* (2nd edn, Methuen 1951) 327-328.

236 WCO, 'About Us: Discover the WCO' <www.wcoomd.org/en/about-us/what-is-the-wco/discover-the-wco.aspx> accessed 1 September 2022.

The functions of the WCO include facilitating cooperation in Customs matters, exchanging information to ensure efficiency and effectiveness in operations, ensuring uniform interpretation and application of its instruments, and representing the voice of Customs at international forums in matters within its competence.[237] As a worldwide umbrella organisation for Customs administrations, the WCO plays an important role in streamlining border procedures. Both the WTO and the WCO, as global organisations, consider trade facilitation as significant to their existence, with the WTO being the custodian of the TFA while the WCO is an implementation agency through its Customs administrations.[238] The role of Customs administrations and the WCO in trade facilitation is discussed in Chapters Five and Seven. The WTO and the WCO complement each other in streamling Customs procedure in order facilitate the fast movement of goods through borderd. It should be noted that the role of the WCO in trade facilitation is not only of interest to the WTO but it extends to include regional trade agreements (RTAs) and the AfCFTA. The WCO and the AfCFTA entered into a Memorandum of Understanding (MoU) in February 2022 in an effort to build close cooperation on issues of mutual interest.[239] The MoU will facilitate implementation of Customs practices in the AfCFTA in accordance with global best practices and will enhance collaboration in Customs matters.

The WCO's highest organ of governance is a council comprised of delegates from the Customs administrations, who are usually the Heads of Customs.[240] They are largely professional and technical experts in Customs. As will be noted in section 2.5 below, the WTO's highest organ is the Council of Ministers, which is a political body. The governance structures of the two organisations are fundamentally different. It can be

237 WCO, 'Discover the WCO'.

238 WCO, 'Message from Secretary General'.

239 WCO, 'About Us: Memoranda of Understanding and Other Cooperation Agreements' <www.wcoomd.org/-/media/wco/public/global/pdf/about-us/partners/mou/244_mou_en.pdf?la=en> accessed 27 August 2022.

240 WCO, 'Terms of Reference for the Council' <www.wcoomd.org/en/wco-working-bodies/council.aspx> accessed 4 June 2022; WCO, 'Successful Conclusion to the 2016 Council Sessions' (16 July 2016) <www.wcoomd.org/en/media/newsroom/2016/july/successful-conclusion-to-the-2016-council-sessions.aspx> accessed 4 June 2022; Convention Establishing the Customs Cooperation Council (adopted 15 December 1950, entered into force 4 November 1952) (CCC Convention).

argued that the WTO, as a political body, is more influential and powerful compared to the WCO, which is made up of Customs experts. Interestingly, the two organisations changed their names almost at the same time in 1994/1995 when they adopted the prefix 'World' to show that their influence was worldwide. The CCC became the WCO while GATT was transformed to the WTO.[241]

2.4.4.3 International Trade Centre

The ITC is a joint agency of UNCTAD and the WTO and is multilateral organisation dedicated to supporting small and medium-sized enterprises (SMEs) so that they can position themselves to participate in global trade.[242] It therefore plays an important role in ensuring that the smaller traders are accomodated in global trade. SMEs occupy a critical position in developing economies such as the AfCFTA. They represent more than 90% of business entities while accounting for two thirds of private sector employment and job creation.[243] The fact that the ITC has the joint support from both UNCTAD and the WTO is evidence of the particular attention given to SMEs in global trade. The support of the WTO for SMEs is already inferred in the preamble of GATT 1994 when it recognises the need to produce and trade in goods.[244] This underscores the fact that the WTO not only supports multinationals but all those involved in international commerce. The ITC also focuses on the removal of NTBs and the need to facilitate cross-border trade.[245] Trade facilitation is an issue for SMEs who need simplified border procedures when moving their products to identified markets. In this respect, it must be noted that the ITC has worked with some RTAs to increase the participation of SMEs in regional value chains and capacity building, and in ensuring the expeditious movement of goods.[246]

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241 Refer to sections 2.3 and 2.4.4.2 of the study.

242 ITC, 'About ITC: How ITC works' <www.intracen.org/itc/about/how-itc-works/our-role-in-the-un-and-wto/> accessed 20 September 2020.

243 ITC, *ITC: Dedicated to the Success of Business through Trade* (ITC 2017) 3.

244 GATT 1994 preamble.

245 ITC*, Annual Report 2019* (ITC 2020) 30.

246 ITC, *Annual Report 2019* 74-75.

The ITC therefore encourages trade in the AfCFTA. In collaboration with ITC the AfCFTA has plans to encourage and empower SMEs in order to enhance intra-African trade through assisting youth and women-led enterprises who dominate the sector.[247] It can therefore be noted that the WTO, UNCTAD, ITC, AfCFTA and governments converge and desire more meaningful contribution of SMEs in global business. The trade facilitation measures of both the WTO and the AfCFTA take into account the circumstances of SMEs.

2.4.5 Capacity building

In addition to servicing governments, the WTO has a wide spectrum of stakeholders who include the private sector, international organisations and Customs administrations. These stakeholders require the requisite capacity in interpreting and implementing WTO laws. The WTO has also observed that, provided with the necessary capacity in matters of trade, its members would engage themselves more fully in the global trading system.[248] Although not specified in the WTO Agreement, this thesis argues that, over the years, capacity building has developed to be an additional function of the WTO. This function has naturally evolved and the WTO is already implementing activities to support members in complying with its requirements. The Marrakesh Declaration recognised the importance of capacity building and the Ministers acknowledged the need to improve GATT/WTO's capacity to give more technical assistance to LDCs.[249]

Apart from strenthening the capacity ot the WTO itself, the declaration above noted that LDCs require assistance to enable them participate in global trade more meaningfully, Countries acceding to WTO membership are expected to align their national trade policies to WTO best practices, implement existing agreements, and participate in

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247 Dorothy Tembo, 'The Power of the AfCFTA and the Promise of Women and Youth' in African Continental Free Trade Area Secretariat and United Nations Development Programme (eds), *Futures Report: Making the AfCFTA Work for Women and Youth* (UNDP 2020).

248 WTO, 'Building Trade Capacity' <www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm> accessed 12 February 2021.

249 Marrakesh Declaration para 5.

negotiations aimed at further trade liberalisation.[250] By building the capacity of its members, the WTO would be assisting them to further the WTO agenda. Without training, the tendency, as observed in respect of the African group, would be to react to agendas proposed by the developed countries who already have capacity to mobilise themselves and take strong positions during negotiations.[251] In a way, the WTO responded to this by introducing a trade-related technical assistance (TRTA) programme to assist developing countries participate more fully in global trade.[252] The programme includes internships, liaison with academia, training in negotiating skills, technical aspects of trade policy, and requirements for members to observe WTO rules.[253] The TFA also includes provisions for capacity building in order to assist WTO members to implement various trade facilitation measures.[254]

Like the WTO Agreement, the AfCFTA Agreement make no mention of capacity building as a strategic move to enhance the participation of its membership. It is, however, clear that negotiations for the remaining areas together with the implementation of the AfCFTA require capacity building of all the stakeholders involved. As an example, the interpretation of the rules of origin (ROO) and the implementation of trade facilitation measures in the AfCFTA require the training of both the Customs administrations and stakeholders to ensure that trade regulations are understood and applied consistenly.

2.5 Governance and structure of the WTO

As stated in section 2.4 above, the founding of the WTO introduced a new dispensation in global trade. As a formal organisation, the WTO has its own structures[255] and a clear

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250 John FE Ohiorhenuan, 'Capacity Building Implications of Enhanced African Participation in Global Trade Rules Making and Arrangements' in T Ademola Oyejide and William Lyakurwa (eds), *Africa and the World Trading System, Vol 1: Selected Issues of the Doha Agenda* (Africa World Press 2005) 356.

251 Ohiorhenuan, 'Capacity Building Implications of Enhanced African Participation' 373.

252 WTO, 'Trade-Related Technical Assistance: WTO Technical Assistance and Training' <www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm> accessed 12 February 2021.

253 WTO, 'Training News Archive' <www.wto.org/english/news_e/archive_e/train_arc_e.htm> accessed 12 February 2021.

254 TFA Arts 21 and 22.

255 WTO Agreement Art IV.

mandate[256] to meet expanding roles in a dynamic trading environment.[257] It has a Secretariat, headed by a Director-General (DG), with the headquarters based in Geneva, Switzerland.[258] The WTO is a member-driven organisation in which decisions are made by consensus, and in exceptional cases where this cannot be achieved, decisions are then made through voting.[259] Decisions regarding the interpretation of WTO agreements are done only by the Ministerial Conference (MC) and the General Council (GC) and these require a majority vote of three quarters of the members.[260] There are also some provisions which require unanimous[261] votes while others require two thirds[262] majority votes.

The 2020 search for a new DG to take Roberto Azevedo's post in the WTO might be used as an example of how decisions are made at the WTO. In October 2020, the Trump administration of the United States, which supported Yoo Myung-hee of South Korea, blocked the appointment of Ngozi Okonjo-Iweala of Nigeria, who commanded the majority support.[263] The required consensus leading to the appointment of Ngozi Okonjo-Iweala was reached in February 2021 following two major events. Firstly, the incoming United States administration under Joe Biden joined the majority of the WTO members, and secondly South Korea's candidate withdrew.[264] The AfCFTA uses consensus to make decisions on substantive issues whereas a simple majority vote is used with regards to questions of procedure.[265] The advantage of consensus is that once it is attained, it unites all parties as they become co-owners of the decision. The major weakness of consensus is that a dissenting voice, whether responsible or irresponsible, can delay a process. A lack of objection to an issue, on the other hand,

256 WTO Agreement Art III.
257 WTO Agreement Arts II and III.
258 WTO Agreement Art IX.
259 WTO Agreement Art VI.
260 WTO Agreement Art IX:2.
261 WTO Agreement Art X:1.
262 WTO Agreement Art X:3 and 4.
263 WTO, 'Director General Selection Process: Members Indicate Strong Preference for Ngozi Okonjo-Iweala as DG but US Objects' (28 October 2020) <www.wto.org/english/news_e/news20_e/dgsel_28oct20_e.htm> accessed 9 February 2021.
264 WTO, 'Director-General: History is Made: Ngozi Okonjo-Iweala Chosen as Director General' <www.wto.org/english/news_e/news21_e/dgno_15feb21_e.htm> accessed 15 February 2021.
265 AfCFTA Agreement Art 14.

is viewed as acquiescence, while non-contribution to a debate can be interpreted as assent to the subject matter.

The WTO's highest decision-making organ is the MC, which is represented by the relevant Ministers responsible for foreign trade from member governments, and they usually meet once every two years.[266] The MC provides political direction and guidance on matters of world trade through the making of international agreements and decisions. The MC can make any decision regarding any of the WTO's agreements.[267] Some of the classical decisions of the WTO concerned a waiver granted on the Economic Partnership Agreement between the European Communities (EC) and the African, Caribbean and Pacific Group of (ACP) States regarding preferential treatment of products originating from the ACP states to the EC.[268] The Ninth MC, which was held in Bali, Indonesia, in December 2013, made major decisions, amongst these being the acceptance of Yemen as a member of the WTO, and the adoption of the TFA, which is currently the only agreement resulting from of the DDA.[269]

As argued in Chapter Three of the study, it appears an incongruity that with UN agencies the highest decision making level are the Ministers, whereas with most subordinate institutions such as RTAs and RECs, the key decisions and directions are made by the Heads of States, who comprise the highest organ. An example of this is illustrated by the EU and the AfCFTA. In the EU, political direction is determined by the Council of the EU, which is comprised of the Heads of States or Governments.[270] In respect of the AfCFTA, decisions are also made by Heads of State and

266 WTO Agreement Art IV:1.

267 WTO, 'Ministerial Conferences' <www.wto.org/english/thewto_e/minist_e/minist_e.htm> accessed 26 May 2021.

268 WTO, 'DOHA WTO Ministerial 2001: European Communities — the ACP-EC Partnership Agreement, Decision of 14 November 2001' <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm> accessed 26 May 2021.

269 WTO, 'Ministerial Conferences: Ninth WTO Ministerial Conference' <www.wto.org/english/thewto_e/minist_e/mc9_e/mc9_e.htm> accessed 26 May 2021.

270 Consolidated Version of the Treaty on European Union (Original adopted 7 February 1992, entered into force 1 November 1993) [2008] OJ C115/13 (TEU) Art 15; Consolidated Version of the Treaty on the Functioning of the European Union (Original adopted 25 March 1957, entered into force 1 January 1958) (26 October 2012) OJ L 326/47-326/390 (TFEU) part 6, Arts 235-243.

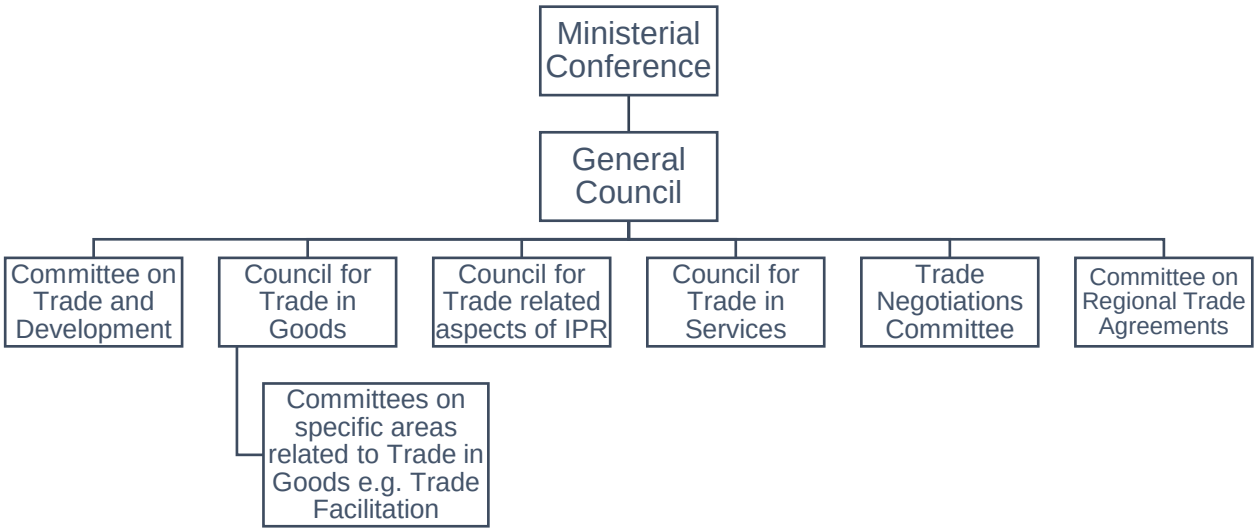
Governments.[271] Although this is a standing structure for most organisations, it creates a misallignment of power when regional organisations, headed by Heads of States, have to conduct their business within the parameters or guidance stipulated from an international agreement whose highest political organ consists of Ministers. Both the RECs and the WTO are a creation of international treaties.

An important subordinate organ of the MC is the GC which convenes as often as is appropriate to conduct the business of the WTO.[272] It is made up of member representatives, who are usually the ambassadors accredited to the WTO, and are authorised to conduct business on behalf of the MC.[273] The GC superintends the routine functioning of the WTO to ensure that the WTO fulfils its mandate, more so when considered that that there are usually two-year gaps between the meetings of the MC.[274] The significance of the GC can be appreciated when considered that it directs the activities of the WTO on behalf the MC as and when necessary. It therefore has an influence on FTAs since these are a creation of the WTO. Some of the functions of the GC involve participation in the DSB and the Trade Policy Review Body.[275] Chapter Seven of this study will discuss the DSB in greater detail.

Figure 2.1 below is a simplified diagrammatic structure of the organs of the WTO which shows the strategic positioning of the GC.

271 AfCFTA Agreement Art 10.
272 WTO Agreement Art IV:2.
273 WTO, 'The WTO General Council' <www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm> accessed 6 March 2022.
274 WTO, 'The WTO General Council'.
275 WTO Agreement Art IV:3-4.

Figure 2.1: Simplified structure of the organs of the WTO



Source: Own compilation, Adapted from WTO, 'WTO Organization Chart' <www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm> accessed 6 October 2020.

The GC conducts its business through councils and committees such as the Council for Trade in Goods and the Council for Trade in Services,[276] and the Committee on Trade and Development.[277] Issues dealing with trade facilitation would fall under the Council for Trade in Goods, one of whose structures is the Committee on Trade Facilitation.[278] The Committee on Regional Trade Agreements (CRTA), which is discussed in Chapter 3 of XXIV or any other requirements of the WTO. Participation in the CRTA is open to all WTO members this study, is of interest because one of its mandates is to consider if RTAs comply with Article.[279]

The AfCFTA has a simpler structure. The Council of Ministers (CoM) is responsible for decisions regarding the implementation of the AfCFTA while Heads of State and Governments provide strategic guidance on the AfCFTA.[280] Committees, such as the Committee on Trade in Goods[281] and the Committee on Trade in Services,[282] which

276 WTO Agreement Art IV:5.
277 WTO Agreement Art IV:7.
278 WTO Agreement Art IV:7.
279 WTO Decision of 6 February 1996 Creating the CRTA (7 February 1996) WT/L/127.
280 AfCFTA Agreement Art 11:3; AfCFTA Agreement Art 10.
281 Protocol on TiG Art 31.
282 Protocol on TiG Art 26.

operate through expert subcommittees such as the Subcommittee on Trade Facilitation, Customs Cooperation and Transit (SCTFCCT),[283] are responsible for facilitating the operations of the AfCFTA. Recommendations from the committees are submitted to the CoM for decisions through a Committee of Senior Trade.[284] The Secretariat of the AfCFTA is headed by the Secretary General (SG) who is responsible for the administration and implementation of the AfCFTA Agreement.[285] Whereas the WTO is responsible for ensuring adherence to global trade laws, the AfCFTA is responsible for the effective operations of Africa's largest FTA. The Secretary General of the AfCFTA has two major responsibilities in managing the FTA: firstly, to ensure that it operates as an FTA within the WTO rules and subject to the exceptions stipulated in Article XXIV; and secondly, to ensure that the parties to the AfCFTA comply with the agreed terms governing the operations of their FTA.

2.6 Overview of WTO law

This section gives an overview of WTO laws. Chapter Six reviews in detail the legal texts which deal with trade facilitation under the WTO and the AfCFTA.

Although GATT 1994 uses the legal texts and language from GATT 1947, the two agreements are separate and legally distinct.[286] GATT 1994 incorporated a number of ancillary texts and explanations on certain provisions of GATT 1947 which were done from 1948 to 1994 and these include six 'Understandings' on GATT 1947,[287] the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, Ministerial Decisions, and explanatory notes to ensure common understanding.

283 Annex 4 Art 17; See also Chapter 7.
284 AfCFTA Agreement Art 12.
285 AfCFTA Agreement Art 13.
286 WTO Agreement Art II:4. Refer to section 2.4 above.
287 The six are: Understanding on the Interpretation of Article II:l(b) of the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994; Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994; Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994; Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994.

The WTO Agreement is comprised of four annexes, each with a specific area of focus. Annex 1 of the WTO Agreement is comprised of Annex 1A, Annex 1B and Annex IC. Annex 1A deals with trade in goods. It consists of GATT 1994[288] and a series of other legal texts governing trade in goods such as the Agreement on Agriculture,[289] the Agreement on Textiles and Clothing,[290] and the Agreement on Rules of Origin.[291] Annex 1B contains the GATS, whereas Annex IC contains the TRIPS. Annex 2 of the WTO Agreement is the DSU, which contains rules on how members would resolve disputes arising from any of the agreements under the WTO, including the TFA. Annex 3 of the WTO Agreement deals with the TPRM, which has been discussed in section 2.4.3 above. The WTO Agreement is therefore a compendium of international agreements whose collective objective is to liberalise global trade and contribute to the economic development of the world.[292] WTO law covers rules, laws and treaties regarding inter-state relationships, and is therefore part of international law.[293] The contribution of WTO law to international law, and in particular to trade, is significant when considered that as of 1 September 2022, the WTO administered its own sixty legal texts and decisions, totalling about 550 pages.[294]

The agreements of the WTO are obligatory to all the members.[295] There is, however, provision for plurilateral agreements for a narrower group with special interests in areas which might not be of importance to the general membership.[296] The provision for plurilaterals is akin to that of Article XXIV in that it is a departure from MFN provisions.[297] Whereas the advantage in respect of a plurilateral agreement is that it allows a group

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288 The original GATT 1947, with some amendments, is now incorporated as GATT 1994. Refer to GATT 1994 Art 1(a) and (b).

289 Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 (Agreement on Agriculture).

290 Agreement on Textiles and Clothing 1868 UNTS 14 (Agreement on Textiles and Clothing).

291 Agreement on Rules of Origin (adopted on 15 April 1994, entered into force 1 January 1995) 1868 UNTS 397 (Agreement on Rules of Origin).

292 WTO Agreement preamble.

293 Shaw, *International Law* 2.

294 WTO, 'WTO Legal Texts' <www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 3 September 2022.

295 WTO Agreement Art II:2.

296 Some of the plurilateral agreements are Agreement on Trade in Civil Aircraft, Agreement on Government Procurement and International Dairy Agreement; Also refer to the WTO Agreement Art II:3.

297 Refer to Chapter 3.

of countries to coagulate together during negotiations without creating an impasse, it can result in cliques within an industry and thus lead to anti-competitive practices taking root. Plurilateral agreements will, however, normally require a waiver if the agreement deals with a subject matter within the scope of existing WTO agreements.[298]

Table 2.2 below gives the an overview of how GATT laws and their categorisation. The various agreements of the WTO can be broadly classified under the key subject areas of goods, services, intellectual property rights and the plurilaterals. The agreements covering trade in goods and trade in services also have their own annexes and schedules. There are crosscutting issues dealing with the trade policy review issues together with dispute settlment.

Table 2.2: Basic overview of the WTO agreements

Marrakesh Agreement Establishing the World Trade Organisation				
Scope of trade covered	**Areas of coverage**			
	Goods	**Services**	**Intellectual Property Rights**	**Identified areas for plurilateral**
Details of specific agreements	-GATT 1994 -Other agreements on goods with their own Annexes and Schedules	-GATS with its own Annexes and Schedules	-TRIPS	-Plurilateral agreements
Crosscutting agreements	• Trade Policy Review Mechanism (TPRM) • Understanding on Rules and Procedures Governing the Settlement of Disputes			

Source: Author, adapted from *The WTO Series, General Agreement on Tariffs and Trade.*[299]

The legal texts of the WTO are broad and cover a number of areas in global trade. Some scholars have observed that the WTO provisions on trade in goods, as stipulated

298 VanGrasstek, *History and Future of the WTO* 553.
299 WTO, *The WTO Series, General Agreement on Tariffs and Trade* (WTO 2009) vii.

in GATT 1994, can be broadley divided into three groups, namely: substantive obligations, exceptions, and disputes.[300] The substantive obligations relate to the commitments in matters such as trade facilitation. The exceptions involve the permissible exemptions from the normal rules while disputes involve he general principles to resolve differences. There are, however, certain fundamental principles governing WTO law and the multilateral trading systems.

2.7 Canons of WTO law

The legal texts of the WTO are critical elements in maintaing 'rule of law' in global trade. To a great extent, the position of rule of law in the WTO can be compared to that prevailing in a country or a state where their parliament is the lawmaker, while the judiciary interpret and ensures adherence to the laws. In WTO law, the MC and GC would be the equivalent of parliament since they negotiate the agreements, and in that sense, become the lawmakers. The DSB, and in particular the panels and AB, take the role of the judiciary in that they interpret WTO laws and pass judgments. The existence of 'rule of law' will depend on the seperation of powers and the independence of these organs. The WTO, through its panels and Appellate Body, has established a corpus of jurisprudence that is consistent, coherent, and acknowledged in public international law.[301] It has managed to apply its rules transparently and fairly, regardless of the power and extent of development of its members. This is illustrated in some cases involving superpowers and small states, such as *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, where the United States imposed safeguard measures under Article 6 of the Agreement on Textiles and Clothing on imports of underwear from Costa Rica.[302]

The WTO has SDT and exception measures. These can be viewed as positive discrimination mechanisms which recognise the differences between members and the

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300 Kyle Bagwell and Robert W Staiger, 'The World Trade Organization: Theory and Practice' [2010] Annu Rev Econ 223, 240.

301 Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) xxvii.

302 *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*: Report of the Appellate Body (10 February 1997) WT/DS24/AB/R.

need to ensure fairness and equality in trade.[303] The SDT and other measures are therefore transparent, and they allow consideration of special circumstances of other members.

The WTO multilateral trading system is governed by certain fundamental principles which are: non-discrimination; commitment to remove trade barriers through negotiations; creating a predictable trading environment in which businesses will have free and fair competition; and recognising that certain member countries need special differential treatment as a result of their level of development.[304] Due to the allegiance given to these rules, they have also been referred to as canons.[305] In the context of these principles, there are four basic rules under GATT 1994 which are designed to provide business with a stable trading environment.[306] These are MFN, national treatment (NT), promotion of free open market trade, and reductions of tariffs. Where a rule requires an exception, these are examined within the particular rule under discussion. These principles are relevant to trade and trade facilitation in the Abuja Treaty, AfCFTA and the RECs.[307]

2.7.1 Most Favoured Nation Treatment

2.7.1.1 Background of the MFN principle

The birth of the MFN principle can be traced to the 11th century as a method of treating foreign merchants equally and without discrimination to ensure a level playing field in the international commerce practised then.[308] This principle has found its way into modern day trading agreements. The MFN treatment is fundamental to trade in goods

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303 Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2007) 17(5) EJIL 969, 974.

304 WTO, 'Understanding the WTO: Principles of the Trading System' <www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 13 February 2021.

305 David Vines, 'The WTO in Relation to the Fund and the Bank: Competencies, Agendas, and Linkages' in Anne O. Krueger (ed), *The WTO as an International Organization* (University of Chicago 1998) 73.

306 ITC and Commonwealth Secretariat, *Business Guide to the World Trading System* (ITC/UNCTAD/WTO and Commonwealth Secretariat 1999) 55.

307 As examples, Abuja Treaty Art 37; AfCFTA Agreement Art 19.

308 Mira Suleimenova, *MFN Standard as Substantive Treatment* (Nomos Verlagsgesellschaft 2019) 27.

in GATT 1994 and under the WTO system.[309] It is regarded as a pillar of global trade.[310] With the signing of the Uruguay Round and the coming into effect of other agreements on trade, the MFN principle is also mandated in GATS[311] and TRIPS.[312] MFN is based on non-discriminatiom against both WTO members and their products. The MFN rule forbids trading partners from discriminating against one another, resulting in a level playing field. The MFN principle in respect of trade in goods is captured in of GATT 1994 as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[313]

The MFN rule has some exceptions, key of which are the establishment of CUs and FTAs,[314] and SDT measures meant to promote trade between developed and developing countries.[315] It must be noted that the AfCFTA Agreement also incorporated an MFN principle in its provisions.[316] This shows an alignment in principles between the WTO and the AfCFTA laws.

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309 GATT 1994 Art I.

310 Das, *International Trade Policy* 126.

311 General Agreement on Trade in Services (Marrakesh Agreement Establishing the WTO, Annex 1B) (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183, 33 ILM 1167 (GATS) Art II.

312 Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh Agreement Establishing the WTO, Annex 1C) (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, 33 ILM 1197 (TRIPS) Art 4.

313 GATT 1994 Art I:1.

314 Gatt 1994 Art XXIV:5. Also Refer to Chapter 3 of this study.

315 Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (28 November 1979) GATT Doc L/4903 (hereafter Enabling Clause) para 1 of preamble and para 4.

316 AfCFTA Agreement Art 4:1.

2.7.1.2 Areas requiring non-discriminatory treatment

The provisions of GATT 1994 identifies the following key elements in which there should be no discrimination when WTO members trade in goods:[317]

(a) Customs taxes and levies on importation or exportation;

(b) fees levied on international payments connected with cross-border trade;

(c) method used to levy such fees;

(d) regulations and procedures in respect of imports and exports; and

(e) issues pertaining to obligations covered under the NT rule.

The aforementioned (a) to (d) all refer to charges and formalities connected with imports or exports or cross-border transactions. The last aspect (e) pertains to non-discrimination with regard to items eligible for NT, as specified in Article III: 2 and 4. The NT principle is discussed in section 2.7.2 below.

The WTO has handled disputes related to the interpretation of the MFN rule, and the rulings have assisted in clarifying the principle. One such case is the *EC – Bananas III* case in which a group of banana-exporting countries complained that the EC had created favourable conditions for bananas imported from the ACP group of countries and thus prejudicing other suppliers.[318] In the case, the EC provided incentives for some operators to purchase bananas from a particular region, granted licences to operators representing producers from certain countries, and imposedrestrictive quotas on the importation of bananas supplied by non-ACP countries. The rules and formalities were such that they discriminated in favour of buying bananas from the ACP and prejudiced suppliers from non-ACP countries. The matter was heard by the panel and

317 GATT Art 1:1.

318 *European Communities – Regime for the Importation, Sale and Distribution of Bananas III;* Report of the Appellate Body AB/1997/3 (9 September 1997) WT/DS27 [190]-[191].

subsequently by the AB, who agreed that the actions of the EC were discriminatory and inconsistent with Article I:1. Their report stated:

> […] As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons [...]. Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV. In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII, apply fully to all imported bananas irrespective of their origin […]. We, therefore, uphold the findings of the Panel[104] that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations […].[319]

The practical effect is that a member country cannot levy customs duties on imports from another at a rate higher than what it charges to imports from other member countries. The same would apply to international bank transfers regarding the payments of imports and exports in that the rates applicable to WTO members must not be discriminatory.

2.7.1.3 Products and like products

The issue arises when two apparently similar products are not accorded the same treatment, resulting in a member complaining that it is being discriminated against. The basic principle is that a product originating in one member country must be treated equally with a similar or like product originating in another member country.[320] This underscores the principle of non-discrimination between 'products' and 'like products'. The interpretation of 'like products' has raised issues resulting in disputes being escalated before the DSB. 'Like products' does not, however, extend to mean products which can be merely substitutable.[321] Some clarity was brought in a case, *Spain – Unroasted Coffee*,[322] in which Spain subdivided imported coffee and charged different rates of duties based on criteria such as mildness or whether it was unwashed. The

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319 *European Communities – Regime for the Importation, Sale and Distribution of Bananas III;* Report of the Appellate Body AB/1997/3 (9 September 1997) WT/DS27 [190]-[191].

320 Hoekman and Kostecki, *Political Economy of the World Trading System* 41.

321 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 210.

322 *Spain – Tariff Treatment of Unroasted Coffee*: Report of the Panel (11June 1981) BISD 28S/102 [4.6]-[4.8].

coffee from Brazil ended up being dutiable and Brazil raised a dispute to the effect that its coffee was a like product and was being discriminated against. Brazil won the case. The panel determined that the products were like products because the coffees were all sold as blends, the consumers regarded them as a single product for drinking, and the other members were not discriminating against the varieties of the blends. Although such a decision was reasonable, the influence from the fact that many members did not apply a tariff structure similar to Spain's would be wrong because the MFN principle does not require WTO members to apply identical rates of duty. All that is required is for tariff structures not to be discriminatory. In other words if South Africa, as a member of the WTO, applies an MFN rate of duty of 25% in respect of mild coffee, it follows that the same rate must be applied uniformly to other WTO members.This thesis contends that different blends of coffees can be argued to be 'like products' whereas beverages such as tea and coffee would not be 'like products'. Similarly while pork, beef, venison and chicken are all edible meats, they are not 'like products'. Chapters Three and Five discuss the International Convention on the Harmonised Commodity Description and Coding System (hereafter HS Convention)[323] whose categorisation of products based on the extent of processing and functionality can be used to determine the extent to which commodities sharing the same code are 'like products'.[324]

2.7.2 National Treatment

2.7.2.1 Background of the NT principle

Unlike MFN issues which concerns imports and exports, NT involves domestic regulatory measures, some of which are enforced by governmental agencies that do not deal with imports and exports. NT requires non-discrimination against imported goods once they have have cleared Customs or complied with border formalities.[325] The entire purpose of this non-discrimination is to prevent domestic regulatory laws or

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323 International Convention on the Harmonised Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) (HS Convention).

324 The HS is governed by the HS Convention whose implications will also be discussed in Chapters 3 and 5.

325 Jackson, *The World Trading System* 213.

domestic taxes (for example value added taxes) from being used as instruments to protect domestic goods through discriminatory procedures.[326] It means that once goods have complied with the import laws for consumption in a domestic market, they must have access and the same opportunities as those in that market, thus be accorded national treatment. It follows that regulations impacting the sale, purchase or circulation of goods in the domestic market must not differentiate the imported goods from those produced domestically.[327] NT is one of the cornerstones of WTO law, and is also relevant in GATS[328] and TRIPS.[329]

2.7.2.2 Scope of the NT principle

The essence of NT in respect of trade in goods is captured in GATT 1994 where it states:

> 1. The Members recognize that internal taxes and other internal charges, and laws, […] affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> 2. The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products [….]
>
> 4. The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin […][330]

Once goods have entered into the commerce of another member country, the application of the NT rule is a fundamental principle for market access and whether the business environment is predictable.[331] The objectives of Article III can be summed as being to ensure that national domestic measures are not used to undermine tariff

326 Jackson, *The World Trading System* 213.
327 ITC and Commonwealth Secretariat, *Business Guide to the World Trading System* 63.
328 GATS Art XVII.
329 TRIPS Art 3.
330 GATT 1994 Art III.
331 Lester and others, *World Trade Law* 279.

bindings by introducing discriminatory measures of taxation target at imported goods; protective measures on imports are limited at the borders, and once goods enter a market they circulate like any other; once foreign products enter a jurisdiction they can freely compete with the rest using the same regulations or restrictions.[332] It can be noted that the MFN and NT rules are complementary and designed to curtail protectionist measures and promote trade liberalisation. This is consistent with the overriding goal of GATT 1994 of achieving a significant decrease in tariffs and other trade obstacles and the abolition of discrimination in global trade.[333]

It has been observed that NT is much more prominent in WTO jurisprudence due to policy issues arising from various regulatory authorities within a country, such as income taxes, environmental laws, health regulations, and many others.[334]

Due to the importance and impact of NT there have been disputes and decided cases addressing the issue. In *Japan – Taxes on Alcoholic Beverages*, Canada, the EC and the United States complained about the Japanese Liquor Tax Law that imposed a lower internal rate on a Japanese liquor, 'shochu', while similar imported products such as liqueurs, gin, whisky and brandy were taxed at a higher rate.[335] After losing the case, Japan appealed to the AB, who affirmed the panel's conclusion and ruled that Japan's domestic laws were not consistent with GATT 1994.[336] In another similar case, *Canada – Measures Governing the Sale of Wine,* Australia raised a dispute, saying that the domestic laws governing the distribution, licensing and sales measures, as well as duties applied in Canada regarding the sale of imported wine, were discriminatory and violated Article III of GATT 1994.[337] Following engagements between the litigants and the panel, both Australia and Canada informed the DSB on 12 May 2021 that they had

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332 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 235.

333 GATT 1994 preamble.

334 Lester and others, *World Trade Law* 279.

335 *Japan – Taxes on Alcoholic Beverages*: Report of the Panel (1 November 1996) WT/DS8/AB/R, WT/DS10/R and WT/DS11/R [7.1]-[7.2].

336 *Japan – Taxes on Alcoholic Beverages* AB-1996-2: Report of the Appellate Body (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

337 *Canada – Measures Governing the Sale of Wine*: Report of the Panel (25 May 2021) WT/DS537/R14.

reached a mutually agreed solution in which Canada conceded that she had violated the provisions of GATT 1994 and undertook to comply with her commitments.[338]

The AfCFTA has also adopted NT law using the same principles enunciated in GATT 1994.[339] In referring to the NT principle, the Protocol on TiG aligns itself to GATT 1994.[340] This demonstrates the connection between the WTO and the AfCFTA and the fact that, though independent, the AfCFTA is aligned with global laws on trade.

2.7.3 Promotion of free open market trade

The WTO provides a set of rules that promotes transparent competition.[341] GATT 1994 is based on the concept of "expanding the production and exchange of goods" and aims to eliminate "discriminatory treatment in international commerce".[342] The concept, which allows market forces to regulate the flow of trade, is pro-free trade and anti-protectionism. It implies that governments should not interfere with the buying and selling of goods across borders.[343] In view of this, the WTO prohibits the use of quantitative restrictions, except, for example, where such restrictions are necesssary for purposes of averting crises such as food shortages[344] or safeguarding balance of payments.[345] As trade liberalisation progresses through the gradual removal of tariffs and other barriers, it becomes increasingly important to ensure that measures to counter anti-competitive business behaviour are put in place.[346] Studies have shown

338 *Canada – Measures Governing the Sale of Wine*: Report of the Panel (25 May 2021) WT/DS537/R14. In noting the settlement between Canada and Australia, para 3.9 of the Report of the Panel reads: 'Accordingly, the Panel concludes its work by reporting that a mutually agreed solution to this dispute has been reached between the parties.'

339 Protocol on TiG Art 5 reads: 'A State Party shall accord to products imported from other State Parties treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by Customs. This treatment covers all measures affecting the sale and conditions for sale of such products in accordance with Article III of GATT 1994.'

340 Protocol on TiG Art 5

341 WTO, 'Principles of the Trading System'.

342 GATT 1994 preamble.

343 ITC and Commonwealth Secretariat, *Business Guide to the World Trading System* 56.

344 GATT 1994 Art XI:2(a).

345 GATT 1994 Art XII.

346 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 853.

the impact of this in that GATT and its successor, the WTO, resulted in an overall increase in global trade.[347]

While GATT aims at the gradual liberalisation of trade, it however recognises that there would be circumstances where member countries may need to protect domestic industry against foreign competition.[348] The first rule urges that where such protection is desired, it must be provided through tariffs, and these must be kept as low as possible. The aspect of tariffs is discussed in section 2.7.4 below. In a case, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* brought by the United States, the AB criticised the measures used by India, for example, its discretionary import licensing system, and ruled that these were protectionist and inconsistent with Article XI:1.[349] It also rejected one of India's defences based on the inadequacy of monetary reserves.

There has been tendencies in some developed nations, such as the UK and USA, to take measures which have been considered to be protectionist. It can be argued that the exit of the UK out of the EU in January 2021, known as Brexit, was motivated by the nationalist and protectionist attitude of the UK. The UK had been a reluctant partner to the EU, and considered herself as a superpower who did not want to lose sovereignty to other countries.[350] The legal perspective is that the UK was a member of the EU, which is an RTA established under Article XXIV, and this meant closer cooperation with EU partners without prejudicing other members of the WTO.[351] There is no rule within the WTO preventing a country to enter or exit an RTA. The practical effect of Brexit was that the UK reverted to being bound by the general WTO membership rules in which trade with the rest of the EU reverted to MFN principles. Brexit therefore meant disengaging from the deeper integration demanded by the EU and did not abrograte

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347 Michael Tomz, Judith L Goldstein and Douglas Rivers, 'Do We Really Know that the WTO Increases Trade?' (2007) 97(5) Am Econ Rev 2005-2018.

348 ITC and Commonwealth Secretariat, *Business Guide to the World Trading System* 7.

349 *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*: Report of Appellate Body (22 September 1999) WT/DS90/16/Add.7.

350 Nugent, *Government and Politics of the EU* 35, 36.

351 GATT 1994 Art XXIV:4.

any WTO rules. The protectionism displayed by the UK was therefore not in breach of WTO rules.

The United States, especially under the Trump administration, and China under Jinping, displayed protectionist tendencies in their trade relations resulting in trade tensions which escalated into trade wars with serious political implications.[352] The United States was more aggressive in its trade and national policies under the stance, 'America First', which is meant to protect its nationalist interests. This resulted in the parties imposing tariffs against each other contrary to WTO rules.[353] Such cases highlight the significance of the WTO and WTO rules in resolving trade battles to prevent them from escalating into geopolitical crises.

2.7.4 Reductions of tariffs

The second rule is that tariffs and other barriers to protect domestic industries should be reduced, and where possible, eliminated through multilateral trade negotiations. The tariffs so reduced should be protected against any further increases.[354] The WTO offers a framework for the progressive removal of tariff and non-tariff barriers to global trade.[355] Both the WTO Agreement and GATT 1994 mention arrangements aimed at reducing barriers in international trade.[356] WTO law emphasises addressing government-imposed barriers such as tariffs and Customs regulations or restrictions.[357] The name, GATT, itself shows the importance of tariffs and trade. This rule is at the centre of GATT whose very name and focus emphasises the element of tariffs. The gradual reduction of tariffs and the elimination of NTBs is a principle enshrined in the preamble, and is a major factor in trade liberalisation.[358]

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352 Dan Steinbock, 'U.S.-China Trade War and Its Global Impacts' (2018) 4(4) China Quarterly of International Strategic Studies 515, 521-528.

353 *United States – Tariff Measures on Certain Goods from China*: Report of the Panel (15 September 2020, under appeal to the AB) WT/DS543/R. Also refer to WTO, 'Dispute Settlement DS543: United States – Tariff Measures on Certain Goods from China' <www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm> accessed 5 September 2022.

354 GATT 1994 Art XXVIII bis.

355 GATT 1994 Art XXVIII.

356 WTO Agreement preamble; GATT 1994 preamble.

357 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 259.

358 Also refer to the discussion in Chapter 3.

While the first rule acknowledges that domestic businesses might require some level of protection, the second rule urges members to take steps to gradually eliminate existing impediments to trade by reducing tariffs. The reduction or elimination of tariffs, combined with trade facilitation measures, are required ingredients for trade liberalisation. As noted in section 2.4.1, the current status of trade liberalisation, has since 1947, been accomplished through negotiations. The second rule is therefore a necessary component of free trade.

2.7.5 Additional principles on the WTO system

Further to the basic rules discussed in the preceding sections above, the WTO provides two additional principles that are critical in guiding the multilateral trading system, and these are predictability and SDT.[359]

2.7.5.1 Predictability

Business and international trade need to operate in a transparent and predictable environment and such a climate is favourable for investment. The imposition of unannounced or arbitrary import or export regulations creates an unpredictable business environment, which acts as a trade barrier. The establishment of the WTO has helped to improve the level of transparency and predictabiity in global trade. The TPRM, which was discussed in section 2.4.3, is one such tool that is used to improve transparency and predictabiliy.[360] Both GATT 1994 and the TFA have provisions that demand transparency and predictability.[361] Similar provisions on issues of transparency and predictability are included in the AfCFTA.[362]

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359 WTO, 'Principles of the Trading System'.

360 Refer to paragraph 2.5.3 which discusses TPRM.

361 GATT 1994 Art X. The TFA has the following examples: Art 1 on Publication and availability of information, Art 3 on Advance rulings, and Art 4 on Procedures for appeal or review.

362 Protocol on TiG Annex 4 has the following examples: Art 4 on Publication of information, Art 5 on Advance rulings, and Art 22 on review and for appeal.

2.7.5.2 Special and differential treatment for developing countries

Since 1948, developing nations have increased their involvement in the WTO, and currently more than three quarters of the membership are either developing countries or countries in transition to market economies.[363] As discussed in section 2.4.1.2, the DDA focused on developmental issues and the subject of SDT became divisive, with the WTO finding itself in a minefield where it could not move that agenda forward. The importance of SDT issues can be drawn from the Doha Ministerial Declaration which refers to 'least-developed' twenty-nine times while 'developing countries' is referred to nineteen times.[364] SDT provisions have been controversial in the context that they are somewhat contradictary to some of the WTO principles such as the MFN, removal of protectionist tariffs and non-descrimination. SDT is, however, founded on the assumption that developing countries and LDCs need help in order to compete with developed countries and to gain access to markets that would otherwise be unavailable to them.[365] Empirical evidence has shown that trade is vital for economic development, and accordingly all countries want a fair share from trade.[366] SDT is therefore not meant to negatively affect the developed countries. The WTO agreements contain provisions which obliges the developed countries to extend SDT treatment to developing countries.[367] Amongst others, SDT also offers flexibility and opportunities for capacity building and infrastructural support to assist with implementation of trade measures.

While some organisations use the UN classification of LDCs, WTO members self-declare their level of development upon accession.[368] Negotiations involving SDT issues have posed a challenge in that the developed members will be debating issues with some members who would have classified themselves as either a developing

363 WTO, 'Principles of the Trading System'.
364 Arvin Panagariya, *Developing Countries at Doha: A Political Analysis* (Blackwell 2002) 1223.
365 T Ademola Oyejide, 'Costs and Benefits of "Special and Differential" Treatment for Developing Countries in GATT/WTO: An African Perspective' in T Ademola Oyejide and William Lyakurwa (eds), *Africa and the World Trading System, Vol 1: Selected Issues of the Doha Agenda* (Africa World Press 2005) 178-179.
366 Lester and others, *World Trade Law* 12-14.
367 Marrakesh Declaration para 5. Also refer to WTO, 'Trade Facilitation'.
368 Hoekman and Kostecki, *Political Economy of the World Trading System* 538.

country or a LDC, or in a category which they may not otherwise qualify. The term 'developing' is elastic, and its definition varies depending on whether it is provided by an economist, social scientist or politician, although it has been generally interpreted as an improvement to the entire social system, whether due to economic or non-economic factors.[369] As a result it is critical that the WTO agree on a common understanding of the terms 'SDT', 'developing country', 'developed country' and 'LDC' in order to have successful Rounds of negotiations involving developmental issues. Chapter Seven of this study will conduct a comparative analysis of the SDT provisions under the WTO and the AfCFTA in terms of how far they affect trade facilitation.

2.8 Accession

Membership to the WTO is open to states or Customs territories upon application.[370] In January 1995, all the contracting parties of GATT 1947 had the option to be the original members of the WTO.[371] As a result, when the WTO was established in 1995, its founding members were the 128 contracting parties to GATT at the time.[372] Thereafter, membership to the WTO has been through accession as stipulated in the WTO Agreement.[373] The applicant would be bound by all existing agreements as demanded in the WTO Agreement.[374] The process requires applicants to approach the WTO, whose members will consider the request and set any terms which they may deem necessary as conditions for the accession. The WTO has established elaborate

369 Gunnar Myrdal, 'What is Development?' (1974) 8(4) Journal of Economic Issues 729.
370 WTO Agreement Art XII.
371 WTO Agreement Art XI.
372 Alex P Kireyev, 'WTO Accession Reforms and Competitiveness: Lessons for Africa' in Patrick Low, Maika Oshikawa and Chiedu Osakwe (eds), *African Perspectives on Trade and the WTO: Domestic Reforms, Structural Transformation, and Global Economic Integration* (CUP 2016) 369.
373 WTO Agreement Art XII on accessions states:
'1. Any State or separate Customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.'
374 WTO Agreement Art II:2.

procedures for membership applications, involving consideration by a working party who will submit recommendations for the decision of the MC.[375] The process of accession makes it incumbent upon anyone desiring to join to make a self-assessment as if they are ready to join a club which will require ceding of certain sovereign rights. Some of the demands involve being prepared to undergo regular peer review of trade policy measures, undertakings to treat partners without discrimination, and adherence to WTO rules in good faith.

The fact that an applicant is admitted to membership upon acceptance by existing members involve negotiations which can last for about ten years, which can make the process onerous, and existing members can impose obligations on the applicants.[376] As noted in Chapter One, there are nine African countries which have signed the AfCFTA and are being considered for accession to the WTO.[377] Although on the surface accession seem to be based on the implementation of trade policies, the fact that new membership is approved by existing members leaves room for political considerations to be brought into issues of global trade. On the other hand, applicants are expected to adhere to the core principles of the WTO and liberalise their markets. In principle, admission to membership is supposed to be purely based on negotiations between the applicant and existing members on issues such as commitment to trade liberalisation and furtherance of the objectives of global trade, but in reality global geopolitics and political ties can affect the membership patterns of the WTO.[378]

While the WTO Agreement has clear guidelines on the process of ratification, the AfCFTA relies on its AfCFTA Agreement, but there are still gaps regarding the

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375 Petra Beslać and Chiedu Osakwe 'The evolution of the GATT/WTO Accession Protocol: legal tightening and domestic ratification' in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (CUP 2015) 356.

376 Uri Dadush and Chiedu Osakwe, 'The Reflection on Accessions as the WTO Turns Twenty' in Uri Dadush and Chiedu Osakwe (eds), *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (CUP 2015) 5.

377 The nine AU member states who have applied for WTO membership but were observers as the on 1st September 2022 were Algeria, Comoros, Equatorial Guinea, Ethiopia, Libya, São Tomé and Principé, Somalia, South Sudan and Sudan.The two non-members who had not applied for membership were Eritrea and Sahrawi Arab Democratic Republic.

378 Christina L Davis and Meredith Wilf, 'Joining the Club: Accession to the GATT/WTO' (2017) 79(3) The Journal of Politics 964, 966-967.

administrative requirements and procedures.[379] The aspect of accession under the AfCFTA Agreement is discussed in Chapter Four of this study.

2.9 Conclusion

The signing of GATT, and later the establishment of the WTO, was a significant step towards ensuring that global trade was governed by rules. In addition to creating the WTO, the Uruguay Round introduced new agreements such as GATS, TRIPS and DSU. When compared to GATT 1947, this broadened the scope of the WTO and added more rules on how global trade must be conducted. The WTO formalised the functions and operations of the global trading system with the objectives of creating a liberalised global trading environment through enhanced cooperation amongst its members. The WTO Agreement has become an important compendium of rules which bind nations and has demonstrated that the WTO is all about multilateralism rather than individualism. Regardless of the flaws in the WTO system, it is evident that global trade has progressed more smoothly with rules than without. In this regard, it can be argued that, as global trade trade becomes more complex, and drawing from the GATT experience, the WTO has a role to play in regulating global trade, and in ensuring that FTAs such as the AfCFTA comply with trade rules.

An understanding of the WTO together with its laws and rules on issues such as free trade, trade facilitation and trading relations amongst nations is therefore an important background for this study. As a result, Chapter 3 examines the special treatment accorded to FTAs in that, while they are exempted from the MFN provisions, the WTO stipulates guidelines within which they must operate.

379 AfCFTA Agreement Art 22.

CHAPTER THREE

ARTICLE XXIV OF GATT 1994 AND FREE TRADE AREAS

3.1 Introduction

The WTO has established a *corpus juris* to regulate global trade amongst its members. GATT 1994 governs trade in goods to ensure that global trade is conducted in accordance with agreed rules. As discussed in Chapter Two, the MFN rule lays down a fundamental principle of non-discrimination amongst members. However, Article XXIV provides for the formation of FTAs and CUs amongst WTO members, and it provides an exception for RTAs to deviate from the MFN principle. The stipulated exception together with the rules governing the operations of FTAs and CUs makes Article XXIV an interesting subject area in international trade law.

This chapter will analyse the implications of Article XXIV and demonstrate its relevance to RTAs in general and the AfCFTA in particular. Article XXIV deals with both CUs and FTAs. A number of clauses in Article XXIV do not distinguish between the two, and there are occasions when the two configurations are referred to jointly. The analysis in this chapter is on FTAs. It commences with a broad perspective on RTAs and proceeds to narrow itself down to FTAs and the AfCFTA. It answers the question why the AfCFTA can create its own regulations to facilitate trade within the allowed exception. This sets the groundwork for a comparative analysis of the legal texts of the WTO and AfCFTA on trade facilitation. As a result, the discussions will contribute towards answering some of the research questions of the study.

3.2 Rise of regional trade agreements

The WTO defines an RTA as any reciprocal trade agreement involving two or more partners who need not belong in the same region.[380] The prefix 'regional', in a way, becomes superfluous because an RTA is not bound by the geographical proximity of

[380] WTO, 'Regional Trade Agreements: An Introduction' <www.wto.org/english/tratop_e/region_e/scope_rta_e.htm> accessed 27 November 2021.

the parties, but by the fact that the parties to the partnership accord each other preferential treatment in trade matters without being bound by the MFN rule.[381] While the WTO advocates for global multilateral trade liberalisation, it recognises and facilitates the formation of RTAs, which can take the form of interim agreements, FTAs and CUs.[382] GATT 1994 conveys that, when members seek to establish an FTA, the formation of such an entity cannot be blocked.[383] The implications of this are further discussed in section 3.7 of this study. Although RTAs are designed to deepen integration in trade or economic matters in the context of the WTO, the mandate has evolved to include other areas of cooperation such as social, developmental and political cooperation.[384] Most of the RTAs have deepened integration well beyond the commitments envisaged under WTO law.[385] The scope of the AfCFTA it includes additional areas of trade such as services, investment and intellectual property rights. It is therefore wider than that of traditional FTAs, which deal with trade in goods.[386]

During the GATT years from 1948 to 1994, a total of ninety-eight agreements were notified under Article XXIV.[387] As at 1 June 2022, there were 323 RTAs notified to the WTO under Article XXIV, of which twenty-one were CUs while 302 were FTAs.[388] From the same database it can be seen that there were an additional sixty-one RTAs involving trade in goods, notified under the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries of 1979 (hereafter the 'Enabling Clause').[389] The Enabling Clause allows WTO members to treat developing countries differently while not extending the same preferential

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381 Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?' (2011) 11(2) CJIL 597.
382 GATT 1994 Art XXIV:4; Also see Section 3.3.2.
383 GATT 1994 Art XXIV:4.
384 Refer to sections 3.3.1, 3.3.2 and 3.4.
385 Leal-Arcas, 'Proliferation of Regional Trade Agreements' 597.
386 AfCFTA Agreement Arts 4 and 7.
387 TN Srinivasan, 'Regionalism and the WTO: Is Nondiscrimination Passé?' in Anne O Krueger (ed), *The WTO as an International Organization* (University of Chicago 1998) 331.
388 WTO, 'Regional Trade Agreements Database' <http://rtais.wto.org/UI/publicsummarytable.aspx> accessed 18 June 2022.
389 WTO, 'Regional Trade Agreements Database'.

treatment to other members.[390] It is therefore a more flexible facility to assist developing countries to enter into RTAs.[391] The Council of Ministers asserted the importance of RTAs when, in its interpretation of Article XXIV, it stated:

> […]*Recognizing* that customs unions and free-trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;
>
> *Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;
>
> *Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;
>
> *Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members […][392]

The above preambular statement connects RTAs with global trade and trade facilitation while emphasising that they are a tool for closer integration amongst the parties. The political declaration, which resulted in greater clarity on Article XXIV, demonstrates that, at political level, RTAs are recognised as building blocks of the WTO system. RTAs have become common in Africa with a number of countries creating these economic entities based on geographic proximities, for example, SACU[393] for five countries in Southern African, the Economic and Monetary Community of Central Africa (CEMAC)[394] for six countries in the Central Africa. The AfCFTA is a reciprocal trade agreement among its members and is also an RTA.[395] Section 3.8 of this Chapter

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390 Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (28 November 1979) GATT/L/4903 (hereafter the Enabling Clause) para 1 of preamble and para 4.

391 Mina Mashayekhi and Taisuke Ito (eds), *Multilateralism and Regionalism: The New Interface* (UN 2005) 38-39.

392 Understanding on the Interpretation of Article XXIV preamble.

393 SACU, 'What is SACU?' <www.sacu.int/show.php?id=471> accessed 27 March 2021 lists the five members of SACU as Botswana, Eswatini, Lesotho, Namibia and South Africa.

394 CEMAC, 'Les Etats Membres' <www.cemac.int/node/34> accessed 27 March 2021 lists the six members of CEMAC as Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea and Gabon.

395 AfCFTA Agreement Arts 3 and 4. Also refer to section 4.7 of the study.

analyses the question if the AfCFTA bears the essential characteristics to qualify for classification as an FTA under the WTO.

3.3 Relevance of regional trade agreements

RTAs have a significant impact within their memberships and in global trade. They have become popular in and outside of Africa for a variety of reasons.[396] Countries pursue RTAs for different purposes. The WTO recognises the significant role that RTAs have played in expanding global trade.[397] The Singapore Ministerial Declaration of 1996 stated:

> We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. […] We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. […] We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization.[398]

The above statement by the highest organ of the WTO[399] emphasises that RTAs are desirable and they contribute to global trade. While Article XXIV deviates from other global rules, it is clear that such a departure is intended to achieve the overall goal of GATT 1994, which is to liberalise world trade.[400] As illustrated in Table 2.1 of this study, the negotiations at the WTO are lengthy and involve its global membership. The slow pace of trade liberalisation at a multilateral level can be frustrating and RTAs involving fewer countries become a more expedient option as they resolve their own regional agenda faster.[401] Regionalism is generally perceived to be a positive phenomenon

396 Peter Robson, *Economic Integration in Africa* (Routledge 2011) 11-12.
397 Understanding on the Interpretation of Article XXIV preamble.
398 WTO, 'Singapore WTO Ministerial 1996: Ministerial Declaration' (18 December 1996) WTO Doc WT/MIN(96)/DEC para 7. Also see WTO, 'Singapore Ministerial Declaration' (adopted on 13 December 1996) <www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 26 June 2022.
399 Refer to section 3.9.2.
400 GATT 1994 preamble.
401 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 552.

when it benefits its members without prejudicing non-members.[402] In essence, a select few nations are promoting the global agenda while not impeding the slower progress of other WTO members. The RTAs therefore enable smaller groupings of countries to identify and attend to their common areas of interest that need attention or closer cooperation. Some of the RTAs in Africa have advanced to deeper levels of integration in matters such as the free movement of persons in the EAC.[403] The West African Economic and Monetary Union (WAEMU or UEMOA) is another example of an agreement within the ECOWAS in which integration in financial and monetary affairs amongst Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo has managed to meet best international standards.[404] From this it can be observed that the AfCFTA and its eight RECs, individually and collectively, contribute positively towards continental integration, and beyond that, to assimilating the continent into global trade. This is consistent with the vision of the AfCFTA's goal of integrating members into the global market.[405]

3.3.1 Agenda of Regional Trade Agreements

As noted in section 3.2, although RTAs are essentially designed to provide a framework for cooperation in trade matters, some, if not most of them, have also served political purposes. The political agenda has become prominent in a number of RTAs such as the SADC and the EU. The SADC regional framework is accompanied by social and political integration aimed at transforming the region.[406] The current EU can be traced to 1951 when six European countries signed the Treaty Establishing the Coal and Steel Community.[407] Following a disastrous war, the six neighbouring countries realised that they needed to work together to keep peace and rebuild their economies, among other

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402 Peter Hilpold, 'Regional Integration According to Article XXIV GATT: Between Law and Politics' (2003) 7 Max Planck Yrbk UN L 219, 233.

403 AU, *African Integration Report 2020* (AU 2020) 29.

404 Ousseni Illy and Seydou Ouedraogo, 'West African Economic and Monetary Union: Central Bankers Drive Basel under IMF Pressure' in Emily Jones (ed), *The Political Economy of Bank Regulation in Developing Countries: Risk and Reputation* (OUP 2020).

405 AfCFTA Agreement preamble.

406 Saurombe A, 'Regionalisation through Economic Integration in the Southern African Development Community SADC (SADC)' (LLD thesis, North West University 2011) 24.

407 Nugent, *Government and Politics of the EU* 16; The six were Belgium, France, West Germany, Italy, Luxemburg and Netherlands.

things. The multi-purposive nature of an RTA can also be drawn from the establishment of the European Economic Community (EEC), whose treaty states:

> DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe,
>
> RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,
>
> AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,
>
> RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.[408]

From the above preamble, it can be noted that the establishment of the EEC was motivated by various forces, including political and socio-economic factors, some of which would not be addressed by the simple trading arrangements under the then GATT. The EU has become one of the most comprehensively integrated arrangements in the world.[409] The growth of the EU has been gradual, from six members in 1951 to a total of twenty-seven members some seventy years later.[410] In terms of imports and exports, not taking membership into consideration, the EU is one of the largest trade blocks in the world.[411] With a membership of fifty-five countries in the AU, the AfCFTA would be the world's biggest FTA when all the eligible participate. As also raised in section 4.8.3 of this study, the uniqueness of the AfCFTA again features when weighed against the current EU, whose founding legal texts were negotiated by six members and would probably have involved smoother give-and-take negotiations compared to the fifty-five parties negotiating the AfCFTA Agreement.

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408 Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 (Treaty of Rome) preamble.

409 Pugel, *International Economics* 256.

410 EU, 'History of the EU' <https://european-union.europa.eu/principles-countries-history/history-eu_en> accessed 10 July 2022.

411 EU, 'The EU in brief' (28 July 2020) <https://europa.eu/european-union/about-eu/eu-in-brief_en> accessed 25 October 2020.

SADC, one of the RECs that is a building block of the AfCFTA, exemplifies the trend that RTAs have agendas far beyond trade.[412] Amongst others, the objectives of SADC are to:[413]

> (a) promote sustainable and equitable economic growth and socio economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
> (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective [...]

The SADC Treaty, in particular, shows that the organisation was founded both for economic and socio-political reasons. Its predecessor, the Southern African Development Coordination Conference (SADCC), was established in 1980 when some Southern African countries resolved to collaborate in order to lessen their dependency on apartheid South Africa, which was a hostile neighbour at the time.[414] In 1992, SADCC was transfomed into the SADC, which balanced both political and trade agendas.[415]

The AfCFTA is not an isolated FTA that is devoid of any political influences. Chapter Four discusses the historical, political and legal origins of the AfCFTA together with its umblical linkage to the political vision of the continental leadership. The AfCFTA is a political project designed to achieve many goals including sustainable development, economic freedom. and political emancipation.

3.3.2 Stages of integration in Regional Trade Agreements

Economic integration involves the implementation of measures designed to abolish barriers to trade amongst states, and it extends beyond simple cooperation in trade

412 AfCFTA Agreement preamble,
413 Treaty of the Southern African Development Community (adopted 17 August 1992, entered into force 30 September 1993) (1993) 32 ILM 479 (SADC Treaty) Art 5.
414 JM Biswaro, *The Quest for Regional Integration in the Twenty First Century: Rhetoric Versus Reality – A Comparative Study* (Mkuki na Nyota 2012) 6.
415 SADCC and SADC will be discussed in Chapter 4.

policies.[416] The depth of integration will therefore vary, and the deeper it gets, the more the parties to it cede their sovereignity. Economic theory identifies five forms of integration, being FTA, CU, CM, economic union and complete economic union.[417] Each of these has unique characteristics.

The basic form of economic integration is through an FTA where some countries agree to trade amongst themselves without tariffs and NTBs, but in which the individual countries set tariffs against the outside world independently.[418] The FTA is discussed and analysed in sections 3.8 and 3.9 of this study where its characteristics are examined in the context of the AfCFTA. The FTA is followed by CU, where in addition to the duty-free movement of goods, and subject to certain exceptions, the parties adopt a common external tariff (CET) for trading with third parties.[419] It should be noted that an FTA and a CU share a common feature in that both of them are formed in order to facilitate trade amongst their members.[420] Members of a CU form a single customs territory, whereas an FTA essentially remains a coalition of different Customs territories. These separate Customs territories may operate individual Customs laws, or better still, under a program to facilitate trade, they could have one Customs law. The harmonisation and adoption of a common Customs law has not yet been achieved, even in some RTAs such as SACU, where each of the Customs territories still operate their individual laws. The CET is, however, one of the major distinguishing marks and commitments of a CU. A CET means that the members of a CU lose the sovereignity

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416 Balassa, *Theory of Economic Integration* 2.

417 Balassa, *Theory of Economic Integration* 2.

418 Paul R Krugman, Maurice Obstfeld and Marc J Melitz, *International Economics: Theory and Policy* (9th edn, Addison-Wesley 2012) 246.

419 DN Dwivedi, *International Economics* (Konak 1998) 175; GATT 1994 Article XXIV:8(a) defines a CU as follows:

'A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that:

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;'

420 GATT 1994 Art XXIV:4.

to negotiate or enter into any agreement to reduce tariffs as individual countries, because they have to agree as members of that block. The more countries involved in the FTA, the more difficult it is for them to agree on a CET. Although FTAs and CUs are different entities, both are created under Article XXIV. They, however, have some resemblances, and in some instances the provsions of Article XXIV pairs them up and refers to both 'CU or FTA' as if they are inseparable.[421] The AfCFTA lays the foundation for the establishment of an African continental CU.[422]

Beyond the CU, countries can deepen their integration by moving into a CM, which is fundamentally, a CU plus unrestricted mobility of factors of production for example, labour, capital, and services.[423] The CM is followed by an economic union in which social, taxation and fiscal policies are harmonised and administered by a supranational institution.[424] The cooperation can deepen further to total economic integration when monetary policies are incorporated into an economic union and are managed by a supranational authority whose decisions are binding on the participating members.[425] Some RTAs, such as the EAC, envisage the furthest level of integration by proceeding into a political federation.[426]

Article XXIV also deals with interim agreements, which are temporary pacts that prepare the ground for the establishment of an FTA or a CU.[427] Interim agreements must have a plan and a timeline showing that an FTA or CU would be created within a reasonable time.[428] An interim agreement is thus a time-bound commitment that leads to the establishment of an FTA or CU. The general consensus is that a period of up to 10 years is regarded appropriate while any time longer require justification.[429] Although

421 Examples are found in GATT 1994 Art XXIV paras 4, 5, 7, 8, 9 and 10.
422 AfCFTA Agreement Art 3(d).
423 John D Daniels, Lee H Radebaugh and Daniel P Sullivan, *International Business: Environments and Operations* (16th edn, Pearson 2019) 232.
424 Carbaugh, *International Economics* 266.
425 Balassa, *Theory of Economic Integration* 2.
426 Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255 (EAC Treaty) Art 5:2.
427 GATT 1994 Art XXIV:5.
428 GATT 1994 Art XXIV:5(c).
429 Understanding on the Interpretation of Article XXIV para.3.

most FTAs and CUs have been implemented in phases, relatively few of these have been notified as interim agreements since 1948.[430]

The lack of interest in notifying an FTA or CU as an interim agreement could be attributed to the stringent requirements outlined in Article XXIV paragraphs 5(c), 7(b), and 7(c) as, well as the thorough scrutiny conducted by the CRTA. The author does not anticipate that the AfCFTA will be notified as an interim agreement. The modalities for tariff concessions in the AfCFTA represent an elaborate plan to reduce tariffs over a period of five years for non-LDCs and ten years for the LDCs.[431] Although the modalities favour the adoption of an interim agreement, the scrutiny demanded by an interim ageement has the risk of delaying the continental agenda. The bureaucratic procedures might contradict the political message of the AfCFTA, being that Africa has established its own FTA which is designed to meet its own aspirations.

The interconnections between trade, development and politics is not unusual and is a common phenomenon in regional integration. Following from the Balassa linear approach to regional economic integration, RTAs will inevitably develop into a political union as they follow the stages from FTA, CU, CM, and economic union through to political federation.[432] The AEC envisaged in the Abuja Treaty involves the setting up of a single African currency, single African central bank and an African Monetary Union.[433] This would represent total economic integration. Chapter Four explores the characterictis of each of the eight RECs recognised by the AU, the stages of integration attained and how that progress has contributed towards the AfCFTA or milestones towards the AEC.

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430 WTO, 'Background Note by the WTO Secretariat on Compendium of Issues Related to Regional Trade Agreements, Background Note by Secretariat' (1 August 2002) WTO Doc TN/RL/W/8/Rev.1 para 55.

431 AU Assembly of Heads of State and Government, 'Twenty Ninth Ordinary Session, Decisions and Declarations of the Assembly: Decision on the Continental Free Trade Area' (4 July 2017) AU Doc ASS/AU/8 (XXIX).

432 Balassa, *Theory of Economic Integration* 2.

433 Abuja Treaty Art 6(ii) and (iii).

3.3.3 Building blocks or stumbling blocks

RTAs have evolved into an important form of cooperation and they exist in both the developed and developing worlds. There are arguments for and against the formation of RTAs. Some consider RTAs as building blocks towards global blocks whereas others consider them to be stumbling blocks.[434] Some literature have used the term 'bloc' as opposed to 'blocks'.[435] Both the Abuja Treaty and the AfCFTA Agreement consider RTAs in Africa as building blocks towards economic integration of the continent.[436] RTAs in Africa will be discussed in Chapter Four of this thesis.

Many developing nations turn to regional integration as a way to develop in a variety of areas, including poverty reduction, better social services, and preservation of peace and security in their geographic regions.[437] It can be argued that development is better coordinated if it begins at the regional level with partners who share a common history and where resources can be pooled together to strengthen a region, as was the case with the EEC and SADC when they were established. Integration in the EU is advancing towards a political federation and it already covers aspects such as common currency and free movement of factors of production.[438] As an example, SADC has a strategic plan with priority areas to be undertaken in sectors such as trade and transport, with the objective of improving development through regional cooperation and integration.[439] Lesotho, with a population of two million people, could easily integrate and contribute to the growth of its economy through a local RTA, rather than rely on the WTO multilateral negotiations system. RTAs, in this regard, offer opportunities to serve as a foundation for global trade. RTAs thus provide opportunies to smaller economies

434 VanGrasstek, *History and Future of the WTO* 490.

435 Richard E Baldwin and Elena Seghezza, 'Are Trade Blocs Building or Stumbling Blocs? New Evidence' (2010) 25(2) Journal of Economic Integration 276.

436 Abuja Treaty Art 4:1(d); AfCFTA Agreement preamble.

437 Eduard Marinov, 'Economic Integration Theories and the Developing Countries' in Rustem Dautov and others (eds), *Proceedings of the 9th Annual South-East European Doctoral Student Conference* (South-East European Research Centre 2014) 168.

438 Nugent, *Government and Politics of the EU* 31, 32.

439 SADC, *SADC Regional Indicative Strategic Development Plan (RISDP) 2020-2030* (SADC 2020) 7.

that may not be able to compete globally, while the larger economies benefit from a market that offers preferential conditions.[440]

Economists argue that RTAs are impediments to the application of the MFN practice within the WTO.[441] This school of thought is unfavourable to regionalism. Although it is true that RTAs block the application of MFN to all members, this argument overlooks the larger picture, namely that FTAs and CUs are premised on the principle that they must not prejudice trade with third parties.[442] Further, the economists' argument fails to recognise the social, cultural, political and historical linkages that exists among countries in a particular region and that, at localised levels, they are able to coordinate their development projects better. This is evident when one considers the relationships in SADC, COMESA, EU, NAFTA and the AfCFTA.

Some, who are critical, of RTAs argue that they introduce discrimination and endanger the multilateral trading system.[443] The author argues that an RTA between neighbouring countries in a region, who choose to trade with each other in accordance with their own comparative advantages, should not be a threat to the global system of 164 countries. From a legal perspective, RTAs are legitimate, having been created by international law with the objective of facilitating trade and not hindering trade between the parties to it and non-members.[444] The WTO recognises that these entities contribute towards global trade.[445] As discussed in section 3.9.1, the WTO notification process also ensures that RTAs meet the requirements outlined in Article XXIV.[446]

The debate over RTAs illustrates that the subject is interdisciplinary and it attracts opposing viewpoints from various perspectives such as economic, legal and political viewpoints. Several studies have found that, in addition to increasing intra-block trade,

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440 Crawford J-A and Fiorentino RV, 'The Changing Landscape of Regional Trade Agreements (WTO Discussion Paper No 8)' (WTO, 2005) <www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf> accessed 24 October 2020.

441 Baldwin and Seghezza, 'Are Trade Blocs Building or Stumbling Blocs?' 276.

442 GATT 1994 Art XXIV:4.

443 Leal-Arcas, 'Proliferation of Regional Trade Agreements' 599.

444 GATT 1994 Art XXIV:4.

445 Understanding on the Interpretation of Article XXIV preamble.

446 Notification process discussed in section 3.9.1 of the study.

FTAs assist member countries in stimulating their trade flows and assimilating into multilateralism.[447] The author considers RTAs to be a positive development which offers an opportunity for any country to take advantage of social, cultural or any other affinity to cooperate with any country of choice and contribute towards regional and global trade. This thesis contends that as a result of the RECs, Africa is more and better integrated among itself and into global trade today. Europe has even taken advantage of the RECs in Africa to negotiate its trade agreements, using the economic partnership agreements (EPAs).[448] The EPAs have contributed towards linking Africa into the global trade. RTAs, in their various forms, are thus building blocks toward the WTO's vision of a liberalised global market.

The nine Rounds of negotiations under GATT/WTO reflected in Table 2.1 would not have, on their own, brought trade liberalisation in Africa to the level attained so far. Apart from the concluded TFA, the DDA has been in limbo from 2001 to 2022, with little progress, whereas there has been remarkable progress and deepening of economic and political integration among Africa's RECs, including the AfCFTA, during that same period.[449] From this, the author argues that the RTA's in Africa or abroad have been building bloc(k)s towards multilateralism. The debate on RTAs is relevant to the AfCFTA in various ways. The AfCFTA is considered to be a modern, model trade agreement that will be able to advance the developmental and socio-economic goals of Africa.[450] On its own, Africa has designed its own FTA that takes into account the visions from the Constitutive Act of the African Union and the Abuja Treaty while remaining within the stipulations of the WTO Agreement.[451] Based on this, the author argues that as with the EU, the AfCFTA would be a game changer for its era and will

447 Jérôme Trotignon, 'Are the New Trading Blocs Building or Stumbling Blocks? A Gravity Model Using Panel Data (Halshs Archives Working Papers 00456590)' (15 February 2010) <https://halshs.archives-ouvertes.fr/halshs-00456590/document> accessed 25 October 2020.

448 European Commission, 'Economic Partnerships' <https://policy.trade.ec.europa.eu/development-and-sustainability/economic-partnerships_en> accessed 18 June 2022.

449 Refer to discussions in Chapter 2 regarding DDA and Chapter 4 regarding economic integration in Africa.

450 Kuhlmann and Agutu, 'The African Continental Free Trade Area' 755-756.

451 AfCFTA Agreement preamble.

have an impact on how a continent can be transformed and living standards improved.[452]

3.4 Political influence of Regional Trade Agreements

There is a connection between politics and some RTAs.[453] This is to be expected in view of the fact that states are administered using political structures, and matters involving international trade are presided over by Ministers or political heads. RTAs, created under WTO rules and with a focus on trade issues, will therefore find themselves engaged with political issues. The mix between trade and politics is also evident when considered that RTAs such as the EU, NAFTA, SADC and AfCFTA were established by, and get their direction from, Heads of State who are the highest decision-making organ. As an example, NAFTA contributed to improved employment levels and standards of living in Mexico, and this solved a political problem when it curbed the illegal migration of poorer Mexicans to the United States.[454] This is a clear illustration of how an RTA, established with a trade agenda, became an instrument for development while at the same time addressing a potentially antagonistic scenario that may have damaged regional politics.

All the RECs and some of the RTAs established under the WTO have a decision making organ comprised of Heads of State and Government.[455] One of the most influential RTAs, the EU, also has the European Council of Heads of States and Governments as an organ.[456] The paradox of this is that, under RTAs and RECs, decisions on trade must be made by Heads of State and Government while adhering to the regulations established by the MC, which is the highest decision-making body at the WTO. Practically, it means that decisions of the AfCFTA regarding trade, made by Heads of States and Governments, must comply with the parameters set by the MC, which is on a lower level. This observation means that RECs and RTAs have a higher

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452 Refer to discussions in section 4.8.
453 See section 3.3.1.
454 Carbaugh, *International Economics* 289.
455 Refer to section 4.5 in respect of the RECs.
456 EU, 'How the European Council Works' <www.consilium.europa.eu/en/european-council/how-the-european-council-works/> accessed 16 April 2022.

political body driven integration when compared to the WTO whose highest organ is the MC. Although it can be argued that respective Ministers in the MC act on instructions from their principals, the fact remains that RTAs are subordinate to the WTO and the political decision-making structures of the two are not properly aligned. This has also been discussed in Chapter Two of this study. Although this is a disordinate allocation of power between RTAs and RECs on the one side and the WTO on the other, the matter is not as simple as that. It must be noted that the RECs also deal with matters other than trade that need the attention of their respective Heads of States.[457] Whereas the involvement of Heads of States in RECs should be natural, the question remains if there is any justification for the WTO's MC to be the final authority on global trade matters. This observation can be the subject matter of a separate study.

3.5 Outline of the provisions of Article XXIV

Article XXIV is titled "Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas".[458] It is backed by the Understanding on the Interpretation of Article XXIV which was developed during the Uruguay Round in order to provide additional clarity on matters involving CUs and FTAs. It should be noted that while the Ministerial Interpretation attempts to explain the meaning of Article XXIV, it lacks a legal basis for changing the rules.[459] Without Article XXIV, the 164 members of the WTO would treat one another equally and in accordance with the MFN principle. RTAs, therefore, derive their existence and special treatment from the provisions of Article XXIV, comprised of twelve paragraphs which pronounces the principles and rules governing the operations of CUs and FTAs. Some important highlights from selected paragraphs in Article XXIV are:

(a) The definitions of FTA and CU are given towards the end of Article XXIV in paragraph 8. These definitions are fundamental in international trade law whenever the principles invoving FTAs and CUs are debated. The question of

457 Refer to section 4.5.
458 GATT Art XXIV, heading,
459 Bonapas Onguglo, 'Issues Regarding Notification to the WTO of a Regional Trade Agreement' in UNCTAD, *Notification to the WTO of an RTA* (UNCTAD 2005) 38.

whether the AfCFTA is an FTA under WTO definition is addressed in sections 3.7 and 3.8 below.

(b) Paragraphs 1 and 2 are introductory provisions which define the term 'customs territory', which is the constituent element of FTAs and CUs. The significance of Customs territories is examined in section 3.6 below. Paragraph 3 point out that it is unavoidable for WTO members to accord discrimination to their neighbouring countries if the objective is to facilitate trade.[460]

(c) Paragraph 4 is critical to this thesis because it states unequivocally that the *raison d'etre* of an FTA or a CU is to facilitate trade between members. This study's central theme is trade facilitation, which is defined in Chapter Five. Paragraph 4 serves as a barometer to determine whether any trade regime created is an FTA or CU. The test is to see if it facilitates trade between its constituent members without raising any trade barriers with other members of the WTO. Paragraph 5 stipulates the characteristics of both an FTA and a CU, and that subject to the proviso, establishment of an FTA or CU cannot be stopped. Elements of paragraph 5 are discussed in section 3.7 below.

(d) Paragraph 6 discusses the complications faced by CUs when negotiating for a CET. It does not have a direct effect on FTAs.[461]

(e) Paragraph 7 deals with the formation of an interim agreement.

Article XXIV lays out the parameters that RTAs must follow when regulating trade amongst themselves and with outsiders. The fact that it allows departure from the MFN principle demonstrates its importance in linking regionalism to multilateralism. Article XXIV is therefore the umblical link between AfCFTA and the WTO. The AfCFTA Agreement acknowledges the need to abide by WTO rules and it makes reference to the WTO throughout its texts. Studies have shown that an FTA is more popular and easier to establish compared to a CU, mainly because it allows greater flexibility in

460 GATT 1994 Art XXIV:3.
461 Understanding on the Interpretation of Article XXIV paras 4-6.

terms of national sovereignity.[462] The members of an FTA can set up their own individual tariffs in respect of trade with third parties, whereas in a CU the members become common customs territory bound by a CET.[463] It must be noted that the AfCFTA Agreement clearly states that the AfCFTA provides a groundwork for a continental customs union at a later stage.[464] This is also in line with the Abuja Treaty which stipulates that Africa's integration agenda towards an economic community must pass through the stage of a CU.[465]

As discussed in section 3.9.1 of this thesis, the forty-four AU states who are members of the WTO must abide by the MFN rule. Eleven members of the AU who are-non members of the WTO are therefore not bound by the global rules.[466] The possibility is that while negotiating for their own FTA, the forty-four AU members adopted their WTO standards to sway the conclusion of the AfCFTA negotiations on the legal texts on trade facilitation.

The current Article XXIV is a version that goes as far back as 1947 in GATT 1947. It has ambiguities.[467] It must be noted that despite the clarification provided by the Understanding on the Interpretation of Article XXIV, the provisions are still considered unclear in certain cases.[468] This has resulted in dispute cases related to the interpretation of some of the provisions of the Article.[469]

GATT is notable for focusing on FTAs and CUs while not giving any attention to other forms of deeper economic integration such as the CM. It has been argued that Article XXIV was drafted in the 1940s when other forms of higher integration were then not

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462 Zakir Hafez, 'Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs,' (2003) 79(4) ND L Rev 879, 888.

463 Hafez, 'Weak Discipline' 888.

464 AfCFTA Agreement Art 3:3(d).

465 Abuja Treaty Art 6(d). Also refer to Chapter 4.

466 The eleven AU member states who are non-members of the WTO as of 1 December 2020 were: Algeria, Comorros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, South Sudan and Sudan. Refer to WTO, 'Doha Development Agenda'.

467 Jackson, *The World Trading System* 167.

468 Hafez, 'Weak Discipline' 879.

469 Examples are on the terms 'restrictive rules of commerce' and 'substantially all trade' used in para 5 of the Article. These terms are discussed in this chapter.

foreseen.[470] The author dismisses this notion because prominent scholars like Viner had begun their writings and were also involved in consultations that contributed to the GATT 1947 agreement and Article XXIV.[471] It would be superficial to contend that international trade in 1940s did not anticipate the future appearance of free mobility of services, labour and capital. A more solid explanation would be to argue that the focus of GATT was on trade in goods and such issues are primarily dealt with during the FTA and CU stages of integration. It is also evident that GATT 1947 was concerned with trade in goods, and it was only later, during the Uruguay Round, that the importance of trade in services featured resulting in the establishment of GATS.[472]

3.6 Customs territories

A customs territory is defined as:

> any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.[473]

This definition is expressed in commercial or trade terms rather than political language. The issue of nationhood and democracy does not arise since a customs territory is defined by the presence of a geographical area that implements uniform customs tariffs or trade laws. This definition of a customs territory is sigificant because the legal definitions of an FTA and CU are both expressed in terms of a customs territory.[474] Membership in an FTA and CU is restricted to customs territories.[475] There is no flexibility as is found with regards to membership of the WTO which is expressed in terms of a “Any State or separate customs territory possessing full autonomy in the

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470 Hilpold, ‘Regional Integration According to Article XXIV GATT’ 227.

471 Jacob Viner, *The Customs Union Issue* (Oxford University Press 2014) xxi-xxx.

472 Refer to section 2.4.1.

473 GATT 1994 Art XXIV:2.

474 GATT 1994 Art XXIV:8(b) states that an FTA ‘shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories’.

475 GATT 1994 Art XXIV:8(a) in respect of CU and Art XXIV:8(b).

conduct of its external commercial relations".[476] The WTO Agreement borrowed the same meaning as was conveyed first in 1947 and which introduced the idea of autonomy in aspects of trade policy.[477] The WTO therefore recognises a Customs territory with a distinguishable trade policy rather than political borders and governments. A unique feature of AfCFTA is that membership is limited to the fifty-five member states of the African Union.[478] This does not violate WTO law because each of the fifty-five member states are a customs territory.

By expressing membership in terms of commercial or trade language, the WTO has steered itself away from political controversies when it comes to members who are appendages of other countries. Where apropriate the UN has used the same language to convey that a customs union is the territory in which the Customs law of a state applies in full.[479] Although Customs tariffs or trade laws are associated with a state or a country, the definition refers to a customs territory rather than a sovereign or independent country. As a result the political status of a country or its nationhood is therefore irrelevant. As a result, a customs territory does not have to be a state, but it might be a country or a group of countries. Despite this careful distinction which the texts make, it must be noted that in non-legal forums, and for convenience, WTO literature has occassionally referred to 'country' instead of the term 'customs territory'.[480] In terms of representation at the WTO's highest decision making body or MC, the WTO Agreement simply states that it shall be "composed of representatives of all the members …".[481] It therefore conveniently steers away from the politics of restricting representation at the MC by politicians or Ministers.

476 WTO Agreement Art XII:1.
477 GATT 1994 Art XXIV:2.
478 AfCFTA Agreement preamble and definitions.
479 UN, 'UN International Trade Statistics, Definitions: Customs Territory' <https://unstats.un.org/unsd/tradekb/Knowledgebase/50132/Definition-Customs-Territory> accessed 21 August 2020.
480 WTO, 'Tariffs: Get Tariff Data' <www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm> accessed 23 August 2020.
481 WTO Agreement Art IV:1.

The issue of a customs territory versus an independent statehood, as a unit of membership, was further resolved during the negotiations of GATT 1947 when it was debated whether the then British colonies of Burma, Ceylon and Southern Rhodesia were customs territories.[482] The United Kingdom was required to demonstrate, amongst others, the autonomy of the colonies in respect of trade policy issues and if the colonies were at liberty to negotiate trade deals with any other government.[483] Following a positive response, the colonies which were controlled by the British Government were determined to be customs territories who qualified to be contracting parties in their own right. While countries were customs territories, the aspect of sovereignity would not be an issue for an entity to be a customs territory.

The case of customs territory emerged again in January 2002. When mainland China and Taiwan sought membership of the WTO, the two were treated as separate territories. Politically, mainland China considers Taiwan as its province while the latter considers itself as an independent state with its own economy and structure of governance.[484] It was argued that membership of the WTO was based on independent economic territories rather than on statehood.[485] It should, however, be observed that the verbosity and introduction of the term “independent economic territories” was not entirely correct.[486] Membership is based on either statehood or being a Customs territory.[487] The admission of Taiwan as the 144th member was, however, correct as it is a customs territory.

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482 Burma is now Myanmar, Ceylon is now Sri Lanka and Southern Rhodesia is now Zimbabwe.

483 UN Economic and Social Council, ‘Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Report of the Ad Hoc Sub-committee of the Tariff Agreement Committee on Paragraph 3 of Article XXIV’ (15 September 1947) UN Doc E/PC/T/198 2-6.

484 Pasha L Hsieh, ‘An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan’ (2007) 28(4) Mich J Int’l L 765.

485 John Shijian Mo, ‘Settlement of Trade Disputes between Mainland China and the Separate Customs Territory of Taiwan within the WTO’ (2003) 2(1) CJIL 145.

486 Refer to the discussion in section 3.6.

487 WTO Agreement Art XII:1.

3.7 Free Trade Areas

Given that this study involves an FTA for African countries, it is critical to conduct an in-depth examination of FTAs. The WTO states that:

> A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[488]

The exceptions given are also prescribed in relation to CUs.[489] Published literature, including that from the WTO draws simplified versions of the above legal definition to explain what an FTA is.[490] Section 3.8 below discusses the FTA in terms of its constituent elements.

Article XXIV:4 also reflects the strong support that the WTO gives to CUs and FTAs and it states:

> The members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the *purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories* and not to raise barriers to the trade of other members with such territories.[491] (italics show the author's emphasis)

The chapeau of Article XXIV:5 leaves the reader in no doubt that the formation of FTAs and CUs cannot be prevented, when it states:

> Accordingly, the provisions of this Agreement [GATT 1994] shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that […][492]

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488 GATT 1994 Art XXIV:8(b).

489 GATT 1994 Art XXIV:8(b). The exceptions in Arts XI and XIII deal with quantitative restrictions, Art XII with balance of payments, Art XIV deals with exceptions to the rule of non-discrimination, Art XV deals with exchange control arrangements, and Art XX deals with general exceptions.

490 WTO, 'Glossary' <www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 1 August 2022.

491 GATT 1994 Art XXIV:4.

492 GATT 1994 Art XXIV:5.

The words "shall not prevent"[493] underscores the point that FTAs and CUs are desirable.This implies that the formation of RTAs cannot be obstructed without valid reasons. It also follows that where these RTAs are required, the WTO will faciltate their formation. The provision is not meant to stop the establishment of RTAs, but these are the conditions which the CU, FTA or interim agreement must comply with.[494] The operations of RTAs must therefore be consistent with Article XXIV.[495] In *Turkey – Restrictions on Imports of Textile and Clothing Products* the AB examined the chapeau of paragraph 5 as key in the matter and stated:

> [I]n examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 'shall not prevent' the formation of a customs union. We read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a customs union. Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, […]
>
> Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent 'the formation of a customs union'. This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.[496]

Although the case involved a CU, it is clear that the chapeau of Article XXIV:5 also applies to FTAs, and thus the AB's interpretation can be extended to include FTAs as well.

It must be noted that an FTA is a voluntary trade agreement between partners. The members are free to join or leave the FTA at any time. The UK is a good example. It joined the EEC in 1973 and was not amongst the six founding members who signed the Treaty Establishing the Coal and Steel Community of 1951 after the Second World

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493 GATT 1994 Art XXIV:5.

494 This is in respect of liberalising duties, regulations of commerce and the need for a plan in the case of an interim agreement.

495 Understanding on the Interpretation of Article XXIV para 1.

496 *Turkey – Restrictions on Imports of Textile and Clothing Products: Report of the Appellate Body* (22 October 1999) WT/DS34/AB/R [45-46].

War.[497] The UK was later to withdraw from the EU in January 2020 and this was an internal matter amongst the EU partners.[498]

3.8 Essential elements of a free trade area

The author has analysed the definition of an FTA in section 3.7 above. The definition provides a critera that can be used to assess if the AfCFTA is indeed an FTA. The study has identified the following six distinct elements:[499]

(a) it must be comprised of at least two Customs territories;

(b) the purpose must be to facilitate trade amongst the participating members;

(c) duties must be eliminated;

(d) restrictive regulations must be eliminated;

(e) liberalisation must apply to substantially all trade; and

(f) preferential trade apply to originating products.

The author considers that the above criteria is the marksheet used to identify an FTA in the context of GATT 1994 and the WTO. Any trading arrangement that meets all the given elements is an FTA. The absence of any one of the six basic elements means that the arrangement is not an FTA. These provisions are part of WTO law, and consequently this thesis considers that these rules would have bearing on those Customs territories who applied to be members of the WTO. It does not stop non-members who establish their own free trade regimes that meet the stipulated elements to refer to themselves as having established an FTA. In any case such countries would need to be commended for meeting normal international best practices. This, however, raises another issue regarding an FTA comprised of members and non-members of the WTO, as is the case with the AfCFTA. Parties to the WTO Agreement are obligated

497 Nugent, *Government and Politics of the EU* 16.
498 The exit of the UK from the EU is commonly referred to as Brexit.
499 GATT 1994 Arts XXIV:4 and XXIV:8(b).

to adhere to Article XXIV and WTO rules in any trading arrangement they enter into. When WTO members join into an FTA partnership with non-members, it literary means that such a regime must adhere to the WTO standards that bind WTO members.

The AfCFTA for the fifty-five AU members, some of whom are WTO members while others are not, must therefore meet the elements in Article XXIV. Each of the six elements is examined below.

3.8.1 Comprised of two or more Customs territories

The membership of the AfCFTA is open to all the AU member states.[500] An FTA must consist of at least two customs territories. As a result, an FTA can take the form of a bilateral agreement as was the case with the June 2004 agreement signed between the United States and Morocco.[501] It can also be a regional grouping as is the case with the European Free Trade Association (EFTA) which include four non-EU member states, namely Iceland, Liechtenstein, Norway and Switzerland.[502] As discussed in section 3.6 above, the unit of membership to an FTA is based on Customs territories and not on independent statehood. As noted, in practice, most of the members would be sovereign states. In an analysis of Palestine, it was opined that the question was not whether or not it was a sovereign country, but rather if it possessed the status of a customs territory and thus qualified for full WTO membership.[503] In this context the debate between some AU members about whether the Sahrawi Arab Democratic Republic (SADR) is a sovereign state would neither affect its participation in the AfCFTA nor its membership of the WTO.[504] The WTO Agreement also explains the

500 AfCFTA Agreement Preamble; Arts 3, 4 and 5.

501 US Department of State, 'Existing US Trade Agreements' <www.state.gov/trade-agreements/existing-u-s-trade-agreements/> accessed 13 August 2022.

502 EFTA, *59th Annual Report of the European Free Trade Association 2019* (EFTA 2019) 4.

503 Thomas Cottier and Krista Nadakavukaren Schefer, 'Legal Opinion Submitted to the Economic Policy Programme on Conditions and Requirements to Qualify as a Separate Customs Territory under WTO Rules' (EPPI C5, February 1998).

504 Arpan Banerjee, 'Moroccan Entry to the African Union and the Revival of the Western Sahara Dispute' (2017) 59 Harvard Int'l LJ 33 <https://harvardilj.org/wp-content/uploads/sites/15/Banerjee_FORMATTED.pdf> accessed 12 April 2021.

interchangeable use of the terms ‘country’ and ‘customs territory’ and that these refer to customs territories, as will be noted in Chapter Five.[505]

It is must be noted that each customs territory may continue to have its own legislation and external tariffs under an FTA. There is no provision compelling the customs territories forming an FTA to apply the same customs laws, other than to ordinarily harmonise their customs or trade procedures as per the dictates expected in trade facilitation. The FTA is therefore comprised of different customs territories whose objective is to allow the free flow of qualifying products. This is in contrast to a CU, which is an amalgamation of customs territories to form one entity in which they apply a CET and common Customs laws, since this is the hallmark of that level of integration. It therefore follows that there is nothing compelling FTA partners to harmonise their Customs laws, save for purposes of fulfilling the objective of facilitating trade. An FTA can therefore operate with each of the partners implementing its own laws.

3.8.2 Purpose of a free trade area

Whereas RTAs are formed for various reasons, one of the key purposes of an FTA is to facilitate trade:

> The contracting parties […] recognize that the *purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories* and not to raise barriers to the trade of other contracting parties with such territories.[506] (italics show the author’s emphasis)

The creation of FTAs is therefore intertwined with the implementation of more favourable trade faciliation measures. The above-mentioned purpose is an important declaration on why FTAs are created. As a result, trade within the FTA must be more liberalised than it was previous to the FTA’s inception. It is evident from this that the whole aim of RTAs is to open space and provide freedom of trade to their constituent members while also allowing them to facilitate trade between themselves. The principle

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505 WTO Agreement Art XVI: Explanatory Notes reads: ‘The terms “country” or “countries” as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.’

506 GATT 1994 Art XXIV:4.

that an FTA is designed to facilitate trade amongst constituent members can be extended to imply that an FTA can devise trade facilitation measures to benefit its members. Several studies have shown that an FTA creates a framework to facilitate trade amongst its members, resulting in an increase in trade within the RTA.[507] Further, any efforts to liberalise trade in an FTA must not result in raising new barriers which would prejudice non-FTA members. The AfCFTA must have the aforementioned and other[508] related features realised if, technically and legally, it is to warrant the tag, 'FTA'. This is not optional. It is clearly laid out that amongst other objectives, the AfCFTA was established in order to facilitate trade amongst its members.[509] The AfCFTA has also demonstrated this. In July 2022, the AfCFTA Secretariat launched a program, the AfCFTA Initiative on Guided Trade, to encourage commercially meaningful trade and ensure that countries harness the benefits of the trade regime.[510] The initiative is a proactive tool to closely monitor trading systems and patterns within selected countries while testing the operational environment in order to draw any lessons out of the exercise.[511]

Article XXIV includes provisions to ensure the success of FTAs, and on top of this list is the exception to deviate from the MFN principle and allow members to grant each other more favourable treatment. As a practical example, orange juice originating and imported from the United States into Zimbabwe is levied duties of 40% under the MFN rates of the WTO which would also apply if originating and imported from any other WTO member.[512] However, if the same orange juice is originating and imported from South Africa into Zimbabwe, the rate of duty applicable would be 0% under the SADC

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507 Misa Okabe, 'Impact of Free Trade Agreements on Trade in East Asia (ERIA Discussion Paper Series ERIA-DP-2015-01' (*ERIA*, January 2015) <www.eria.org/ERIA-DP-2015-01.pdf> accessed 20 April 2021.

508 The other features as discussed in section 3.8 include removal of duties, eliminations of other restrictive regulations of commerce, and trading in originating goods.

509 AfCFTA Agreement Preamble and Art 4; Protocol on TiG, Preamble and Art 2; Annex 4, Art 2.

510 Issa Mohammed, 'National AfCFTA Policy Framework, Action Plan Launched' *Ghana News Agency* (Accra, 3 August 2022) <www.gna.org.gh/1.21538997> accessed 14 August 2022.

511 AfCFTA Secretariat, 'The AfCFTA Initiative on Guided Trade' (*Twitter*, 25 July 2022) <https://twitter.com/AfCFTA/status/1551615488911884293?ref_src=twsrc%5Etfw> accessed 12 August 2022.

512 Customs and Excise (Tariff) Notice [Chapter 23:02] Statutory Instrument 53 of 2017; HS Commodity Code 20091900.

FTA trade regime.[513] Therefore, an FTA liberalises trade in addition to the liberalisation which may have been attained under the WTO. In practice it has been observed that trade facilitation measures implemented in one FTA may differ from those being implemented in another FTA.[514] As noted in Chapter One, a total of forty-four member states of the AU (excluding eleven members) are members of the WTO.[515] This then suggests that the forty-four member states are party to the trade facilitation instruments of both the WTO and the AfCFTA. Given that the goal of an FTA is to have a more favourable environment for international trade, it stands to reason that the trade facilitation measures included in the AfCFTA would be expected to serve Africa's requirements better.[516] The trading environment is therefore anticipated to improve. In addition to tariff reductions, trade facilitation measures can be used as a tool to accomplish this. Most FTAs would go beyond the basics of the tariff-free movement of goods and proceed to the harmonising of procedures and laws in order to facilitate the movement of goods within their membership. This was the original intention of the GATT and was reaffirmed in the Understanding on the Interpretation of Article XXIV which states:

> [...] Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members […][517]

From this, it can be drawn that an FTA can discriminate with trade facilitation measures in line with the MFN rule. It is therefore possible and acceptable that an FTA can

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513 Customs and Excise (Southern African Development Community) (Suspension) (Amendment) Regulations, 2006 (No 6), [Chapter 23:02] Statutory Instrument 212 of 2007; HS Commodity Code 20091990.

514 Shintaro Hamanaka, Aiken Tafgar and Dorothea Lazaro, 'Trade Facilitation Measures Under Free Trade Agreements: Are They Discriminatory Against Non-Members?' (ADB Working Paper Series on Regional Economic Integration No 55) (ADB, July 2010) <www.adb.org/sites/default/files/publication/28529/wp55-trade-facilitation-measures.pdf> accessed 16 October 2022.

515 The eleven African Union member states who are non-members of the WTO as of 1 July 2022 were: Algeria, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, São Tomé and Principé, Somalia, South Sudan and Sudan. Refer to WTO, 'Doha Development Agenda'.

516 Chapter 7 of the study focuses on the comparison of the two sets of legal texts from the WTO and the AfCFTA.

517 Understanding on the Interpretation of Article XXIV preamble.

develop trade facilitation measures targetted at its members, with those measures not necessarily being part of the TFA. As a result, trade facilitation measures within an FTA do not necessarily have to be an exact duplicate of the WTO TFA. More often than not, most trade facilitation measures applied in an FTA are neutral and are also beneficial to non-members. As discussed in Chapters Four, Five and Six, the AfCFTA developed its own trade facilitation instruments.

There may, however, be instances of discrimination if the measures are exclusively applicable to FTA members and these cases can arise in instances such as service fees and use of regional standards. However, as with tariffs, it can be argued that Article XXIV allows for preferential treatment among trading partners under an FTA and thereby discrimination against other WTO members who are not parties to the FTA, as is the case with duties. The litmus test will be whether such measures impose any additional burden on WTO members not participating in the FTA. It therefore follows that more favourable trade facilitation measures can be agreed upon for an FTA, and such preferential treatment can be justified as falling within the ambit of Article XXIV.[518] Chapter Five discusses trade facilitation as a subject matter in detail. RTAs in Africa have emphasised the importance of facilitating trade within their own configurations, with some, including the AfCFTA, having developed their own frameworks for the facilitation of trade.[519] Any formation of an FTA whose design does not facilitate trade or which raises barriers to non-FTA members woud be operating contrary to the core spirit of GATT 1994 and the WTO. It therefore follows that as long as they do not introduce more restrictive procedures, trade facilitation measures are of benefit to global trade. These provisions therefore benefit and protect both FTA members and non-FTA members.

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518 UNCTAD, *Trade Facilitation in Regional Trade Agreements* (UN 2011) (UN Doc UNCTAD/DTL/TLB/2011/1).

519 This will be discussed in detail in Chapter 5 of this thesis.

3.8.3 Elimination of duties

The term FTA denotes free trade and the elimination of duties or border tariffs. The definition of the FTA, itself, signifies the elimination of border-related taxes.[520] From a broader perspective, it can be noted that the elimination of duties in FTAs is consistent with the objectives envisaged in GATT 1994 which refers to a desire for "the substantial reduction of tariffs and other barriers to trade".[521] As discussed in section 3.8.5 of this study, the elimination of duties in the AfCFTA is substantial and it is based on an agreed framework of phasedown.

There is a need to examine the definition of 'duty' in the context of the WTO. The WTO uses the terms 'duties', 'taxes' and 'customs duties' interchangeably, and has a broad definition that these are taxes on imports and exports which are levied as goods move across borders.[522] The AfCFTA Agreement defines customs duties similarly.[523] The WCO, which is an authority on Customs matters and is in close collaboration with the WTO, defines duties and taxes as "import duties and taxes and/or export duties and taxes",[524] while customs duties are "duties laid down in the customs tariff to which goods are liable on entering or leaving the customs territory".[525] The reference is to tariffs, customs duties or duties which are levied on imports and exports. These customs duties are used as weapons to protect domestic goods against foreign goods and are also border taxes levied when goods move from one territory to the other.[526] The WCO's HS can be used as a tool to implement trade policy issues.[527]

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520 GATT 1994 Art XXIV:8(b).

521 GATT 1947 preamble,

522 WTO, 'Understanding the WTO, The Agreements: Tariffs: More Bindings and Closer to Zero <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm> accessed 21 April 2021.

523 The Protocol on TiG defines Customs duty as 'a duty or charge of any kind imposed on or in connection with the importation or exportation of a good, including any form of surtax or surcharge imposed on or in connection with such importation or exportation'.

524 International Convention on the Simplification and Harmonisation of Customs Procedures (adopted 18 May 1973, entered into force 25 September 1974) 950 UNTS 269, as amended by the Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures (adopted 26 June 1999, entered into force 3 February 2006) 2370 UNTS 27 (Revised Kyoto Convention / RKC) General Annex, definitions.

525 RKC General Annex, definitions.

526 Robert Schütze, *European Union Law* (CUO 2015) 486-487.

527 See discussions on HS in Chapters 3 and 5.

Customs duties are levied in a variety of ways and forms. The most basic form of levying customs duties is the *ad valorem* which is based on a percentage of the value of the goods.[528] Since the *ad valorem* rate is always proportional to the value of the goods, it provides a safeguard against inflation in that the nominal figure of the duty collected would always be commensurate to the rise or fall of the value of the commodities being traded. This is in contrast to the *specific* rate where duty is expressed as a specific amount of a currency per unit of quantity such as US$50 per kilogramme.[529] Some of the measurable units used as basis for specific rates are volume and length. Academic studies in Economics have shown that trade and tariff policy prefer *ad valorem* tariffs to specific tariffs.[530] The *ad valorem* tariff is more equitable in that the duties are proportional to the value, as opposed to the specific tariff where the duty payable, for example, on a Rolls Royce vehicle would equal that paid on a Ford vehicle.[531] The specific rate is convenient when dealing with goods whose quantities, in whatever units, need to be monitored or restricted. The compound or combination rate combines aspects of the *ad valorem* and specific rates.[532]

In addition to these various types of rates, there exists the 'alternative' tariff which offers optional rates of duties.[533] In some jurisdictions, such as Zimbabwe, legislation requires that the option yielding more duty be applied in the case of alternative rates of duty.[534] A country's trade policy would dictate whether to use the *ad valorem* or specific or other rates of duty. The USA uses both the *ad valorem* and specific rates whereas the

528 WTO, 'Glossary'. An example of *ad valorem* is 20% of a value.

529 WTO, 'Glossary'.

530 Jan G Jørgensen and Philipp JH Schröder, 'Welfare-Ranking *Ad Valorem* and Specific Tariffs Under Monopolistic Competition' (2005) 38(1) CJE 228, 228-241.

531 Mordechai E Kreinin*, International Economics: A Policy Approach* (10th edn, Thomson South-Western 2006) 58.

532 For example, duty on shoes would be 20% of a value plus R10 per pair.

533 For example, the rate could be either 20% of a value or R10 per pair, whichever is higher.

534 Customs and Excise (Tariff) Notice [Chapter 23:02] Statutory Instrument 53 of 2017 First Schedule, Part I, para 3(2) reads:

'When a rate of duty in any column of Part II in respect of any goods consists of two parts separated by the word "or", each part shall be deemed to be a separate and complete rate of duty, and the rate of duty yielding the higher amount of duty shall be applicable in respect of such goods.'

European countries rely on the former.[535] The members of the AfCFTA implement all these various forms of levying duties.

The elimination of customs duties, in whatever form they are levied, results in the free movement of qualifying goods within an FTA. Internal taxes such as excise duties or value added taxes on goods would be subject to the national treatment principle as discussed in Chapter Two.

3.8.4 Elimination of other restrictive regulations of commerce

Apart from abolishing duties, an FTA must eliminate "other restrictive regulations of commerce" in the constituent territories.[536] In addition to other restrictive regulations of commerce" (ORRC) Article XXIV mentions "other regulations of commerce" (ORC)[537] but the legal texts do not distinguish between the two, and thus leave a gap to be filled by interpretations and jurisprudence. The concept of ORC, which is not a constituent element in the definition of FTA, is examined in section 3.9.3. Article XXIV is vague on the scope and coverage of ORRC.

The question which arises from the definition is the meaning of ORRC, a term which is of significance to understanding what an FTA entails. Closely related to this is the lack of clarity on the trade restrictions that must be eliminated as part of ORRC. It is obvious that ORRC cannot be referring to duties or tariffs because the reference to ORRC is preceded by the conjuction 'and', showing that this is an additional requirement to the 'duties' which are specified already.[538] It is also evident that ORRC is a constituent element of the definition of an FTA whose primary focus is to enhance trade amongst its parties. This is also evident from the Understanding on the Interpretation of Article XXIV, which emphasises the internal liberalisation envisaged in RTAs.[539] This then

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535 Kreinin, *International Economics* 58.
536 GATT 1994 Art XXIV:8(b).
537 GATT 1994 Art XXIV:5(b).
538 GATT 1994 Art XXIV:8(b).
539 Understanding on the Interpretation of Article XXIV preamble, which in, part reads:
'[…] *Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

suggest that ORRC is all about the removal of restrictions affecting the cross-border movement of goods within the FTA such as administrative rules, trade facilitation issues or introducing burdensome surcharges and controls on intra-FTA trade. This view is corroborated by Lockhart and Mitchell who consider that the whole purpose of eliminating ORRC is, amongst others, to have a border-free FTA.[540] Tratchman compares ORRC and ORC and considers the former as an internal test that calls for the removal of barriers to intra-FTA trade, whereas the latter is concerned with the elimination of barriers with third parties.[541]

It is, however, clear that this relates to commercial activities between members of the FTA. ORRC can be examined in the broader context of a liberalised regime for trade in goods. The preamble to GATT 1994 states that the agreement is directed towards

> *substantial* reduction of *tariffs* and *other barriers* to trade and to the *elimination of discriminatory treatment in international commerce* …[542] (italics show the author's emphasis)

The highlighted words are similar to the words used in the definition of an FTA, both showing a desire to liberalise restrictive practices. This suggests that the intention of ORRC is to liberalise trade across borders and create a border free market.[543] This important point is reiterated in the Understanding on the Interpretation of Article XXIV which states:

> […] *Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories […]'.

540 Nicolas JS Lockhart and Andrew D Mitchell, 'Regional Trade Agreements Under GATT 1994: An Exception and Its Limits' in Andrew D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005).

541 Joel P Trachtman 'Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT' (2003) 6(2) JIEL 459, 485.

542 GATT 1994 preamble.

543 Lockhart and Mitchell, 'Regional Trade Agreements Under GATT 1994'.

> *Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded […].[544]

In *Turkey – Restrictions on Imports of Textile And Clothing Products*, ORRC was broadly interpreted as relating to the movement of goods or the commerce within that particular FTA.[545]

Despite the vagueness in the interpretation of ORRC and ORC, from a simplistic point of view an FTA does not condone barriers to trade with both intra-FTA or third parties. The conclusion from this is that an FTA, as is the case with the AfCFTA, must not have restrictictive laws or procedures for conducting business. The AfCFTA is premised on removing restriction and liberalising trade.[546] The AfCFTA has developed its own instruments which are designed to facilitate trade and these are examples of initiatives to eliminate ORRC.[547] This is consistent with the stated objectives of the Protocol on TiG.[548] The elimination of ORRC in an FTA is therefore part of the process to liberalise trade in goods, and all these concern facilitating intra-FTA trade. FTAs must therefore develop their own regulations or strategies in order to facilitate trade among the member territories.

3.8.5 Liberalisation must be on substantially all the trade

One of the characteristics of an FTA is the demand for liberalisation on substantially all the trade (SAT).[549] The principle of SAT is significant because it is one of the variables used to determine whether an FTA or CU exists. The concept 'SAT', in an FTA, infers that although not all products can be traded duty-free, a significant measure of trade must be free. The features of tariff-free trade and the elimination of restrictive regulations, which were covered in sections 3.8.3 and 3.8.4 above respectively, are relatively easier to understand because it is possible to quantify the extent of elimination

544 Understanding on the Interpretation of Article XXIV preamble.
545 *Turkey – Restrictions on Imports of Textile and Clothing Products: Report of the Appellate Body* (22 October 1999) WT/DS34/AB/R [48].
546 AfCFTA Agreement Preamble; and Art 3 and 4; Protocol on TiG Preamble; and Art 2 and 3.
547 Refer to Chapter 6.
548 Protocol on TiG Art 3.
549 GATT 1994 Art XXIV:8(b).

and measure the extent of fulfillment. The adjective 'substantial' is judgmental and it invokes different meanings and understandings depending on the person measuring it and those affected by the value so determined. The interpretation of 'substantially all the trade' is therefore not definitive and will differ since it is influenced by many values. The flexibilities from such elastic rules accommodate a number of situations while creating different interpretations and the possibility of disputes. The following extract from an AB report in the case *Turkey – Restrictions on Imports of Textile and Clothing Products* demonstrates the difficulty in defining SAT:

> Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear, though, that 'substantially all the trade' is not the same as *all* the trade, and also that 'substantially all the trade' is something considerably more than merely *some* of the trade.[550]

The above statement does not provide any solution. It merely restates the problem and demonstrates that there are no hard rules in the interpretation, and that each instance would be evaluated on its own merits. In a WTO case, *US – Line Pipe* involving safeguard measures under GATT 1994 Articles I, XIII and XIV, it was stated that NAFTA provided for the elimination, within ten years, of all duties on 97% of the parties' tariff lines, and that was more than 99% of the volume of trade in the RTA.[551] Although the case did not involve Article XXIV, based on what was presented, the panel was able to remark that such a figure was above the threshold of SAT. Although not averting the opinion on SAT, the AB was to later observe that the question of Article XXIV was not pertinent to the arguement.[552]

The debate on SAT has centred on whether the terms 'substantial' and 'all trade' should be assessed in terms of the quantity or quality of trade.[553] Saurombe noted that SAT offers no formula, but acknolwedges that not all trade is covered and the unanswered

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550 *Turkey – Restrictions on Imports of Textile and Clothing Products: Report of the Appellate Body* (22 October 1999) WT/DS34/AB/R [45-48].

551 *US – Line Pipe: Report of the Panel* (29 October 2001) WT/DS202/R [7.142].

552 *US – Line Pipe: Report of the Appellate Body* (15 February 2002) WT/DS202/AB/R [199].

553 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 568.

question was how much must be left out.[554] As a result, more cases will feature as notifications are made or disputes are declared. Those who follow the quantitative approach base their arguments on the overall statistics of trade within a country, whereas those who base their arguments on the qualitative approach leverage this on how representative the trade is across the major sectors of the economy.[555] Although the issue has been debated within WTO jurisprudence, it is still subject to various interpretations and can therefore accommodate a variety of scenarios.[556] In terms of VCLT the interpretation of international law must take into account the whole purpose of GATT 1994 which, according to its preamble, is to liberalise trade.[557] FTAs and CU, in particular, are intended to facilitate trade among the parties rather than to raise trade barriers with third parties.[558]

There have never been a standardised method for determining the optimal level of SAT, and cases have varied depending on their background and how they were to the CRTA.[559] In view of this, the CRTA continues to handle cases on their own merits.[560] In a Working Party Report involving *EC – Agreements with Portugal*,[561] the EC argued its case that there was no specific definition of SAT, and while advocating for 80%, it was reasoned that it was not appropriate to prescribe a figure. In another case involving the EFTA, the Working Party argued that even with a figure of 90%, that proposal could not be the only criteria for consideration.[562] The proponents of quality argue that SAT must be representative of a cross-section of all sectors involved in trade, and leaving

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554 Amos Saurombe, 'Southern African Development Community (SADC) Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV' (2011) 14(4) PELJ 287, 305.

555 Andrew D Mitchell and Nicholas JS Lockhart, 'Legal Requirements for PTAs Under the WTO' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (CUP 2009).

556 Srinivasan, 'Regionalism and the WTO' 332

557 VCLT Art 31 states:
'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
'2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …'.

558 GATT 1994 Art XXIV:4.

559 Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (Sweet and Maxwell 2005) 592-593.

560 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 570.

561 GATT, 'Working Party Report on EEC' GATT Doc BISD 20S/171 para 16.

562 GATT, 'Working Party Report on EEFT' GATT Doc BISD 96/83 para 48

out particular sectors goes against the spirit of Article XXIV that envisaged free circulation of qualifying goods in FTAs and CUs.[563] This qualitative approach is supported by an argument that the "substantial" in Article XXIV:8 is qualifying "all trade".[564] Based on the qualitative approach, the exclusion of a whole sector would therefore be contrary to the spirit of GATT.[565] In practice, the quantity test based on an approximately 90% benchmark seems to be sticking as a viable indicator for a number of RTAs, although it has been subjected to some verification using the test of quality.[566]

The SADC FTA came into effect in January 2008 after a gradual phasing down of tariffs and when the member states had achieved an agreed threshold of 85% duty-free tradeable products.[567] Tariff reductions on the remaining 15% of tradeable products were to be phased down over a period ranging from four to eight years.[568] The absence of a criteria within the WTO makes the whole process dependant on how a case is argued and defended. At the same time, in the absence of a definitive criteria, it becomes unfair to reject an application in a case where the applicant has made an effort to establish an FTA.

In respect of the AfCFTA, the AU member states agreed to liberalise and grant duty free access to one another with effect from 2021, based on 90% of the tariff lines and within five years, while the LDCs were granted up to ten years.[569] The remaining 10%

563 Mohammad FA Nsour, *Rethinking the World Trade Order: Towards a Better Legal Understanding of the Role of Regionalism in the Multilateral Trade Regime* (Sidestone Press 2010) 87.

564 Petros C Mavroidis, 'Do Not Ask Too Many Questions' in E Kwan Choi and James C Hartigan (eds), *Handbook of International Trade: Economic and Legal Analyses of Trade Policy* (Blackwell 2004).

565 WTO, Committee on Regional Trade Agreements: Annotated Checklist of Systemic Issues – Note by the Secretariat' (26 May 1997) WTO Doc WT/REG/W/16 paras 40-44.

566 James Mathis and Jennifer Breaton, 'Regional Trade Agreements and the WTO: Implications for Eastern and Southern Africa' in T Hartzenberg (ed) *Cape to Cairo: An Assessment of the Tripartite Free Trade Area* (tralac 2011) 37.

567 SADC, *SADC Free Trade Area Handbook* (SADC 2008) 3.

568 SADC, *SADC Free Trade Area Handbook* 7.

569 AU Assembly of Heads of State and Government, 'Twenty Ninth Ordinary Session, Decisions and Declarations of the Assembly: Decision on the Continental Free Trade Area' (4 July 2017) AU Doc ASS/AU/8 (XXIX); UNECA, *African Continental Free Trade Area: Towards the Finalization of Modalities on Goods* (UNECA 2018) 1.

of the tariff lines would cater for sensitive goods and goods on the exclusive list.[570] The AfCFTA used the simple interpretation of SAT based on a minimum of 90% of tariff lines being duty-free, which amounted to a quantitative rather than a qualitative approach, making it eligible either under the Enabling Clause or Article XXVI.[571] The Enabling Clause is discussed in section 3.9.1 below. It can therefore be argued that the AfCFTA meets the SAT requirement, more so when it is considered that SADC, one of the major RECs in Africa, became an FTA based on 85%. The AfCFTA has demonstrated strong political commitment to liberalise trade in line with the goals of GATT 1994.

Since FTAs are based on the principle of substantial trade, the author considers that the summation of the accomplishments in RTAs have complemented towards liberalising global trade. The fact that there are so many RTAs in operation after liberalising their trade should signal the important role that regionalism can play as a prelude to multilateralism. The failures of the DDA is an indictment of multilateralism and its slow pace.[572] All continents operate these mega FTAs, and with the requirement of SAT, it means global trade is gradually being liberalised through RTAs in areas such as trade facilitation, removal of ORRC and ORC, tariff reductions, and removal of barriers to trade. At some point it must be on the agenda of the WTO to gradually merge these RTAs so that WTO members can achieve duty free movement of goods amongst its membership.

3.8.6 Trade must be in respect of originating goods

FTA states must grant each other concessions on products which originate within the FTA members' borders.[573] This introduces the concept that there must be rules

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570 UNCTAD, *Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth: Economic Development in Africa Report 2021* (UN 2021) 94-95. The remaining 10% tariff lines cover 7% of sensitive products which would be liberalised over a period of ten years and over thirteen years in respect of LDCs while up to 3% tariff lines would be excluded from liberalisation.

571 UNCTAD, *Designing Trade Liberalization in Africa: Modalities for Tariff Negotiations Towards an African Continental Free Trade Area* (UNCTAD 2020) 27.

572 See Chapter 2.

573 GATT 1994 Art XXIV:8(b).

governing what is considered to be 'originating' within the FTA. The rules of origin (ROO) can be viewed as the criteria to define the nationality of a commodity when it moves across borders.[574] ROO exist because governments want to distinguish between foreign and domestic goods and, where necessary, accord preferential treatment.[575] They are an essential component in the operation of an FTA because their purpose is to ensure that the products granted free movement without payment of duty are those which have been defined as originating within the constituent territories of the FTA.[576] The criteria determining the ROO would be part of the FTA. This involves legally binding definitions of what is meant by originating products. The ROO are therefore important legal instruments for the application of preferential trade agreements.[577] FTAs, such as SADC[578] and the AfCFTA,[579] have the rules as a separate annex or protocol, comprising an integral part of their respective agreements. Every FTA develops rules that are geared to accommodate the requirements and the economic development of its members in line with the objectives of their agreement.

The application of such rules is critical for the AfCFTA because it prevents the FTAs from granting each other preferential treatment for goods sourced outside the continent. The rules provide a control system to guarantee that non-originating goods entering into an FTA are not traded at the same tariff rates as originating products.[580] Most African countries, for example, trade with China and import goods such as textiles or other manufactured products. Such goods, once imported into Africa, do not qualify for duty-free movement within the AfCFTA because they do not originate in Africa.

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574 Joseph A LaNasa III, 'Rules of Origin and the Uruguay 's Effectiveness in Harmonizing and Regulating Them' (1996) 90(4) AJIL 625.

575 Rod Falvey and Geoff Reed, 'Economic Effects of Rules of Origin' (1998) 134(2) Weltwirtschaftliches Archiv / Review of World Economics 209, 209-229.

576 AU, UNECA and AfDB, *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (UNECA 2017) 88.

577 WCO, *Origin Compendium* (WCO 2017) 9.

578 SADC Protocol on Trade (adopted 1 August 1996, entered into force 25 January 2001) (SADC Trade Protocol) Annex I.

579 AfCFTA Agreement Annex 2 on ROO.

580 Lester and others, *World Trade Law* 350.

Annex 2 to the Protocol on Trade in Goods of the AfCFTA Agreement (hereafter Annex 2 on Rules of Origin) stipulates the requirements for goods to qualify as originating within the AfCFTA. It outlines the objectives of the rules which are to: deepen market integration in Africa; improve trade amongst African countries; stimulate regional and continental value chains in manufacturing goods which are made in Africa; and promote industrialisation by ensuring that the continent acquires the capacity and processes to supply the necessary goods.[581] The rules establish transparent and predictable standards required for goods that are eligible for preferential treatment during trade within the AfCFTA.[582]

A typical annex on ROO would identify goods which must be wholly produced in a territory in order to qualify as 'originating' and this would be followed by other criteria such as the specific manufacturing or processing operation.[583] Wholly produced goods are those which are wholly obtained, grown or harvested in a territory and contain no foreign materials such as minerals, plants, and animals. This criterion is relatively simple to establish.[584] The second criterion applies to manufactured or assembled goods, as well as those made from materials obtained from a variety of countries including those outside the AfCFTA.[585] This criterion has been difficult to interpret because it is intended to prevent the conferring of origin on goods that have undergone simple processes. The criterion involves technical expertise that must be defined by the rules such as: the value addition test; the definition of substantial transformation; and requirements regarding change in tariff classification using the HS Code.[586] As an example, the process of extracting cooking oil from foreign sunflowers might confer originating status on the cooking oil in the country where the extraction would have taken place. Another example would be the process of milling some imported wheat grain into flour, which, owing to its simplicity, may be rejected as imparting originating status in the nation where the milling happens. As a result, the rule on wheat flour could

581 AfCFTA Agreement Annex 2 on ROO Art 3.
582 AfCFTA Agreement Annex 2 on ROO Art 2.
583 UNCTAD, *Economic Development in Africa Report 2019: Made in Africa Rules of Origin for Enhanced Intra-African Trade* (UNCTAD 2019) 56.
584 LaNasa III, 'Rules of Origin and the Uruguay Round's Effectiveness' 629.
585 AfCFTA Agreement Annex 2 on ROO Art 6:2.
586 LaNasa III, 'Rules of Origin and the Uruguay Round's Effectiveness' 629.

state that wheat flour from a territory would be considered as qualifying in that terrory if the flour is milled out of wheat wholly produced in that territory.

Given the expertise required to interpret ROO, a number of preferential trading arrangements, such as the EAC, would develop a manual to enable uniform interpretation and application by stakeholders.[587] The AfCFTA has also developed a procedure manual to assist Customs administrations, traders and other interested stakeholders in interpreting ROO. In practice goods being traded in an FTA and claiming preference would require a certificate of origin declaration to that effect.[588]

ROO can be the subject matter of fraudulent claims when products from non-members are falsified as originating within the FTA. An example would be rice imported from Asia into a COMESA FTA member state, and then repacked into bags and labelled as originating within the FTA. The rice can be exported into the COMESA FTA as having originated within the FTA. Such cases would require skilled enforcement authorities, such as Customs administrations, together with cooperation amongst the enforcement authorities in the constituent territories of the FTA. Therefore, an FTA must outline the processes for confirming the claimed origin of goods. This is an illustration of a situation in which the knowledge and assistance of Customs administrations would be required.[589]

The WTO has an Agreement on Rules of Origin for its members, a result of the Uruguay Round and with the objective to have harmonised ROO for the WTO.[590] The harmonisation of ROO amongst the RTAs will take time because it will involve balancing conflicting interests. Some countries have a competitive advantage in producing heavy industrial products whereas, despite having raw materials, some of the developing countries might not have the capacity to build industries and manufacture goods. In the short term, the objective of the Agreement on Rules of Origin

587 EAC, *Manual on the Application of the East African Community Customs Union (Rules of Origin) Rules, 2015* (EAC 2016) 5.
588 AfCFTA Agreement Annex 2 on ROO Art 17.
589 WCO, *Origin Compendium* 78.
590 Agreement on Rules of Origin preamble.

is to ensure that the ROO developed by members to use within their respective trading regimes are transparent, predictable, and facilitate flow of trade rather than create an unnecessary barrier to trade.[591] Apart from preferential trade, ROO can also be used for compiling trade statistics and for other actions which may be deemed necessary by the WTO and where the origin of the goods need to be known, such as enforcing anti-dumping duties and quotas.[592]

ROO are therefore an important component of an FTA in that they can determine the level of substantial trade to be conducted. If they are complicated or if the partners in an FTA use them to protect their markets, they can stymie trade and become a non-tariff barrier. Complicated ROO undermine the whole purpose of an FTA.[593] In order to stimulate economic development in RTAs, the ROO should be simple, transparent and easy to implement.[594] Negotiations for FTAs would thus include an attempt to encourage investment into industries to ensure that originating products are produced and traded, while also ensuring that the FTA is not used as a conduit to trade in non-originating products. While ROO is a distinct element in defining an FTA, it is clear that this aspect is inextricably linked to the concept of ORRC.[595]

3.9 External requirements for a free trade area

Section 3.8 above discussed the definition of an FTA and the essential elements stipulated for an FTA. These are mainly the internal requirements laying down how members in an FTA must interact with each other in regulating their own trade. In addition to the requirements governing the intra-FTA liberalisation, Article XXIV also imposes certain obligations concerning how members of an FTA relate their trade with

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591 WTO, 'Legal Texts: A Summary of the Final Act of the Uruguay Round' <www.wto.org/english/docs_e/legal_e/ursum_e.htm#iAgreement> accessed 18 October 2020.

592 Agreement on Rules of Origin Art 1.

593 UNCTAD, *Economic Development in Africa Report 2019* 197.

594 Stephen N Karingi, Ottavia Pesce and Simon Mevel, 'Preferential Trade Agreements in Africa: Lessons from the Tripartite Free Trade Agreements and an African Continent-Wide FTA' in Patrick Low, Chiedu Osakwe and Maika Oshikawa (eds), *African Perspectives on Trade and the WTO: Domestic Reforms, Structural Transformation and Global Economic Integration* (Cambridge UP 2016) 244-245.

595 Refer to section 3.8.4 above.

non-FTA members. An FTA, as is the case of the AfCFTA in this study, has certain obligations that it must comply with or manage with outsiders or third parties. Although not part of and distinct from the definition of an FTA, the fulfilment of these obligations also contribute towards the creation of an FTA, and it automatically follows that the AfCFTA must comply with them. These requirements include the obligation to inform the WTO of the FTA,[596] a commitment by the FTA not to increase trade barriers with non-FTA members,[597] and a requirement that tariffs and ORC not be higher or more restrictive.[598]

3.9.1 Notification

One of the procedural requirements is that any WTO member who wishes to participate in an FTA or CU must notify the WTO and provide details of the RTA.[599] WTO members must therefore ensure the FTA which they belong to operates within the WTO rules and thus subordinate to the superior body. This is significant for the AfCFTA, in which, as of September 2022, a critical mass of forty-four out of a total of fifty-five AU states are WTO members.[600] The fact that the forty-four countries are bound by WTO rules means that any global trading involving these members must be in compliance with WTO requirements. By default, the eleven AfCFTA members who do not belong to the WTO, will therefore trade in the AfCFTA in compliance with WTO rules. Although an initiative by Africa for African countries, it can be argued that the AfCFTA coerces non-WTO members to comply with WTO rules and eventually become WTO members. This does not, however, compromise the fundamental principle that WTO members can deviate from the MFN principle only when trading in a CU or FTA configuration.

596 GATT 1994 Art XXIV:7(a).
597 GATT 1994 Art XXIV:4.
598 GATT 1994 Art XXIV:5(b).
599 GATT 1994 Art XXIV:7(a).
600 As of 1 July 2022, some forty-four member states of the AU were WTO members, except for the following eleven: Algeria, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, São Tomé and Principé, Somalia, South Sudan and Sudan. Refer to WTO, 'Doha Development Agenda'.

In 1996, the GC established the Committee on Regional Trade Agreements (CRTA) as the competent body to receive and consider notifications of the agreements, as well as to monitor their operations.[601] The WTO has defined the terms of reference and mandate of the CRTA on how notifications should be processed.[602] The establishment of the CRTA, along with the transparency mechanism, resulted in streamlined processes that aid RTAs in their efforts to comply with WTO rules. Since the entering into a regional arrangement is a sovereign decision made by a member, what the WTO can only do is question if application is in accordance with the rules.[603]

RTAs between less-developed parties for the mutual reduction of trade barriers would also be eligible for reporting to the WTO in terms of and under the flexible provisions of the Enabling Clause.[604] The AfCFTA cannot be notified under the Enabling Clause because the stipulated provisions apply specifically to members of the WTO.[605] The AfCFTA can, however, be notified under Article XXIV, which caters for FTAs that involve non-WTO members. This is therefore the only option for the AfCFTA, given that some of its members are not party to the WTO. The whole purpose of the notification is to ensure compliance, and for WTO members to ensure that the FTA meets the applicable requirements.[606] The notification under Article XXIV is an open and transparent process which involves scrutiny by the CRTA and negotiations with other members of the WTO.[607] As of June 2022, the AfCFTA had not yet been notified to the WTO. Further, the AfCFTA is a fully fledged FTA like the ASEAN, NAFTA and others, which must therefore be fully integrated into global trade as an assertive African agenda.

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601 WTO Agreement Art IV:7.

602 WTO Decision of 14 December 2006 on Transparency Mechanism for Regional Trade Agreements (18 December 2006) WT/L/671 paras 3-6.

603 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization* 556.

604 Enabling Clause paras 1, 2(c) and 4. Also refer to section 3.2 regarding the Enabling Clause.

605 Enabling Clause paras 1, 2(c) and 4.

606 WTO Decision of 14 December 2006 on Transparency Mechanism for Regional Trade Agreements (18 December 2006) WT/L/671.

607 Yehualashet Tamiru Tegegn, 'AfCFTA's Notification Options to WTO: Enabling Clause or Article XXIV Exception' (2020) 14(2) Mizan Law Review 357, 367-372.

It should be noted that, in practice, some notifications have been done when the RTAs have already entered into force. The WTO has a deliberate approach to notifications being done while the FTA is already in force.[608] The GC endorsed that the legal process can take place after entry into force.[609] A typical example is NAFTA, which was signed in December 1992, entered into force in January 1994, and the Working Party[610] to examine its consistency with Article XXIV subsequently established in March 1994.[611] As of June 2022, the AfCFTA had not yet been notified to the WTO and was still finalising compliance with requirements needed for trade to commence. In July 2022 the AfCFTA Secretariat announced a plan, the AfCFTA Initiative on Guided Trade, in which Ghana, Kenya, Cameroon, Mauritius, Tanzania, Rwanda and Egypt were to commence trade under the AfCFTA as a way of testing systems and demonstrating that there is trade taking place.[612] Judged by the processes involved with previous notifications at the WTO, the delay by the AfCFTA cannot be considered to have lagged behind. The AfCFTA must therefore ready itself for the rigour and laborious verification process of the CRTA and WTO members.

3.9.2 Trade barriers with non-free trade areas

While the purpose of an FTA is to facilitate trade among its members, WTO rules forbid FTA members from raising trade barriers against those WTO members not participating in the FTA.[613] From *Turkey – Restrictions on Imports of Textile and Clothing Products*, two major conclusions were drawn regarding the relationships between RTAs and the WTO.[614] The first is that by removing trade restrictions and liberalising it, RTAs enhance the multilateral trading system. The second is that RTAs must generally be acknowledged as operating within the guidance and supremacy of WTO rules, as was

608 WTO Decision of 14 December 2006 on Transparency Mechanism for Regional Trade Agreements (18 December 2006) WT/L/671.

609 WTO General Council Decision of 14 December 2010 on Transparency Mechanism for Preferential Trade Arrangements (16 December 2010) WT/L/806.

610 What used to be called the Working Party is now CRTA.

611 Petros C Mavroidis, *Trade in Goods* (2nd edn, OUP 2012) 202.

612 AfCFTA Secretariat, 'The AfCFTA Initiative on Guided Trade'.

613 GATT 1994 Art XXIV:4.

614 *Turkey – Restrictions on Imports of Textile and Clothing Products: Report of the Panel* (22 October 1999) WT/DS34/AB/R [9.163].

stated during the Singapore Ministerial Declaration, and discussed in section 3.3 above.

The WTO members who are not party to an FTA must therefore not be prejudiced by the actions of those who resolve to form their own 'club' within the bigger WTO family and agree to facilitate trade among themselves. At the same time, while facilitating intra-FTA trade, there is nothing to prevent FTA partners from reducing trade barriers by doing business with non-members of the FTA. As a result an FTA must have either a neutral or an advantageous effect on non-members. In practice, non-FTA members might actually benefit from certain measures implemented within an FTA. For example, a measure to automate Customs procedures in the AfCFTA would benefit non-AfCFTA members and global trade, as it results in faster processing of all Customs procedures without any discrimination.

The imposition of trade barriers is contrary to the spirit of the Abuja Treaty, one of whose objectives is to eliminate such barriers both in the RECs and Africa.[615] There is also convergence in the objectives of the WTO and the AfCFTA in that both seek to liberalise trade through the removal of barriers.[616] The AfCFTA learnt lessons from the experiences of its own RECs, some of whose members use NTBs to protect their markets.[617] SADC and SACU have cases of intra-RTA import bans, price controls and border issues being used to hamper cross-border movement of goods.[618] The same scenario exists in COMESA, EAC and SADC.[619] Without any meaningful market access there cannot be trade and this defeats the purpose of trade agreements. Trade is therefore enhanced when tariff barriers are either removed or reduced.[620] One

615 Abuja Treaty Arts 4:2(d) and 31.

616 WTO Agreement preamble; GATT 1994 preamble and Art XXIV:4; AfCFTA Agreement Art 4; and Protocol on TiG preamble and Art 2.

617 UNCTAD, *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries* (UN 2013) 5-6.

618 Nick Charalambides, 'What Shoprite and Woolworths Can Tell Us about Non-Tariff Barriers (SAIIA Occasional Paper No 148)' (SAIIA, October 2013) <https://saiia.org.za/research/what-shoprite-and-woolworths-can-tell-us-about-non-tariff-barriers/> accessed 16 October 2022.

619 UNCTAD, *Non-Tariff Measures to Trade* 61-62.

620 Andrew Mold, *Non-Tariff Barriers: Their Prevalence and Relevance for African Countries* (African Trade Policy Centre, UNECA 2005) 1.

observation was that trade agreements must have strong legal provisions to regulate the impositions of NTBs.[621] The AfCFTA Agreement has therefore built upon the achievements from the RECs to deal with NTBs and any disputes arising from such actions.[622]

3.9.3 Duties and other regulations of commerce

The relationship between the parties of an FTA and the members of the WTO not party to the FTA, in respect of duty concessions and ORC, is stipulated as follows:

> […] the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area […][623]

These duties and ORC has also been referred to in Article XXIV:5(a), 5(b), and 8(a)(ii) and appear similar to duties and ORRC used in Article XXIV:8(a)(i) and 8(b). There are parallels in the implications of this section and section 3.8.4 which discussed the removal of ORRC. As is the case with ORRC, ORC is also not defined. ORC is a broad term, demonstrating how flexible WTO law can be. In implementation such terms with elastic meanings can cause different interpretations. Although both ORC and ORRC deal with trade barriers, the distinction between the two is the use of the term 'restrictive' in respect of the latter. Article XXIV does not distinguish between ORC and ORRC, despite the fact that it is clear that one deals with trade with third parties and the other with intra-FTA trade. As discussed in section 3.8.4, the structure of Article XXIV:8(b) demonstrates that ORRC deals with reduction of barriers to intra-RTA trade whereas ORC is used in the context of dealing with barriers to trade with non-members of the

621 Sibangilizwe Mukwena and Jeffrey Kurebwa, 'The Implications of Non-Tariff Barriers to Trade on COMESA Free Trade Area: The Case of Zimbabwe and Zambia' (2019) 15(2) Canadian Social Science 34, 42.

622 Protocol on TiG Art 11; Protocol on Rules and Procedures for Settlement of Disputes (adopted 21 March 2018, entered into force 30 May 2019) (PSD) Art 2.

623 GATT 1994 Art XXIV:5(b).

FTA.[624] This is also corroborated by Saurombe who noted that ORC applies to trade with members of the WTO not participating in the FTA.[625]

From a common and general understanding, regulations to commerce affecting trading partners outside an FTA would include licensing requirements and border formalities. In its submission to the WTO, Korea provided a list of some of the ORCs which were prevalent, including quantitative restrictions and measures of similar effect; TBT and SPS standards; antidumping and countervailing measures; and ROO.[626] ORCs can therefore be interpreted to include trade facilitation instruments developed and implemented within RTAs.

The aim of an FTA is to enhance trade amongst its members and such a gesture among the participating members must not prejudice non-FTA members.[627] This is in line with the notion that Article XXIV's primary objective was not to make RTAs a barrier to the growth of multilateral trade, but rather to make them a step towards free trade.[628] As a consequence, while entering into an FTA, the members must not alter their external trade policies in such a manner that they negatively impact WTO members who are not party to the FTA.[629] It also implies that, when trading with non-members, FTA members would either maintain or reduce tariffs and not raise any trade barriers found in place. In practice, chances are that tariffs involving external trade members of the WTO will gradually be reduced in line with continuous obligations under multilateral trade negotiations. The formation of FTAs, in effect, assures non-members that their tariffs and ORCs have been bound and will not exceed what they were prior to the formation of such an FTA.

The overarching goal is to streamline trade procedures within the FTA. In practice it means that the participation of a country such as South Africa in the AfCFTA must

624 Trachtman 'Toward Open Recognition?' 485.
625 Saurombe, 'SADC Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV' 300.
626 WTO 'Negotiating Group on Rules of Origin, Submission on Regional Trade Agreements: Communication from the Republic of Korea' (11 June 2003) WTO Doc TN/RL/W/116.
627 GATT 1994 Art XXIV:4.
628 Saurombe, 'SADC Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV' 300.
629 Lester and others, *World Trade Law* 357.

result in trade being facilitated with the other parties to the AfCFTA. Additionally, the trade facilitation initiatives within the AfCFTA must not create barriers for trade between South Africa and a country such as Japan, which is a WTO member but does not belong to the AfCFTA. As a result, it can be argued that the establishment of FTAs or RTAs is a neutral action to members of the WTO who are not party to such an RTA since they must not suffer any prejudice.

3.10 Conclusion

Amongst others, Article XXIV defines an FTA and provides rules governing its operations. The Article connects the WTO to CUs and FTAs and highlights their significance in both international and global trade. This chapter has identified the key elements of an FTA and the parameters governing trade relations between FTA members and other WTO members. Article XXIV provides key rules which affect RTAs and authorises FTAs such as the AfCFTA to operate outside the MFN principle.

Article XXIV allows a group of countries to form their own FTAs and CUs in order to speed up trade outside of the multilateral trading system while not imposing any burdens that would impede trade with non-members. It spells out the key principle that FTAs, and thus the AfCFTA, are created to liberalise and facilitate trade amongst their members. Article XXIV therefore permits a coalition of certain members of the WTO to cooperate and extend to each other preferential treatment not accorded to every other member of the WTO. Accordingly, FTAs may develop their own legal instruments in order to liberalise and facilitate trade amongst their own members. The AfCFTA can therefore legitimately implement more favourable trade facilitation measures as long as they do not impose additional trade barriers on third parties. Non-AfCFTA members will therefore not be subjected to any additional obstacles when trading with Africa. This chapter further justifies the need to compare global legal texts on trade facilitation with those created by AfCFTA members who wish to expand trade amongst themselves.

The analysis found that the AfCFTA is an FTA as defined, and as a result, is bound by WTO rules. The AfCFTA therefore complies with the WTO requirements requirements for an FTA. As an FTA, the AfCFTA serves as a building block for a liberalised global

trading system in which barriers to trade are removed. African countries can therefore take advantage of the AfCFTA in resolving their economic developmental issues rather than rely on multilateralism, which is slower as a result of a large global membership. This chapter also found that, although RTAs are established as trade regimes, some of them serve political and developmental reasons.

CHAPTER FOUR

ECONOMIC INTEGRATION IN AFRICA: HISTORICAL AND LEGAL PERSPECTIVES

4.1 Introduction

Chapter Three demonstrated that RTAs are a tool to regulate international trade relations amongst the relevant partners. RTAs are an important instrument to foster national and regional development. In addition, as economic integration deepens, some of these trading configurations have also assumed political responsibilities and regional political influence.[630] As already discussed, RTAs complement the goals of the larger multilateral trading system.[631] The AfCFTA represents a milestone towards the realisation of a political vision of economic integration that dates back to the OAU in 1963, which was formed as a Pan-African organisation to represent the voice of independent African countries.[632] The founding of the OAU (later renamed the AU) emphasised the need for a shared vision for Africa's integration within itself and with the international community as a means of development and economic independence.[633] Under the auspices of the OAU, the continent devised the Abuja Treaty, which outlined a timetable for the formation of an economic union by 2034.[634]

This chapter examines the historical and legal dimensions of Africa's quest for economic integration, which led to the AfCFTA Agreement. It demonstrates concerted convergences by African nations and their continental organisation towards creating an appropriate integration agenda for Africans. This vision has gradually been realised through the implementation of successive treaties such as the Charter of the Organisation of African Unity (hereafter the OAU Charter), the Abuja Treaty and the

630 Refer to Section 4.5 which shows that the RECs also play a political role to their members.
631 Refer to Chapter 3.
632 Gino J Naldi, *The Organisation of African Unity: An Analysis of Its Role* (2nd edn, Mansel 1999) 1.
633 Charter of the Organisation of African Unity (adopted 25 May 1963, entered into force 13 September 1963) (1963) 2 ILM 766 (OAU Charter) Art II.
634 Abuja Treaty Art 6:1.

Constitutive Act of the African Union (hereafter the AU Constitutive Act), and the AfCFTA Agreement. The establishment of the AfCFTA is therefore a step towards establishing a continental CU and the AEC.[635]

4.2 Organisation of African Unity to the African Union

The OAU was formed when thirty-two African Heads of State and Government met in Addis Ababa, Ethiopia in 1963 and adopted the OAU Charter which formally established the organisation.[636] The OAU Charter was an international treaty whose membership was for the independent African states, including the surrounding islands such as Comoros, Mauritius and Madagascar.[637] The objectives of the new organisation were broad and covered cooperation in areas such as political liberation, abolition of colonialism, defence and security, and economic development of Africa.[638] It was an intergovernmental organisation with no supranational authority.[639]

Although the word 'integration' was not mentioned in the objectives of the OAU Charter, it is clear that, amongst other things, desired unity and cooperation was desired to improve the lives of Africans. A narrowed and focused form of economic integration is implied in the OAU Charter where, amongst others, it identifies the coordination and harmonisation of economic cooperation, including transport and communications.[640] The establishment of the OAU was welcomed because its vision sought to uplift the living standards of the continent.[641] Economic integration, as opposed to mere international cooperation, is viewed as a process of bringing together different nation states and removing trade barriers and various forms of discrimination among the parties involved.[642] It can be argued that integration is so broad and can cover several sectors, and economic integration is just a subset of integration. It can also be claimed

635 AfCFTA Agreement Art 3:d.
636 Naldi, *The Organisation of African Unity* 1.
637 OAU Charter Art I:2.
638 OAU Charter Art II.
639 Eduard Marinov, 'The History of African Integration: A Gradual Shift from Political to Economic Goals' (2014) 6(4) Journal of Global Economics 74, 77.
640 OAU Charter Art II:2.
641 Naldi, *The Organisation of African Unity* 37.
642 Balassa, *Theory of Economic Integration* 2.

that the OAU intended a broad and holistic form of integration. [643] Economic integration is emphasised by trade economists in the context of creating markets and liberalising trade while allowing the free movement of people and factors of production.[644] As examined earlier, economic integration usually leads to political integration.[645] The OAU Charter implied this sectoral and total integration of the continent.[646] A milestone for the OAU was the conclusion of the Abuja Treaty in 1991.[647] Unlike the OAU Charter, the AU Constitutive Act is more explicit and refers to a continental political and socio-economic integration.[648] Some fifty-five years after the adoption of the OAU Charter, and two decades after the adoption of the Abuja Treaty, then came the AfCFTA Agreement, whose objective included liberalising trade and deepening economic integration in the continent.[649] The AfCFTA Agreement therefore shares the ideals of the OAU Charter, Abuja Treaty and AU Constitutive Act.

By 1994, the OAU had scored highly on the continent's political liberation with all African countries achieving political independence and no longer being colonies of the West.[650] During the 1999 OAU Summit held in Algiers, Algeria, Heads of States and Government resolved to fast track the implementation of the Abuja Treaty.[651] In terms of economic integration, the OAU managed to lay the necessary groundwork for the realisation of a Pan-Africanist vision involving trade and economic issues.[652] Despite high political scores, the OAU has been criticised for being incoherent in resolving continental issues

643 OAU Charter Art II.

644 Steve Kayizz-Mugerwa, John C Anyanwu and Pedro Conceição, 'Regional Integration in Africa: An Introduction' (2014) 26(1) Afr Dev Rev 1.

645 Refer to Chapter 3.

646 OAU Charter preamble and Art II.

647 Refer to section 4.4.

648 Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 (AU Constitutive Act) Art 3(c).

649 AfCFTA Agreement Art 3.

650 Kasaija Phillip Apuuli, 'The African Union and Regional Integration in Africa' in Daniel H Levine and Dawn Nagar (eds), *Region-Building in Africa: Political and Economic Challenges* (Palgrave Macmillan 2016).

651 OAU Assembly of Heads of State and Government, 'Thirty-Fifth Ordinary Session of OAU/Third Ordinary Session of AEC, Decisions and Declarations of the Assembly: Implementation of the AEC Treaty and Ratification of the AEC Treaty' (12-14 July 1999) AHG/Decl 1-2 (XXXV) Algiers, Algeria AHG/Dec 132-142 (XXXV) AHG/OAU/AEC/Dec.1.

652 Robson, *Economic Integration in Africa* 12-13.

concerning democracy, human rights, disputes, peace and security matters.[653] The author considers that political independence on its own and the laying of a firm ground for deep economic integration were major achievements during the OAU era. The consolidation of democracy and human rights would be viewed as an internal process within the independent countries, and admittedly they would require intervention from the continental organisation.

At the dawn of the new millenium, the OAU acknowledged the need for institutional reforms in order to confront the new century from a well-coordinated position of strength, and it accordingly transformed itself into the AU in July 2002.[654] The Heads of States and Governments adopted the AU Constitutive Act which repealed the OAU Charter.[655] Some of the consequences of establishing the AU included structural changes such as transforming the OAU Secretariat into a more meaningful African Union Commission (AUC) led by a Chairperson rather than a Secretary General.[656] The AU Constitutive Act also created a Pan-African Parliament (PAP) as one of the AU's organs, whose purpose was to broaden the participation of African people in the continent's agenda on economic development and integration.[657]

The AU Constitutive Act recognises the significance of economic integration, as indicated by two of the eleven preambular clauses that relate to the Abuja Treaty, which states:

> […] CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community; […]
>
> […] CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-

653 Martin Welz, *Integrating Africa: Decolonization's Legacies, Sovereignty and the African Union* (Routledge 2013) 7.

654 AU Assembly of Heads of State and Government, 'First Ordinary Session, Decisions and Declarations of the Assembly: The Durban Declaration in Tribute to the Organization of African Unity on the Occasion of the Launching of the African Union' (10 July 2002) AU Doc ASS/AU/Decl.2(I).

655 AU Constitutive Act Art 2.

656 AU Constitutive Act Art 20:1.

657 AU Constitutive Act Art 17:1.

> economic development of Africa and to face more effectively the challenges posed by globalization […][658]

The AU Constitutive Act also identifies additional objectives which are more comprehensive and developmental in nature. This includes nurturing an environment in which the continent can coordinate its inputs into the activities of the RECs and the global economy.[659]

The AU Constitutive Act reinforces the position stated in the Abuja Treaty. The RECs are recognised as a means to realise the vision of the AU, which includes the harmonisation of trade policies as well as advocating continental positions when dealing with global issues.[660] The replacement of the OAU Charter with the AU Constitutive Act did not affect the status of the Abuja Treaty which remained as a stand-alone treaty dealing with the implemention of a roadmap towards establishing an AEC.[661] The AU Constitutive Act however supercedes any inconsistencies that could have been in the Abuja Treaty.[662]

The AU's supreme organ is the Assembly of Heads of State and Government (hereafter the Assembly) which meets at least once a year in an ordinary session but may also convene an extraordinary session.[663] The Assembly is the decision making body of the AU.[664]

4.3 Lagos Plan of Action

The concept of an AEC can be traced back to a series of engagements between the OAU, UNECA and the African states in the 1970s.[665] This resulted in the Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (hereafter referred to as

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658 AU Constitutive Act preamble.
659 AU Constitutive Act Art 3.
660 Abuja Treaty Art 28:1. Also refer to Section 4.5 of the study.
661 Refer to section 4.4.1.
662 AU Constitutive Act Art 33:2.
663 AU Constitutive Act Art 6.
664 AU Constitutive Act Art 7.
665 Francis Mangeni and Calestous Juma, *Emergent Africa: Evolution of Regional Economic Integration* (Headline Books 2019) 49.

the LPA) which developed a broad strategy for an economic-oriented blueprint for the integration and growth of Africa.[666] The LPA, with its Annex I, the Final Act of Lagos (FAL), were adopted by OAU Heads of State and Governments at a Special Economic Summit in Lagos, Nigeria in April 1980.[667] The LPA was a strategic document with a commitment to implement it in stages over the two decades of the 1980s and 1990s.[668] Its emphasis was on economic integration in a variety of sectors such as agriculture, industry and energy. UNECA was to act as a coordinator, marshalling technical assistance and serving as a link between the OAU and the UN.[669] The 1980s were set aside for the establishment of RECs in each of the regions in Africa while the 1990s were set aside for creating a CM common market as a stride towards the AEC by 2000.[670]

Despite the declarations and the pledges of the LPA, the plan was not carried out. Several reasons have been advanced, including a lack of desire among members in the face of other priorities such as political conflicts.[671] The LPA's ambition of creating an AEC for more than fifty nations by 2000 was too ambitious for the continent, which faced several hurdles. A number of African countries experienced economic problems in the 1980s and 1990s, resulting in the adoption of structural economic adjustments which were seen as a solution to the situation.[672] That pre-2000 era could have been spent strengthening unity, establishing RECs, and consolidating the operations of the regional configurations.

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666 Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (adopted 29 April 1980) (LPA) Annex I:I and II.

667 The thesis will therefore make reference of the LPA. FAL is an Annex of LPA. Only when necessary, will reference be made to FAL.

668 LPA and FAL, Annex I:II.

669 Rose M D'Sa 'The Lagos Plan of Action: Legal Mechanisms for Co-operation Between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) 27(1) JAL 4.

670 LPA Annex I:I and II.

671 Mzukisi Qobo, 'The Challenges of Regional Integration in Africa in the Context of Globalisation and the Prospects for a United States of Africa (ISS Paper 145)' (*Institute for Security Studies*, June 2007) <https://issafrica.s3.amazonaws.com/site/uploads/Paper145h.pdf> accessed 30 December 2021.

672 Naldi, *The Organisation of African Unity* 241.

The author considers that the LPA was more of an academic and rhetoric document that contained expressions of intent but lacked the legally binding treaty provisions that require implementation. A number of actions required from the member states in areas of trade used language that was either insufficiently binding or, at best, merely best endevours.[673] The LPA was devoid of monitoring and evaluation apparatus commensurate with such a continental strategy. The LPA demonstrated that the resolutions of the Assembly require more than a mere declaration to be implemented. The LPA lacked an implementation plan supported with the necessary resources. The LPA is a typical example of instruments whose legal status are unclear with no explicit intention to create legal obligation, and what Evans terms as 'soft law' or agreements.[674] Soft agreements, such as declarations or statements expressing a desired vision or goal, cannot be ratified at national level. The LPA was, however, a bold and ambitious declaration on paper that provided insights into economic integration for Africa, and thus laid the groundwork for the Abuja Treaty.

4.4 The Abuja Treaty

While some critics questioned the effectiveness of the LPA, its promoters, UNECA and OAU, used it as a foundation for further consultations within the continent to establish appropriate time lines and treaty language.[675] This culminated in the OAU member states signing the Abuja Treaty in 1991, which came into effect in 1994 after attaining the required number of ratifications.[676] The Abuja Treaty created a continental framework for cooperation and development with the goal of achieving economic stability, promoting self-sufficiency, and improving the standard of living in Africa.[677]

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673 As an example, Chapter VII dealing with Trade and Finance, under para. 250 reads:
'(e) Member States should endeavour to eliminate all obstacles which have the effect of curtailing trade among themselves by *the year* 1990;
'(f) Member States should grant to each other best favoured nation treatment in their integrational trade as soon as possible;'

674 Malcolm D Evans, *International Law* (OUP 2003) 174, 175.

675 Gilbert M Khadiagala, 'Institution Building for African Regionalism (ADB Working Paper on Regional Economic Integration No 85)' (*Asian Development Bank*, August 2011) <www.econstor.eu/bitstream/10419/109596/1/wp-085.pdf> accessed 7 June 2021.

676 Kyu Deug Hwang, 'Some Reflections on African Development Strategies in the 21st Century: From the LPA to NEPAD' (2009) 16(2) Journal of International and Area Studies 125, 130.

677 Abuja Treaty Art 4:1.

The Abuja Treaty can be regarded as the apex treaty of the AU in terms of the vision, desires, objectives and time frames of the continent's agenda on economic integration. It is therefore an international treaty designed to deepen the integration of African economies. It embraced the concept of using the five geopolitical regions of the continent which are the Northern, Western, Central, Eastern and Southern as a foundation towards building an integrated continent.[678] The Abuja Treaty is therefore premised on the principle that RECs are building blocks for the AEC.[679] This principle is entrenched in the key legal and policy instruments of the OAU including the OAU Charter[680] and the LPA.[681] The subject of RECs is discussed in section 4.5 below.

4.4.1 Objectives of the Abuja Treaty

The Abuja Treaty states that the AEC is a subsidiary of the AU, implying that it derives its authority from the umbrella organisation.[682] While the RECs pursue their own regional integration agendas through their respective treaties, the Abuja Treaty coordinates the AU's continental integration agenda, which is to be achieved through the RECs.[683] The broad goals of the Abuja Treaty includes the complete integration of the African economies.[684] There is a legal relationship between the AU, the Abuja Treaty and the RECs.[685] One of the specific objectives of the AEC is to establish FTAs in Africa and to liberalise trade in the continent.[686] The issue of trade facilitation is indelible and the Abuja Treaty mentions the harmonisation and standardisation of procedures in order to ease the cross-border flow of goods throughout the continent.[687] In a way the AfCFTA realises this through its trade facilitation instruments which are discussed in Chapters Five and Six of the thesis.

678 Abuja Treaty Art 1:1(d).
679 Mangeni and Juma, *Emergent Africa* 52.
680 OAU Charter Art II:(a) and (b).
681 LPA para 14.
682 Abuja Treaty Art 98:2.
683 Abuja Treaty preamble and Art 4. Art 98-99; AU Constitutive Act preamble and Art 3.
684 Abuja Treaty Art 4:1(a)-(c).
685 Abuja Treaty preamble, Art 4, Art 98-99; AU Constitutive Act preamble and Art 3. Also refer to Section 4.5.
686 Abuja Treaty Art 4:2(d).
687 Abuja Treaty Art 39.

An interesting observation is that, despite using GATT language and tone on matters involving trade, the Abuja Treaty does not make any reference to the then existing GATT 1947 which was operational when the Abuja Treaty was signed in 1991. Chapters II and V of the Abuja Treaty used the common GATT language, for example, by referring to FTAs, CUs, elimination of barriers to trade, the MFN principle, exceptions and the CET. The Abuja Treaty was signed prior to GATT 1994 and before the establishment of the the WTO. This can be seen as an indication that although the continent was developing its specific framework of trade and economic integration based on its own peculiar vision and aspirations, it respected the fact that trade or integration in Africa must be conducted within certain GATT principles and taking cognisance of certain acceptable international standards. There is no evidence that the African vision was compromised. This actually shows that trade amongst African countries can be conducted successfully within the principles and guidelines set by GATT and the WTO.

4.4.2 Implementation stages of the Abuja Treaty

The Abuja Treaty identified six sequential and linear stages for the establishment of the AEC within fourty years of the treaty's entry into force.[688] In general, these stages adhere to the Balassa approach of a methodical deepening of integration beginning with the FTA, CU, CM and an economic union.[689] Although the Abuja Treaty makes no mention of a AfCFTA, it recognises that a continental CU cannot bypass the FTA stage in any of the RECs.[690]

Table 4.1 depicts the stages outlined in the Abuja Treaty, and all leading towards the attainment of the AEC. Each stage has a clear timeframe and what must be achieved by a certain date. The first four stages involve liberalising the movement of goods in the RECs through establishing a continental CU. To some extent, this shows the importance that the Abuja Treaty attaches to trade facilitation in the continent. Most of

688 Abuja Treaty Art 6:5.
689 Balassa, *Theory of Economic Integration* 2.
690 Abuja Treaty Art 6:2(c) and (d).

the RECs have accomplished the first three stages although the degree of achievement differs.[691]

Table 4.1: Roadmap for the establishment of the African Economic Community

Provisions extracted from the Abuja Treaty				Comments by the author[692]
Stage	**Key tasks**	**Time frame**	**Relevant provisions in the Abuja Treaty**	
1	Consolidate existing RECs; Build new RECs to cover regions where none exist.	1994 to 1999	Article 6:2(a)	This is in line with Article XXIV which considers the trading aspects of RECs as contributing towards the global. See discussions in Chapter 3, particularly sections 3.2 to 3.5.
2	Stabilise and eliminate tariff and NTBs within RECs, as well as coordinate and harmonise activities	2000 to 2007	Article 6:2(b)	This is in line with Article XXIV. These are trade facilitation issues which are discussed in Chapter 5.
3	Establish FTAs and CUs in each REC	2008 to 2017	Article 6:2(c)	FTAs and CUs are created in order to facilitate trade in line with Article XXIV, as discussed in Chapter 3.
4	Establish a continental CU	2018 to 2019	Article 6:2(d)	CUs are created in order to facilitate trade in line with Article XXIV as discussed in Chapter 3.
5	Establish an African Common Market, including rights to establishment, residence and movement of people.	2020 to 2023	Article 6:2(e)	While benefitting Africa, this stage integrates Africa into the global economy.
6	Create single currency and establish other continental institutions to support implementation of the AEC such as: single African Central Bank and PAP.	2024 to 2028	Article 6:2(f)	While benefitting Africa, this stage integrates Africa into the global economy.
	Latest date for implementation of the AEC	2034	Article 6:6	Operationalise AEC within fourty years of Abuja Treaty's entry into force.

Source: Author: Compiled using data obtained from Art. 6 of the Abuja Treaty.[693]

The above Table 4.1 also illustrates that the establishment of the AEC would be premised upon the efforts and achievements of the RECs. Furthermore, advancement to the next deeper stage is contingent on meeting the requirements of the previous

691 Refer to section 4.5 of the study.
692 This column represents the authors analysis of the various stages of the Abuja Treaty.
693 Abuja Treaty Art 6.

stage, while the implementation of the AEC must be a reality by 2034.[694] The following are some examples of the stages:

- Third stage – within a period of no more than ten years;[695]
- Fifth stage – within a period of no more than 4 years;[696]
- Sixth stage – within a period of no more than 5 years;[697]

The following is the definitive date and overarching deadline for the entire process from start to finish:[698]

> 4. The transition from one stage to another shall be determined when the specific objectives set in this Treaty or pronounced by the Assembly for a stage, are implemented and all commitments fulfilled. The Assembly, on the recommendation of the Council, shall confirm that the objectives to a particular stage have been attained and shall approve the transition to the next stage.
>
> 5. Notwithstanding the provisions of the preceding paragraph, the cumulative transitional period shall not exceed forty (40) years from the date of entry into force of this Treaty.

The dates in Table 4.1 are thus drawn from 1994 when the treaty entered into force, with the next stage dependent on the completion of the preceding stage and on the condition that the total period is completed within forty years, which translates to 2034.There is also enough time between the completion of stage 6 and the latest date for implementation of the AEC. The Abuja Treaty is therefore more realistic than the LPA which had stipulated a period of twenty years for the establishment of the AEC.[699]

The signing of the AfCFTA Agreement in March 2018 was therefore a significant step towards achieving the third stage stipulated in the Abuja Treaty. According to the projection in stage 4 of the Abuja Treaty, a CU was supposed to have been established by 2019. This was not achieved and will therefore have an effect on subsequent stages and their deadlines. The CU has not yet been attained in two of the major RECs, namely

694 Abuja Treaty Art 6:5.
695 Abuja Treaty Art 6:2(c).
696 Abuja Treaty Art 6:2(e).
697 Abuja Treaty Art 6:2(f).
698 Abuja Treaty Art 6:4 and 6:5.
699 Refer to section 4.3.

COMESA and SADC, whose targets were 2009 and 2010 respectively. The attainment of FTAs by the RECs made the negotiations of a continental FTA easier since this involved the merging and rationalisation of what had been accomplished. The establishment of CUs involves a lot more policy interventions and loss of sovereignity. The COVID-19 pandemic has also had a detrimental efect on the world economy, disrupting several economic sectors at national, regional and global levels, including global value chains, commodity prices, fiscal revenues, labour markets and business practices.[700] This might delay, but will not stop, the continent's agenda of economic integration.

Unlike the LPA, which was merely a declaration, the Abuja Treaty is a legally binding international agreement with treaty language. It contains extensive provisions that cover various sectors. As an example, Articles 29 to 42 give extensive coverage to the measures which Africa must implement to liberalise trade. The inclusion of trade liberalisation demonstrates complementarities between the Abuja Treaty and WTO legal texts in that they both seek to remove restrictions in trade.[701] The WTO and GATT 1994 are both geared toward trade liberalisation.[702] Some of the trade liberalisation issues covered by the Abuja Treaty and relevant to the AfCFTA are the removal of customs duties in RECs,[703] the removal of NTBs,[704] MFN treatment,[705] freedom of transit,[706] Customs cooperation,[707] trade documentation and procedures,[708] and trade promotion.[709] The author considers that the Abuja Treaty therefore established a solid foundaton, with practical time frames, for a continental trade regime. Except for the AMU, all of the RECs acknowledge, in their treaties, the parenthood of the LPA and the

700 AU, *Impact of the Coronavirus (COVID 19) on the African Economy* (AU 2020) 6.
701 Arye L Hillman, 'Trade Liberalization and Globalization' in Charles Rowley and Friedrich Schneider (eds), *The Encyclopedia of Public Choice* (Springer 2008).
702 GATT 1994 preamble; WTO Agreement preamble.
703 Abuja Treaty Art 30.
704 Abuja Treaty Art 31.
705 Abuja Treaty Art 37.
706 Abuja Treaty Art 38.
707 Abuja Treaty Art 39.
708 Abuja Treaty Art 40.
709 Abuja Treaty Art 42.

Abuja Treaty in their establishment.[710] These RECs, which are pillars of continental integration and the AfCFTA, are not only a product of the Abuja Treaty but of the AU and its predecessor, the OAU.[711]

Beyond putting in place all the legally binding treaties, there is the aspect of political will to accomplish the objectives. The maturity of systems within the OAU, and the establishment of the AU, witnessed a shift among member states, recognising that the ratification of their own multilateral treaties is crucial to the acceleration of economic and political integration.[712] Since the signing of the Abuja Treaty in 1991, there have been achievements in the establishment or strenghtening of RECs and in the implementation of the respective programs leading to the signing of the AfCFTA Agreement, thus creating a platform for implementing cross-border trade regionally and continentally.

4.5 Regional Economic Communities of the African Union

The term 'Regional Economic Community' or 'REC' has been used in the LPA, Abuja Treaty and AU Constitutive Act, although none of them defined it.[713] The Abuja Treaty also called for the establishment of RECs where none existed, and it was from these RECs that the AEC was to be gradually established.[714] The Abuja Treaty makes numerous references to RECs as building blocks for deeper continental integration.[715] It also calls upon member states to consolidate and strengthen the existing RECs.[716] The Abuja Treaty therefore regards RECs as a means of achieving the AEC.[717] Rather than limiting a REC to economic integration, the Protocol on Relations Between the African Union and the Regional Economic Communities established a broader and holistic definition of a REC as "a regional grouping of African states organized into a

710 Refer to Section 4.5.
711 AfCTA Agreement preamble.
712 Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13(2) MILJ 1, 3.
713 For example, refer to LPA and FAL Annex I:II (B)(1) and Abuja Treaty Art 6:2(a).
714 Abuja Treaty Art 28:2.
715 Examples are Arts 4, 6:2, 28 and 88 of the Abuja Treaty.
716 Abuja Treaty Art 28:1.
717 Abuja Treaty Art 28.1.

legal entity by treaty with economic and social integration as the main objective".[718] This replaced the narrow meaning in the repealed 1998 Protocol on Relations Between the African Economic Community and the Regional Economic Communities.[719]

The AU decided that out of the many regional groupings in Africa, the following eight be recognised as RECs and as pillars for building the AEC: AMU, COMESA, EAC, ECCAS, CEN-SAD, ECOWAS, IGAD, and SADC.[720] The term 'REC' has become unique to the AU, and as noted, it is used to refer to the eight blocks recognised by the AU. All fifty-five countries of the AU belong to at least one of the RECs and there are many cases of multiple memberships.[721] These eight regional groupings are the sole RECs upon which integration in Africa will be built.[722] Africa has a total of fourteen regional groupings, six of which are not recognised as RECs and building blocks under the Abuja Treaty.[723] It should be emphasised that those six groupings have advanced their integration efforts and are assisting in the continent's overall integration. The substance of these RTAs that are non-RECs featured prominently when the Economic and Monetary Community of Central Africa (CEMAC) and SACU submitted, as blocs, their list of goods to be accorded duty-free status, despite the fact that they had participated in the negotiations for the AfCFTA as individual countries.[724] Although not amongst the eight RECs recognised by the AU, CEMAC and SACU are trading blocs

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718 Protocol on Relations Between the African Union and the Regional Economic Communities (adopted January 2008) (Protocol on Relations Between AU and RECs) Art 1.

719 Protocol on Relations Between the African Economic Community and the Regional Economic Communities (adopted 25 February 1998, entered into force 25 February 1998) (Protocol on Relations Between AEC and RECs) Art 1:d, which defined a REC as a corporate legal entity established by its own treaty and whose objective is to promote economic integration as a step towards the establishment of the AEC.

720 AU Assembly of Heads of State and Government, 'Seventh Ordinary Session, Decisions and Declarations of the Assembly: Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs)' (2 July 2006) AU Doc ASS/AU/Dec.112(VII)-EX.CL/278(IX).

721 Refer to section 4.7.

722 Also refer to sections 3.3.3 and 4.5.

723 Refer to Kwame Akonor, *African Economic Institutions* (Routledge 2010) 65. The six which are not RECs are: Economic and Monetary Community of Central Africa (CEMAC), Indian Ocean Commission (IOC), West African Economic and Monetary Union (UEMOA/WAEMU), Economic Community of the Great Lakes Countries (CEPGL), Mano River Union (MRU), and Southern African Customs Union (SACU). Also refer to Akonor, *African Economic Institutions* 65.

724 AfCFTA, 'This Month in Trade in Goods and Competition' (May 2022) <https://au-afcfta.org/2022/05/this-month-in-tigc-may-2022/> accessed 26 June 2022.

with their own CETs and whose memberships could therefore not offer anything dissimilar. A SACU member, such as Namibia, is obliged to implement the same tariff structure in respect of goods entering that CU since it is party to that customs territory.[725]

It is evident that the AfCFTA has an African context and was derived from the Abuja Treaty and AU Constitutive Act. The preamble to the AfCFTA Agreement acknowledges the quadripartite relationship among the AfCFTA Agreement, the AU Constitutive Act, the Abuja Treaty and the WTO Agreement, and states:

> COGNISANT of the launch of negotiations for the establishment of the Continental Free Trade Area[726] aimed at integrating Africa's markets in line with the objectives and principles enunciated in the *Abuja Treaty* during the Twenty-Fifth Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Johannesburg, South Africa from 14-15 June 2015 (Assembly/AU/Dec. 569(XXV);
>
> DETERMINED to strengthen our economic relationship and build upon our respective rights and obligations under the *Constitutive Act of the African Union of 2000,* the *Abuja Treaty* and, where applicable, the *Marrakesh Agreement Establishing the World Trade Organization of 1994*; […]
>
> […] ACKNOWLEDGING the Regional Economic Communities (RECs) Free Trade Areas as building blocs towards the establishment of the African Continental Free Trade Area (AfCFTA) […][727]

The preamble to the AfCFTA Agreement conveys possible relationships between the legal texts of the AfCFTA and the WTO, and it brings to the fore some issues pertinent to the study. While acknowledging the importance of the WTO as an overarch on trade issuues, the AfCFTA is premised to serve Africa and within the precincts of global trade rules.

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725 SACU, 'About SACU' <www.sacu.int/show.php?id=394> accessed 27 December 2021. The SACU members are Botswana, Eswatini, Lesotho, Namibia and South Africa. Also refer to section 4.5.8 of this thesis.

726 On 29 January 2018, the Assembly decided to prefix the Continental FTA with 'African' to distinguish it from other FTAs in other continents and to make it clear that reference was to an FTA for Africa. It then became the African Continental Free Trade Area, shortened AfCFTA. Refer to AU Assembly of Heads of State and Government, 'Thirtieth Ordinary Session, Decisions and Declarations of the Assembly, Decision on the Continental Free Trade Area' (29 January 2018) AU Doc Ass/AU/666(XXX).

727 AfCFTA Agreement preamble

The AfCFTA Agreement acknowledges the importance of its forerunner, the RECs, and the fact that continental integration will be premised upon the eight RECs.[728] The AfCFTA Agreement also defines REC, and in alignment with other texts of the AU, it acknowledges that the eight RECs are recognised by the AU.[729] This study proceeds to provide an overview of the RECs which are recognised by the AU and which are building blocs of the AfCFTA.[730]

4.5.1 Arab Maghreb Union

The AMU was established in 1989 by the Treaty Establishing the Arab Maghreb Union for the northern region of Africa. The founding members were Algeria, Libya, Mauritania, Morocco and Tunisia.[731] In terms of the number of countries, the AMU is the smallest of the RECs with only five countries participating. The AMU's highest decision-making body is the Heads of States and Governments.[732] Its objectives are diverse, including economic objectives, cultural objectives, the strengthening of cooperation amongst members, and free trade.[733] The objectives include elements from the LPA and are also consistent with the Abuja Treaty. The objectives of the AMU are consistent with those of the Abuja Treaty. The members therefore underscore the need for activities which lead to the development of Africa.

The AMU emphasises the importance of unity among its members and the fact that these are founded on the history, Islam religion and Arabic language of its membership. The AMU plays a major representative role in continental issues, not only from a regional perspective but also from the perspective of the African community whose language and culture are Arabic and with Islam as dominant religion. The common feature among its members and which gives the REC a unique identity in Africa, is a strong Arab-Islamic culture that has existed for centuries in North Africa. The members

728 AfCFTA Agreement preamble and definition of 'RECs'.
729 AfCFTA Agreement preamble.
730 The section differs from the discussions in Chapter 5 whose focus was to define trade facilitation.
731 Treaty Establishing the Arab Maghreb Union (adopted 17 February 1989, entered into force 1 July 1989) 1546 UNTS 160 (AMU Treaty) preamble.
732 AMU Treaty Art 2.
733 AMU Treaty Art 6.

recognise their connection to the vision of a progressive continent. When the AMU was established the Heads of States declared:

> […] Convinced that a developed Maghreb entity will enable our countries to support joint action with the rest of the brotherly African countries for the progress and prosperity of our African continent […][734]

The AMU is therefore a pillar contributing to Africa's agenda in that it brings together the Arab-Islamic states of North Africa and takes them into the continental agenda as an entity. All the members of the AMU have signed the AfCFTA Agreement, demonstrating their commitment to trade with the rest of the continent. Despite its strong geographic proximities and cultural affinities, the AMU has been marred by conflicts among its members, which has hampered progress towards its own agenda on economic integration.[735] As a result of the regional political conflicts, the AMU's political, economic and cultural integration has been slow.[736] Consequently, the AMU has yet to attain its own FTA as a region.

It should be noted that the geographic location of AMU members is strategic and links Africa with the Mediterranean, Europe and the Middle East. The AMU incorporates North African and Arabic-speaking Africa into the continental agenda. The AfCFTA countries can take advantage of this natural geographical positioning of AMU to trade with the European and Arabic markets. AMU is therefore a key representational pillar of continental agendas like AfCFTA. Further, most members of the AMU belong to CEN-SAD, a REC which was founded in 1998 and which has made progress in economic integration as discussed in section 4.5.3 below.

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734 AMU Treaty, Declaration of the Institution of the Arab Maghreb Union.

735 Finaish MA and Bell E, 'The Arab Maghreb Union' (*IMF*, 1 May 1994) <https://www.elibrary.imf.org/view/journals/001/1994/055/article-A001-en.xml> accessed 9 June 2021.

736 Barth M, 'Regionalism in North Africa: The Arab Maghreb Union' (Brussels International Centre, 7 June 2019) <www.bic-rhr.com/research/regionalism-north-africa-arab-maghreb-union-2019> accessed 17 October 2022 2.

4.5.2 Common Market for Eastern and Southern Africa

COMESA is one of the largest RECs with a geographical area of two thirds of the African continent and almost 45% of the continent's population.[737] Membership to COMESA is open to countries in Eastern and Southern Africa.[738] Membership can also be extended to countries who are immediate neighbours of a member state and this has contributed to the growth of the REC.[739] As of 1 May 2022, COMESA had a total membership of twenty-one countries covering Eastern, Central, Southern and Northern Africa.[740] In terms of member countries, COMESA is second to CEN-SAD, which has twenty-nine members.[741] COMESA is, however, deeper than CEN-SAD in economic integration since the latter is not yet an FTA whereas COMESA operated as an FTA since 2000.[742] This context demonstrates the significance of COMESA to the agenda of the AfCFTA. In terms of the continental trade agenda and business, COMESA therefore has more members than any of the RECs, bringing countries from four of the regions in Africa, and thus becoming a strategic REC of the AfCFTA.

COMESA evolved from the Treaty Establishing a Preferential Trade Area (PTA) for Eastern and Southern Africa, which was signed in 1981 and came into force in 1982.[743] After a decade of operating as a PTA, the Treaty Establishing a Common Market for Eastern and Southern Africa (hereafter COMESA Treaty) was signed in 1993 and entered into force in 1994. The supreme authority responsible for directing COMESA

737 COMESA, 'What is COMESA?' <www.comesa.int/what-is-comesa/> accessed 28 December 2021; COMESA, 'Quick Facts About COMESA' <www.comesa.int/quick-facts-about-comesa-2/> accessed 28 December 2021.

738 Treaty Establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994) (1994) 33 ILM 1067 (COMESA Treaty) Art 1:2 and 1:3.

739 COMESA Treaty Art 1:3.

740 COMESA, 'Member States' <www.comesa.int/members/> accessed 1 May 2022. The twenty-one member states were Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

741 Refer to para 4.6.3 which discusses CEN-SAD.

742 COMESA, 'What is COMESA?'.

743 COMESA Treaty preamble.

are Heads of State and Government.[744] COMESA was established in line with the Abuja Treaty, and the COMESA Treaty expressly states in its preamble:

> […] INSPIRED by the objectives of the Treaty for the Establishment of the African Economic Community and in compliance with the provisions of Article 28(1) of the said Treaty;
>
> DETERMINED to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development […][745]

COMESA's objectives include cooperation in all fields of economic activities, promoting peace and stability amongst its members; and contributing towards achieving the goals of the AEC.[746]

COMESA's uniqueness stems from the fact that it includes member states from four AU regions (that is the Eastern, Central, Southern and Northern Africa), thus creating a quandary of overlapping memberships, covering a big portion of Africa. Although COMESA launched a CU in 2009, progress towards implementing it has been slow and the member states have not implemented a CET.[747] COMESA is therefore operating as an FTA. Based on an AU assessment of the performance of RECs, COMESA was ranked fourth after ECOWAS, EAC and ECCAS.[748] The assessment was based on identified dimensions of integration which included free movement of persons, infrastructure development, monetary affairs, and trade integration. The activities of a REC are, however, determined by its treaty. COMESA would be scored high on trade issues, whereas on political issues it would perform poorly because such matters would be attended to by its counterpart RECs where its members also belong, such as IGAD in the Horn of Africa, EAC in East Africa and SADC in Southern Africa. COMESA has made significant contributions regarding Africa's integration agenda and the move

744 COMESA Treaty Art 8.
745 COMESA Treaty preamble.
746 COMESA Treaty Art 3.
747 Mangeni and Juma, *Emergent Africa* 96.
748 AU, *African Integration Report 2020* (AU 2020) 25, 26.

towards an AEC through its extensive programs, which include the FTA, investment, and the establishment of financial institutions to facilitate trade.[749]

4.5.3 Community of Sahel-Saharan States

CEN-SAD was formed in 1998 through the Treaty Establishing the Community of Sahel-Saharan States (hereafter CEN-SAD Treaty) which was later revised in 2013.[750] It consists of twenty-nine members comprised of the countries across and within the Sahara Desert spanning across the Western, Central, Northern and Eastern African countries, including the island state of Comoros.[751] Further, all members of the AMU, except for Algeria, are members of CEN-SAD. The aims and objectives of the REC include cooperation in agriculture, energy, industrialisation, social and cultural issues, trade, transport networks, education, scientific areas and technical fields.[752] The trade agenda is broad, and it covers trade liberalisation and the free movement of persons.[753] The highest organ is the Conference of Heads of State and Government.[754]

CEN-SAD is one of the RECs formed post the Abuja Treaty. The CEN-SAD Treaty embraces the ideals of the LPA and Abuja Treaty and it states:

> […] Bearing in mind the Plan of Action and the Lagos Final Act of April 1980, in particular the measures aimed at the economic, social and cultural development of Africa and defining, inter alia, those relating to the creation of subregional structures and the strengthening of existing structures with a view to the gradual and progressive establishment of an African Economic Community […]
>
> […] Determined to give concrete expression to the desire for economic, political, cultural and social integration in accordance with the relevant provisions of the Constitutive Act of the African Union and the Abuja Treaty of 1991 […][755]

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749 Mangeni and Juma, *Emergent Africa* 89.

750 Treaty Establishing the Community of Sahel-Saharan State (adopted 4 February 1998) (hereafter CEN-SAD Treaty).

751 AUC, *African Union Handbook 2021* (AU 2021) 152. The twenty-nine members of CEN-SAD are Benin, Burkina Faso, Cabo Verde, Central African Republic, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia.

752 CEN-SAD Treaty Art 3.

753 CEN-SAD Treaty Art 3(f).

754 CEN-SAD Treaty Art 10.

755 CEN-SAD Treaty preamble.

It was founded with the strong support and charisma of the late Libyan leader, Muammar Gaddafi, who offered it headquarters in Tripoli, and as a result it wielded strong political power.[756] The death of Gaddafi in 2011 and the political conflicts in the Sahel-Sahara region affected the economic, political and security programs of the REC.[757] More than half of African countries belong to CEN-SAD, thus making the REC significant to the AfCFTA. It essentially stretches from the Atlantic to the Indian Oceans and has grown to become Africa's largest trading bloc, encompassing all major cultures and languages. The member countries comprise countries from all regions and RECs of the AU. CEN-SAD has not yet achieved FTA status.

CEN-SAD is a good illustration of the challenges experienced by AU members with multiple memberships in various RECs. With its members drawn from the other seven RECs it becomes difficult for CEN-SAD to implement any program that is not in harmony with the other seven RECs. As a result, members may end up committing to implementing selected programmes from identified RECs of their preference. One of the objectives of the AfCFTA is to "resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes".[758] It can also be argued that by virtue of its all-encompassing membership, CEN-SAD could have served as a solid foundation to build the AfCFTA upon. That could have, however, brought strong political issues in view of the dominance of the late Gaddafi. As it turned out, CEN-SAD was one of the key RECs, but not the sole REC, upon which the AfCFTA was built.

4.5.4 East African Community

The EAC covers the Eastern region of Africa. Its history spans from 1917 when, initially, under British colonialism, a Kenya-Uganda Customs Union was formed.[759] The EAC was established in 1967 by Kenya, Uganda and Tanzania soon after their

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756 Khadiagala, 'Institution Building for African Regionalism'.

757 Saeed Ali Ahmed Taha, 'Efforts of Integration in the African Regional Groupings (The Community of Sahel-Saharan)' (2016) 13(44) African Perspectives, Studies and Articles 17, 23-24.

758 AfCFTA Agreement Art 3:h.

759 Khadiagala, 'Region-Building in Eastern Africa'.

independence from Britain, but was disrupted in 1977 following political differences amongst the members.[760] It was resuscitated in 1999, following the signing of the Treaty for the Establishment of the East African Community (hereafter EAC Treaty),[761] which entered into force in 2000. As of 1 April 2022, the membership of the EAC had grown to seven following the entry of Burundi, DRC, Rwanda and South Sudan.[762]

The objectives of the EAC are diverse and include cooperation in economic, developmental, security and political matters.[763] The REC became a CU in 2005[764] and in 2010 it progressed further into a common market.[765] The EAC is currently moving towards establishing a monetary union.[766] The supreme organ of the EAC is the Summit of the Heads of State and Government which provides overall direction for the attainment of its objectives.[767] The EAC Treaty demonstrates that it aims to fulfil the aspirations of the Abuja Treaty and, it states, in part:

> […] DETERMINED to strengthen their economic, social, cultural, political, technological and other ties for their fast balanced and sustainable development by the establishment of an East African Community, with an East African Customs Union and a Common Market as transitional stages to and integral parts thereof, subsequently a Monetary Union and ultimately a Political Federation;
>
> CONVINCED that co-operation at the sub-regional and regional levels in all fields of human endeavour will raise the standards of living of African peoples, maintain and enhance the economic stability, foster close and peaceful relations among African African states and accelerate the successive stages in the realization of the proposed African Economic Community and Political Union states and accelerate the successive stages in the realisation of the proposed African Economic Community and Political Union […][768]

760 EAC Treaty preamble.
761 EAC Treaty Art 153.
762 EAC, 'EAC Partner States' <www.eac.int/eac-partner-states> accessed 14 April 2022; EAC, 'The Democratic Republic of the Congo Joins EAC as Its 7th Member' (29 March 2022) <www.eac.int/press-releases/2402-the-democratic-republic-of-the-congo-joins-eac-as-its-7th-member> accessed 31 March 2022.
763 EAC Treaty Art 5.
764 EAC, 'Customs Union' <www.eac.int/customs-union> accessed 5 January 2021.
765 EAC, 'Common Market' <www.eac.int/common-market> accessed 5 January 2021.
766 EAC, 'Monetary Union' <www.eac.int/monetary-union> accessed 5 January 2021.
767 EAC Treaty Art 11.
768 EAC Treaty preamble.

The EAC is aligned to the Abuja Treaty, and it serves as a building block for both the AfCFTA and the AEC. It has grown from three to seven states that extend from the Indian Ocean in the east to the Atlantic Ocean in the west. This represents a strategic coverage of the continent. The countries involved all belong to a geographic group, they share borders, and have a common history and culture. The member states also have a sense of solidarity, and they refer to themselves as 'partner states' rather than 'member states.[769] The use of the term 'partner state' evokes close relationships of cooperation to achieve common goals. The other RECs use the term 'member state', which implies being subscribed to an institution. Article XXIV emphasises that RTAs are established to achieve a trade agenda. 'Partner' rather than 'member' is therefore more action-oriented and synchronised with Article XXIV. The advances in the EAC can also be attributed to the fact that the REC does not include many countries and cooperation amongst the partners would be easy and effective.

The EAC implements a number of programs in accordance with its treaty and, as a REC, it is regarded as a role model for the continent.[770] The AfCFTA, still in infancy, can learn lessons from the EAC in various areas such as trade liberalisation, market integration, trade facilitation, dispute resolution, and preparations for deeper economic integration. As is the case with other RECs, partner states of the EAC also belong to other RECs. Burundi, Kenya, Rwanda and Uganda all belong to COMESA, whereas Democratic Republic of Congo (DRC) and Tanzania belong to SADC. The EAC has announced that it aspires to be a political federation.[771]

4.5.5 Economic Community of Central African States

ECCAS represents the Central Africa region of the continent and as of 1 January 2022 it had eleven members.[772] Except for Portuguese-speaking Angola, Equatorial Guinea, and São Tomé and Príncipe, nine of the countries were either former French or Belgian colonies. Most of the members therefore share several issues in common such as the

769 EAC, 'EAC Partner States'.
770 Khadiagala, 'Region-Building in Eastern Africa'.
771 EAC Treaty Art 5:2.
772 The eleven members are Angola, Burundi, Cameroon, Central African Republic, Chad, Congo Republic, DRC, Equatorial Guinea, Gabon, Rwanda and São Tomé and Príncipe.

official languages, system of governance, currency, and a common history shaped by European colonialism. Such characteristics shaped by a shared past help to strengthen regional cohesion. As a result, ECCAS is a significant component of the AfCFTA, particularly in representing Central African nations.

ECCAS was established by the Treaty Establishing the Economic Community of Central African States (hereafter ECCAS Treaty) which was signed in 1983.[773] ECCAS was established soon after the LPA and FAL. The Treaty states:

> Recalling: […] The Lagos Plan of Action and the Final Act of Lagos (April 1980), in particular the measures relating to the economic, social and cultural development of Africa and inter alia those relating to the establishment of sub-regional structures with a view to the gradual and progressive establishment of an African common market as a prelude to an African economic community […][774]

The preamble acknowledges the activities that led to the Treaty and specifically mentions that it was reached to fulfil the aspirations of the LPA and FAL. Its objectives are therefore in line with LPA and FAL, and by extrapolation, with the vision of the Abuja Treaty. The objectives of ECCAS are broad and designed to advance and deepen sustainable development in all areas that contribute to the progress of Africa.[775] The pronouncement is wide enough to cover various socio-economic sectors. The ECCAS Treaty has provisions for deeper economic integration through the stages of an FTA and a CU.[776] ECCAS became an FTA in 2004, but failed to graduate into a CU because some of the members needed to consolidate implementation of the FTA.[777] Economic integration is also hampered because its various members have multiple memberships in other RECs.[778] The highest organ of the REC is the Conference of Heads of State

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773 Treaty Establishing the Economic Community of Central African States (adopted 18 October 1983, entered into force 18 December 1984) (1984) 23 ILM 945 (ECCAS Treaty) preamble.

774 ECCAS Treaty preamble.

775 ECCAS Treaty Art 4.

776 ECCAS Treaty Art 6.

777 Nurettin Can and Abubakar Aliyu Maigari, 'Economic Regionalism in Africa: A Study of ECCAS (Economic Community of Central African States) (The 9th International Conference on Management, Economics and Humanities, London, 26-28 July 2019)' <https://www.doi.org/10.33422/9th.icmeh.2019.09.995) accessed 10 June 2021.

778 For example, Angola and Democratic Republic of Congo belong to the SADC while Burundi and Rwanda belong to the EAC.

and Government which is responsible for making decisions, with the provision that some decisions may be delegated to Ministers.[779]

4.5.6 Economic Community of West African States

ECOWAS is unique in that it was formed in 1975 by independent African states. This is different from most RECs, which were either established after the LPA or had an earlier history of cooperation initiated during colonial rule, such as the EAC. ECOWAS was formed because of encouragement from the ECA, the wind of Pan-Africanism that was blowing across the continent at the time and lobbying by the private sector.[780] As a result, ECOWAS is considered to be truly African. This history and Africanism are a major component and contribution to the AfCFTA whose aspiration is driven by an African vision.[781]

ECOWAS is one of the RECs that has grown to a high degree of integration, making it an essential pillar in the continental agenda.[782] It was established by the Treaty of the Economic Community of West African States in May 1975.[783] The treaty was revised in 1993 and replaced by the Revised Treaty of the Economic Community of West African States (hereafter ECOWAS Treaty).[784] ECOWAS has therefore played a key role in influencing economic integration and serving as a model for other RECs to emulate.[785] Whereas this is a positive trait, it can also lead to both its members and the REC itself viewing themselves as the 'big brother' to integration. The ECOWAS Treaty acknowledges the historical role of the LPA. It is consistent with the Abuja Treaty and states:

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779 ECCAS Treaty Art 9.

780 Charles D Jebuni 'The Role of ECOWAS in Trade Liberalization' in Zubair Iqbal and Mohsin S Khan (eds), *Trade Reform and Regional Integration in Africa* (IMF 1998).

781 AfCFTA Agreement preamble.

782 AU, *African Integration Report 2020* 48-50.

783 Treaty of the Economic Community of West African States (adopted 28 May 1975, entered into force 28 May 1975) 1010 UNTS 17, (1975) 14 ILM 1200 (Treaty of ECOWAS).

784 Revised Treaty of the Economic Community of West African States (adopted 24 July 1993, entered into force 23 August 1995) (1996) 35 ILM 660 (ECOWAS Treaty) preamble.

785 Welz, *Integrating Africa* 183.

> […] BEARING IN MIND ALSO the Lagos Plan of Action and the Final Act of Lagos of April 1980 stipulating the establishment, by the year 2000, of an African Economic Community based on existing and future regional economic communities;
>
> MINDFULOF the Treaty establishing the African Economic Community signed in Abuja on 3 June, 1991;
>
> AFFIRMING that our final goal is the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa […][786]

The objectives of ECOWAS, under its new treaty, are aligned with the Abuja Treaty.[787] The objectives are broad and include cooperation for the attainment of an economic union to raise the living standards of its peoples, to improve economic stability, to foster good relations among members, and to contribute towards the development Africa.[788]

As of 1 July 2022, ECOWAS had a membership of fifteen countries from West Africa.[789] The REC includes some influential African countries, such as Ghana which was the first country to achieve independence under Kwame Nkrumah, who laid the groundwork for an integrated and united Africa. Furthermore, Nigeria, the continent's most populous country, is a member of ECOWAS. Nigeria's influence in ECOWAS is also evident when considering that the 1975 treaty bear the name 'Lagos',[790] while both the LPA and the Abuja Treaty all bear the names Lagos or Abuja, which are Nigerian cities. In addition, the headquarters of ECOWAS is based in Abuja, Nigeria. The highest organ in ECOWAS is the Authority of Heads of State and Government.[791]

A comparison of the objectives of the ECOWAS and the Abuja Treaties reveals that the two are complementary. One cannot overlook the role that ECOWAS could have played in contributing towards inputs for the Abuja Treaty. West Africa has had its share of

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786 ECOWAS Treaty preamble.
787 ECOWAS Treaty Art 3:1; Abuja Treaty Art 4
788 ECOWAS Treaty Art 3:1.
789 ECOWAS, 'Member States' <www.ecowas.int/member-states/> accessed 9 July 2022. The members were Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria Senegal, Sierra Leone and Togo.
790 The full name is 'Treaty of the Economic Community of West African States (ECOWAS). Concluded at Lagos on 28 May 1975'.
791 Treaty of ECOWAS Art 7.

conflicts and civil wars, resulting in ECOWAS investing in regional peace-building based on the realisation that any form of regional integration can only succeed in a conducive environment where peace and governance issues are secured.[792] The REC has therefore taken an active role on security issues and conflict resolution within its region.[793] According to a recent assessment of the performance of RECs, ECOWAS was rated as being the best performer overall. It was rated highly in the dimensions of environmental integration, free movement of persons, monetary integration, political integration, and social integration, while it scored low on matters related to infrastructural, financial and trade integration.[794]

The membership of ECOWAS is not exempt from overlapping membership with other RECs. As an example, thirteen of the ECOWAS member states are members of CEN-SAD.[795] As of 1 January 2022, ECOWAS was a CU moving towards becoming a common market.

4.5.7 Intergovernmental Authority on Development

IGAD has its origins from Intergovernmental Authority on Drought and Development (IGADD) which was founded in 1986 to handle droughts and natural catastrophes in the Horn of Africa and East Africa.[796] In 1996, the Agreement Establishing the Inter-Governmental Authority on Development (hereafter IGAD Treaty) was signed.[797] IGADD then transformed itself into the Intergovernmental Authority on Development (IGAD) with a broader mandate that included the promotion of peace and stability; collaboration in developmental programs; the harmonisation of policies; and food

792 Said Adejumobi, 'Region-Building in West Africa' in Daniel H Levine and Dawn Nagar (eds), *Region-Building in Africa: Political and Economic Challenges* (Palgrave Macmillan 2016).

793 Akonor, *African Economic Institutions* 73.

794 AU, *African Integration Report 2020* 48.

795 Refer to section 4.6.3 above. The thirteen member states who belong to CEN-SAD are Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Gambia, Ghana, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

796 IGAD, *Inter-Governmental Authority on Development: Regional Trade Policy, 2022-2026* (Africa Trade Fund 2022) 8.

797 Agreement Establishing the Inter-Governmental Authority on Development (adopted 21 March 1996) (IGAD Treaty).

security.[798] Another niche program to which it has contributed for the benefit of its members is in infrastructure and communication networks.[799] As of 1 January 2021, IGAD had eight members from East Africa and the Horn of Africa.[800] The integration programs of IGAD all fall within the scope of the continental vision and deepening integration towards the AEC. The IGAD Treaty, like those of other RECs, recognises the Abuja Treaty as a reference point, and its members also belong to COMESA. The IGAD Treaty states:

> Convinced that Africa's ability to meet the challenges for promoting sustained economic growth, its ability to interact and compete in the global economy on behalf of its inhabitants will depend on collective self-reliance and on its determination and ability in pooling its considerable natural endowments and human resources through appropriate, sustainable and practical arrangements for co-operation as stipulated in the Treaty Establishing the African Economic Community;
>
> Recalling further the spirit, principles and objectives of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA);[801]

Accordingly, IGAD's trade agenda is aligned to COMESA's, the latter which can be argued to be a mother body to the REC. Further, its members Kenya, South Sudan and Uganda belong to the EAC, and this brings a strong EAC influence into the programs of IGAD.[802] The major trading partners in IGAD, Ethiopia, Kenya, Sudan, and Uganda, are prominent in utilising either the COMESA FTA or the EAC trading regime. IGAD has played a positive role in mediating peace and security while alleviating the consequences of drought in the volatile area of the Horn of Africa.[803] Trade and development are aided by political stability. IGAD has attracted membership with its multipurpose approach which places less emphasis on trade but gives more recognition

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798 IGAD Treaty Art 7.

799 Memar Ayalew Demeke and Solomon Gebreyohans Gebru, 'The Role of Regional Economic Communities in Fighting Terrorism in Africa: The Case of Inter-Governmental Authority on Development (IGAD)' (2014) 2 (Special issue) European Scientific Journal 216, 218-219, 223.

800 AUC, *African Union Handbook 2021* 162. The eight members were Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda.

801 IGAD Treaty preamble.

802 Refer to section 4.5.4 regarding the membership of EAC.

803 K Isaac Weldesellassie, 'IGAD as an International Organization, Its Institutional Development and Shortcomings' (2011) 55(1) JAL 1, 22-25.

to peace and development.[804] The REC, with its COMESA-EAC orientation, is an important gear in continental integration and an integral building block of the AfCFTA.

4.5.8 Southern African Development Community

As of 1 July 2022, the SADC was comprised of sixteen members.[805] The members share historical and cultural ties from the time of colonialism and the struggle for independence.[806] Countries such as Angola, Mozambique, Namibia and Zimbabwe underwent a bitter armed struggle against colonialism and this political background instilled a shared vision and camaraderie amongst members.[807] The common background has bonded them into a community eager to collaborate in order to meet global challenges.[808] Furthermore, the role played by the OAU and other African countries in the liberation of Southern Africa makes SADC countries respect the AU agenda, which includes integration and sustainable development.

As noted in Chapter 3, the SADC was established in 1992 to coordinate development projects in Southern Africa, with the goal of reducing dependency on the then apartheid South Africa.[809] The SADC Treaty, as revised, underscores the point that the REC aims to fulfil the objectives of the Abuja Treaty and it states:

> […] DETERMINED to alleviate poverty, with the ultimate objective of its eradication, through deeper regional integration and sustainable economic growth and development;
>
> FURTHER DETERMINED to meet the challenges of globalization;

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804 Bruce Byiers and Luckystar Miyandazi, 'Balancing Power and Consensus: Opportunities and Challenges for Increased African Integration' [2021] Istituto Affari Internazionali 1, 23.

805 SADC, 'Member States' <www.sadc.int/member-states/> accessed 18 July 2022. The sixteen member states are Angola, Botswana, Comoros, DRC, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

806 SADC Treaty Art 5:1(h).

807 Scott Taylor, 'Region-Building in Southern Africa' in Daniel H Levine and Dawn Nagar (eds), *Region-Building in Africa: Political and Economic Challenges* (Palgrave Macmillan 2016).

808 SADC Treaty preamble.

809 Trudi Hartzenberg and Gavin Maasdorp, 'Regional Integration Arrangements in Southern Africa: SADC and SACU' in Zubair Iqbal and Mohsin S Khan (eds), *Trade Reform and Regional Integration in Africa* (IMF 1998).

> TAKING INTO ACCOUNT the Lagos Plan of Action and the Final Act of Lagos of April 1980, the Treaty establishing the African Economic Community and the Constitutive Act of the African Union […][810]

The cornerstones of the SADC have linkages to the LPA, FAL, Abuja Treaty and the AU Constitutive Act. The highest organ in the SADC is comprised of Heads of State or Government.[811] The objectives of the SADC include cooperation by member states in all sectors ranging from economic development, cultural activities, politics and governance issues, and matters of peace and security.[812] As a result, the SADC has a holistic integration agenda that includes many areas of development and which are agreed upon through protocols.[813] The specific areas of cooperation identified in the SADC are spelt out in separate protocols, each of which is open for its own signature and ratification.[814] Some of the SADC protocols are in Trade in Goods; Finance and Investment; Gender and Development; and Politics, Defence and Security. As noted in Chapter 3, the SADC became an FTA in 2008 and based on 85% of tariff lines being duty-free.[815] It had plans to become a CU in 2010 and move to a deeper stage of a CM in 2015 and a monetary union by 2016, but these have not yet been attained as the REC prioritised consolidating the FTA and implementing the industrialisation strategy.[816] Despite the relatively long time the SADC has taken to consolidate its FTA and an apparent unpreparedness to move into a CU, the REC is implementing an effective FTA and trade agenda for its sixteen member states. It represents Southern Africa on continental issues and plays an important role in representation to the AU. The SADC is therefore an important pillar towards an operational AfCFTA and AEC.

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810 SADC Treaty Art 5.
811 SADC Treaty Art 10.
812 SADC Treaty Art 5.
813 SADC Treaty Arts 21 and 22.
814 SADC Treaty Art 22.
815 Bridget Chilala, *Guide to the SADC Protocol on Trade* (Southern Africa Global Competitiveness Hub 2009) 1.
816 SADC, *SADC FTA: Growth, Development and Wealth Creation* (SADC 2008) 5; SADC, *35th SADC Summit of SADC Heads of State and Government, 17-18 August 2015* (SADC 2015) 15, 18.

The issue of multiple memberships in RECs also feature among SADC members.[817] More than 56% of SADC member states belong to COMESA.[818] It must also be noted that all the SACU members are members of the SADC.[819] As discussed in section 4.5 above, although not amongst the eight recognised RECs, SACU has played a pivotal role in the SADC because its five members provides collective input on certain issues pertaining to the operations of the REC. As a CU, SACU is one customs territory which operates a CET, and has commonalities on issues pertaining to Customs laws and trade facilitation.

4.6 Summary of the Regional Economic Communities

It is interesting to note that all the RECs emphasise their heritage and commitment to Africa. Further, all of the RECs, with the exception of AMU, trace their mission and values to LPA and the Abuja Treaty. Although AMU does not specifically mention the LPA or the Abuja Treaty, it acknowledges that its existence is to contribute to the development of Africa and, accordingly, it aligns its vision and mission with the tone found in those declarations.[820]

Table 4.2 below summarises the discussion in section 4.5 and illustrates the geographic regions covered by each REC. It can be noted that all regions of the continent have RECs, and this was as envisaged by the OAU and the Abuja Treaty. The proliferation of RECs has also created a concern regarding the aspect of countries having multiple memberships.

817 Refer to discussions in section 4.7.

818 Refer to section 4.5.2. They are Comoros, DRC, Eswatini, Madagascar, Malawi, Mauritius, Seychelles, Zambia and Zimbabwe.

819 SACU, 'About SACU'. The SACU members are Botswana, Eswatini, Lesotho, Namibia and South Africa.

820 AMU Treaty Art 6; AMU Treaty, Declaration of the Institution of the Arab Maghreb Union.

Table 4.2: List of the eight RECs recognised by the African Union

Name of regional economic community	Number of countries	Indication of the geographic region covered by the REC
AMU	5	Northern Africa
COMESA	21	Eastern, Southern and Northern Africa
CEN-SAD	25	Western, Central, Eastern and Northern Africa
EAC	7	Eastern Africa
ECCAS	11	Central Africa
ECOWAS	15	Western Africa
IGAD	8	Eastern African and the Horn of Africa
SADC	16	Southern and Eastern Africa

Source: Table compiled using information obtained from AUC, *African Union Handbook 2021* (AU 2021) 151-164.

4.7 Multiple memberships in RECs and the Tripartite Free Trade Agreement

Each of the RECs cover a region(s) of Africa. The use of RECs to build upon economic integration for the continent made the process manageable since, to a great extent, some harmonisation have been achieved in the regions.[821]

As has been noted in section 4.5 of the study and in Table 4.3 below, the issue of overlapping memberships still remains inherent. Tanzania, for example, is in East Africa and belongs to the EAC, but it cannot abandon its political ties with the SADC, which it helped to establish. Zambia hosts the COMESA headquarters, which is more focussed on trade, but it cannot abandon its political ties to countries in Southern Africa, some of whose liberation agendas were planned from Lusaka. In March 2022, DRC became a member of the EAC.[822] Mauritania is a member of the AMU due to its Arabic and Islamic culture, but it has applied to join ECOWAS, which will offer more trading opportunities. Mauritania shares borders with Senegal and Mali, both of whom are ECOWAS member states. Taking the case of DRC and Mauritania as examples, one would have thought that with their trade agenda fully taken care of through the other RECs they belong to, and the AfCFTA which they helped establish, there would have been no need to apply to join any other REC. This illustrates that there is more to RECs than simply the trade agenda. It also shows that the issue of multiple memberships is

821 Oppong, *Legal Aspects of Economic Integration in Africa* 19.
822 EAC, 'The DRC Joins EAC as Its 7th Member'.

not as simple as it would appear. As shown in section 4.5.7 above, IGAD countries are another example of members who belong to other RECs and yet consider the need to have their own configuration important. This proves that, as long as they serve numerous other objectives, the AfCFTA stage would not be able to eliminate these RECs.

Table 4.3 below is a matrix that illustrates examples of some of the African countries with overlapping memberships in the eight RECs. As an example, Kenya belongs to COMESA, CEN-SAD, EAC and IGAD. Some of the countries also belong to RTAs, which, though not recognised by the AU as RECs, are implementing effective programs for their members. These include CEMAC and SACU, which are implementing deeper levels of economic integration as CUs.

Table 4.3: Selected cases of multiple memberships in the RECs of the AU

		Regional economic communities							
No	**Country**	**AMU**	**CENSAD**	**COMESA**	**EAC**	**ECCAS**	**ECOWAS**	**IGAD**	**SADC**
1	Burundi			X	X	X			
2	Comoros		X	X					X
3	DRC			X	X	X			X
4	Djibouti		X	X				X	
5	Eritrea		X	X				X	
6	Kenya		X	X	X			X	
7	Libya	X	X	X					
8	Madagascar			X					X
9	Nigeria		X				X		
10	Rwanda			X	X	X			
11	Somalia		X	X				X	
12	Sudan		X	X				X	
13	Tunisia	X	X	X					
14	Uganda			X	X			X	
25	Zambia			X					X

Source: Table adapted and updated from Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (CUP 2011) 15, 16.

The AU Constitutive Act recognises the need to rationalise activities of RECs for the AU to achieve its objectives.[823] One of the goals of forming the Tripartite Free Trade Area (TFTA) was to resolve the issue of multiple memberships in respect of COMESA,

[823] AU Constitutive Act Art 3:(m).

the EAC and the SADC.[824] Following observations that COMESA, the EAC and the SADC had shared interests and overlapping memberships, there were consultations about closer cooperation and merging them into a TFTA. A Summit of Heads of State and Government from the three RECs convened a meeting in October 2008 and mandated that the three RECs cooperate and work towards a merge.[825] The negotiations were conducted from 2011, resulting in the signing of an Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community (hereafter TFTA Agreement) in June 2015. The TFTA Agreement was intended to help the three RECs contribute towards continental integration. The preamble of the TFTA Agreement states:

> […] COMMITED to championing and expediting the continental integration process under the Treaty establishing the African Economic Community and the Constitutive Act of the African Union through regional initiatives;
>
> COGNISANT of the provisions establishing free trade areas in the Common Market of Eastern and Southern Africa Treaty, Treaty for the Establishment of the East African Community and the Southern African Development Community Protocol on Trade […];
>
> DETERMINED to build upon the success and best practices achieved in trade liberalisation within the three Regional Economic Communities;
>
> COMMITTED to resolving the challenges of overlapping memberships of the Tripartite Member/Partner States to the three Regional Economic Communities […][826]

The Tripartite FTA deals with trade and trade-related issues.[827] The objective of the TFTA Agreement is to enhance regional and continental integration for the benefit of its people.[828] Membership of the TFTA is open to the twenty-seven member states

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824 Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community (adopted 10 June 2015) (TFTA Agreement) preamble.

825 COMESA, EAC and SADC, 'Final Communique of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government' (20 October 2008) <http://repository.eac.int/handle/11671/558?show=full> accessed 31 December 2021 para 13.

826 TFTA Agreement preamble.

827 TFTA Agreement Art 3.

828 TFTA Agreement Art 4.

belonging to COMESA, the EAC and the SADC.[829] The TFTA Agreement require fourteen countries to ratify it to enable it to come into force.[830] As of 1 May 2022, the TFTA had attracted ten ratifications out of its total membership of twenty-seven.[831] The highest organ of the TFTA is the Summit which is comprised of Heads of State and Governments.[832]

The ideals of the TFTA are noble in fast tracking continental integration in accordance with the Abuja Treaty. The relevance of the TFTA after the AfCFTA Agreement entered into force can be a debatable issue. The TFTA was meant to be the precursor to the AfCFTA and to prepare for its arrival.[833] The TFTA failed to prepare the way on time and has been overtaken by events. Had it entered into force earlier than the AfCFTA, the TFTA would then have been an effective forerunner to the AfCFTA. Negotiations for the AfCFTA Agreement started in 2016, but as of May 2022 thirty-seven out of fifty-five countries had ratified it. The AfCFTA was supposed to be born from the TFTA, but the former ended up outgrowing its parent. From a legal perspective, Article XXIV does not prohibit the formation of a TFTA within the AfCFTA. The TFTA can, however, remain relevant if it creates a trade regime which is more liberalised than the AfCFTA, and it can be redundant if it fails to reach this mark.

The TFTA, however, did make some inputs towards the AfCFTA negotiations which started in 2016, while the legal texts of the TFTA had been finalised in 2015. With a membership of twenty-seven countries, the TFTA countries influenced the negotiations by advancing common positions and lobbying for the remaining twenty-eight countries in favour of consensus. There are similarities between some of the legal texts of the TFTA and the AfCFTA in, for example, rules of origin (ROO), trade remedies and NTBs.

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829 TFTA Agreement Art 2.

830 TFTA Agreement Art 39:3.

831 These were Botswana, Burundi, Egypt, Eswatini, Kenya, Namibia, Rwanda, South Africa, Uganda and Zambia. Also refer to SADC, 'COMESA-EAC-SADC Holds 33rd Tripartite Taskforce Meeting as SADC Hands Over Rotational Task Force Chairship to EAC' <www.sadc.int/news-events/news/comesa-eac-sadc-holds-33rd-tripartite-taskforce-meeting-sadc-hands-over-rotational-task-force-chairship-eac/> accessed 11 May 2022.

832 TFTA Agreement Art 29:1(a).

833 TFTA Agreement preamble.

Some countries benefited from the TFTA because it provided a glimpse of what trade would be like in a twenty-seven-member bloc, and the experience gained provided an opportunity to visualise what to anticipate from a fifty-five-member continental bloc. South Africa saw it as an opportunity to advance for continental industrialisation by building upon the benefits accrued from the TFTA.[834] Despite a proliferation of these RECs and RTAs, it must be noted that, as discussed in Chapter 3 of the study, they all serve towards broader liberalisation at continental and global levels.[835]

4.8 The African Continental Free Trade Area

4.8.1 Background

Section 4.5 above has higlighted the significance of each of the eight RECs in terms of contributing towards continental integration and towards the AEC.[836] Although the Abuja Treaty makes no specific reference to a continental FTA, the linear steps of economic integration passes through the FTA stage before deepening to the level of CU.[837]

Table 4.4 gives the stages of integration attained by the eight RECs as discussed in section 4.6. Table 4.4 shows that as of 1 September 2022, three of the RECs had not attained the FTA stage, whereas the other five were either FTAs or had advanced to stages deeper than an FTA. Only two RECs had attained the status of CU. It must be noted that the Abuja Treaty succeeded to the extent that each region has a REC, and though behind schedule, each of the RECs is implementing an integration agenda.

834 Sören Scholvin, 'Developmental Regionalism and Regional Value Chains: Pitfalls to South Africa's Vision for the Tripartite Free Trade Area' (2018) 53(3) Africa Spectrum 115, 115-129.
835 Kreinin, *International Economics* 133-134.
836 Abuja Treaty Art 6:2(d).
837 Dominic Salvatore, *International Economics* (8th edn, Wiley-India 2009) 321-322.

Table 4.4: Stages of integration in the RECs as of 1 September 2022

REC	Stage of integration			Comments
	Not yet an FTA	Operating as an FTA	CU or deeper	
AMU	√			
CEN-SAD	√			
COMESA		√		Although a CU was launched n 2009, COMESA is still largely operating as an FTA. Progress towards operationalisation of a CU has been slow.[838]
EAC			√	It is operating as a common market.
ECCAS		√		
ECOWAS			√	It is operating as a common market.
IGAD	√			Not yet an FTA. All members belong to COMESA. IGAD members trade using either the COMESA FTA of the EAC regime.
SADC		√		

Source: Author

The coming into force of the AfCFTA in May 2019, in a way, makes the need of attaining FTAs in all the individual RECs redundant because the AfCFTA amounts to a continental FTA in which goods can move freely. However, the whole principle of Article XXIV discussed in Chapter 3 does not preclude establishing an FTA within another FTA. While consolidating the effective implementation of the AfCFTA, the AU needs to prepare for the next stage of integration, which is the continental CU.

4.8.2 Negotiations for AfCFTA

Following a series of political engagements amongst the AU's Ministers responsible for trade, the Assembly of Heads of State and Government decided to take measures to boost intra-African trade and agreed on a roadmap for the establishment of a continental FTA by an indicative date of 2017.[839] The Twenty-Fifth Ordinary Session of

838 Mangeni and Juma, *Emergent Africa* 96; COMESA*, COMESA in Brief: Growing Together for Prosperity* (COMESA 2018) 16.

839 AU Assembly of Heads of State and Government, 'Eighteenth Ordinary Session, Decisions and Declarations of the Assembly: Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area' (30 January 2012) Assembly/AU/Dec.394(XVIII) AU Doc EX.CL/700(XX).

the Assembly of Heads of State and Government, which was held in June 2015 in Johannesburg, South Africa, launched the negotiations which were aimed at:

> […] integrating Africa's markets in line with the objectives and principles enunciated in the Abuja Treaty Establishing the African Economic Community.[840]

The steps mentioned above demonstrate the determination of the political leadership to pursue the agenda of the Abuja Treaty. Where trade agreements are concerned, political will is a critical success factor. The negotiations for the AfCFTA commenced in February 2016 and were divided into three phases as follows: Phase I covered negotiations on the framework AfCFTA Agreement, on trade goods, trade in services, and on dispute resolution.[841] Phase II covered intellectual property rights, investment, and competition policy.[842] An additional Phase III was later added to cover e-commerce.[843] Although all fifty-five African countries participated during the negotiations of the AfCFTA Agreement, a total of forty-four countries signed the AfCFTA Agreement on 21 March 2018 when it was adopted.[844] The negotiations and signing of the AfCFTA Agreement within two years and for a process involving fifty-five countries was an unprecedented achievement.[845]

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840 AU Assembly of Heads of State and Government, Twenty-Fifth Ordinary Session, Decisions and Declarations of the Assembly: Decision on the Launch of Continental Free Trade Area Negotiations' (14-15 June 2015) Assembly/AU/Dec.569(XXV) AU Doc Assembly/AU/11(XXV).

841 AfCFTA Agreement Art 6.

842 AfCFTA Agreement Art 7; Philomena Apiko, Sean Woolfrey and Bruce Byier, 'The Promise of the African Continental Free Trade Area (AfCFTA) (Political Economy Dynamics of Regional Organisations, Discussion Paper No 287)' (*ECDPM*, December 2020) <https://ecdpm.org/wp-content/uploads/Promise-African-Continental-Free-Trade-Area-AfCFTA-ECDPM-Discussion-Paper-287-December-2020.pdf> accessed 15 June 2021.

843 AU Assembly of Heads of State and Government, 'Thirty-Third Ordinary Session, Decisions and Declarations of the Assembly: Decision on the African Continental Free Trade Area (AfCFTA)' (9-10 February 2020) Assembly/AU/Dec.751(XXXIII) AU Doc Assembly/AU/4(XXXIII).

844 AU, 'List of Countries which Have Signed, Ratified/Acceded to the Agreement Establishing the African Continental Free Trade Area' (19 April 2021) <https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA.pdf> accessed 18 November 2021

845 Refer to Chapters 1 and 3.

4.8.3 Entry into force of the AfCFTA Agreement

The AfCFTA Agreement includes provisions that its signing, ratification or accession must be in accordance with the national laws of the member states.[846] It stipulates that twenty-two members must deposit their instruments of ratification to the Chairperson of the AUC for it to come into force.[847] The AfCFTA Agreement therefore entered into force on 30 May 2019, as stipulated.[848] When the operational phase of the AfCFTA Agreement was launched in July 2019, a total of fifty-four member states had signed the treaty while twenty-seven had deposited their instruments of ratification with the Chairperson of the AUC.[849] The member states who ratify the treaty become State Parties.[850] The AfCFTA Agreement therefore mentions 'Member States' when referring to the countries belonging to the AU whereas 'State Party' is in respect of a Member State that has ratified or acceded to the AfCFTA Agreement. Accordigly, the legal texts of the AfCFTA will use 'State Party' when dealing with issues of implementation.

As of 1 September 2022 all the fifty-five member states of the AU, except Eritrea, had signed the Agreement while forty-three member states had ratified the AfCFTA Agreement.[851] Although some commentators have considered this to be a slow pace of ratifications, this thesis regards the signing of the AfCFTA Agreement and the pace

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846 AfCFTA Agreement preamble and Arts 22 and 24.

847 AfCFTA Agreement Art 23 states: 'This Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes shall enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.'

848 AfCFTA Agreement Art 24; AU Assembly of Heads of State and Government, 'Twelfth Extraordinary Session of the Assembly: Decision on the Launch of the Operational Phase of the African Continental Free Trade Area (AfCFTA)' (7 July 2019) AU Doc Ext/Assembly/AU/Dec.1(XII).

849 AU Assembly of Heads of State and Government, 'Twelfth Extraordinary Session of the Assembly: Decision on the Launch of the Operational Phase of the African Continental Free Trade Area (AfCFTA)' (7 July 2019) AU Doc Ext/Assembly/AU/Dec.1(XII).

850 AfCFTA Agreement Art 1 defines a State Party as 'a Member State that has ratified or acceded to this Agreement and for which the Agreement is in force'.

851 Refer to AU Assembly of Heads of State and Government, 'Thirty-Fifth Ordinary Session, Decisions and Declarations of the Assembly: Decision on the African Continental Free Trade Area (AfCFTA)' (5-6 February 2022) AU Doc Assembly/AU/Dec. 831(XXXV). As of 6 February 2022, the following thirteen countries had not yet ratified the AfCFTA Agreement and were not State Parties: Benin; Botswana, Comoros, Eritrea, Guinea Bissau, Libya, Liberia, Madagascar, Morocco, Mozambique, Somalia, Sudan and South Sudan. Refer also to AfCFTA Secretariat, 'State Parties' <https://au-afcfta.org/state-parties/> accessed 24 September 2022.

at which instruments of ratifications have been submitted to the AUC as fast and unprecedented.[852] Negotiating and concluding a trade agreement in two years between fifty-five countries that speak more than four offcial languages, coming from diverse cultures and with different legal systems, has been a significant success for the continent.[853] The success by Africa in creating its own continental FTA becomes apparent when it is considered that the history of the EU can be traced back to 1945 when six European countries decided to cooperate, and it took them untill 1957 to sign the Treaty of Rome, which established the EEC.[854]

The decisions of the AfCFTA are taken by the CoM which consists of the Ministers responsible for trade or other designated Ministers.[855] The Heads of State and governments provide oversight and strategic guidance on the AfCFTA.[856] The legal texts of the AfCFTA will be covered in Chapter Six.

The AfCFTA is an FTA for the fifty-five AU member states covering a market of over 1.3 billion people and a gross domestic product (GDP) of US$3.4 trillion.[857] It has its own unique features. It represents a significant development from Africa and demonstrates how the continent can expand intra-African trade and assert itself in global trade. Once fully operational, with all eligible countries participating, the AfCFTA will be the WTO's largest FTA in terms of number of countries.[858] Kuhlmann and Agutu have argued that the AfCFTA is Africa's mega-regional trade agreement with the potential to break, rewrite and redesign international trade law and its rules, having an

852 Olubunmi Ajala, Amanze Ejiogu and Adeniyi Lawal, 'Understanding Public Sentiment in Relation to the African Continental Free Trade Agreement' (2021) 13(2) Insight on Africa 127, 128.

853 The four official languages of the AU are English, French, Portuguese and Arabic. In addition, some members, such as Tanzania, have their own national language, eg Swahili. The legal systems in Africa vary per country. The systems include civil law, common law, customary law and Muslim law. In addition, these have influences from the European and American systems.

854 David Phinnemore, 'The European Union: Establishment and Development' in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds), *European Union Politics* (6th edn, OUP 2019) 13-16; Pierre-Henri Laurent, 'The Diplomacy of the Rome Treaty, 1956-57' (1972) 7(3/4) Journal of Contemporary History 209, 209-220. Also refer to section 3.3.1 of this study.

855 AfCFTA Agreement Art 11.

856 AfCFTA Agreement Art 10.

857 World Bank, *The African Continental Free Trade Area: Economic and Distributional Effects* (World Bank 2020) 1.

858 World Bank, *The African Continental Free Trade Area* 1.

impact beyond Africa, and possibly affecting global trade.[859] The AfCFTA is therefore an AU initiative that pursues the principles of the Abuja Treaty toward an AEC.[860] While it is an African initiative, the AfCFTA Agreement sought to ensure that the economic relationships in trade matters complied with WTO rules, and it states:

> […] DETERMINED to strengthen our economic relationship and build upon our respective rights and obligations under the *Constitutive Act of the African Union of 2000,* the *Abuja Treaty* and, where applicable, the *Marrakesh Agreement Establishing the World Trade Organization* of 1994 […][861]

The AfCFTA has various general objectives, which include: a free market for goods and services; contributing to the movement of capital and natural persons; facilitating investment building; laying the foundation for the establishment of a continental CU; and dealing with the challenges of multiple and overlapping memberships in RECs.[862] These objectives are in line with those stipulated in the Abuja Treaty, further showing that the AfCFTA is aligned to the vision for establishing an AEC.[863]

4.8.4 Key issues of the African Continental Free Trade Area

The author considers that several factors have contributed to the success of the AfCFTA. Firstly, there was political commitment to the cause as demonstrated by the successsive political decisions, inluding Agenda 2063. One of the decisions which monitored that the process was on track was when, in January 2017, the AU Assembly appointed one of its members, then President Mahamadou Issoufou of Niger, to champion the AfCFTA cause, guide the process, and ensure that deadlines were achieved.[864] The appointment of a head of state to lead the process exhibited the political will to make the AfCFTA succeed. The Abuja Treaty was based on realism,

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859 Kuhlmann and Agutu, 'The African Continental Free Trade Area' 753.

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

861 AfCFTA Agreement preamble. See also section 4.3 of the study.

862 AfCFTA Agreement Art 3.

863 Abuja Treaty Art 4.

864 AU Assembly of Heads of State and Government, 'Twenty-Eighth Ordinary Session, Decisions and Declarations of the Assembly: Decision on the Continental Free Trade Area' (31 January 2017) Assembly/AU/Dec.623(XXVIII) AU Doc Assembly/AU/4(XXVIII).

unlike the LPA, which was based on political rhetoric, and it embodied the African dream. The AfCFTA was an African agenda negotiated by Africans for Africans. It built upon the successes of the RECs, resulting in groups of countries bringing rationalised positions from their configurations, unlike a situation involving fifty-five negotiating positions; it utilised the advances and lessons drawn from the negotiations for the TFTA under which three RECs, representing about half of the AU member states had negotiated, and thus laid a solid base to incorporate other countries; and its Heads of States appointed a champion and leader who was able to guide the process.

Although the creation of the AfCFTA has been a major achievement for Africa, there is scepticism in certain quarters as to whether the FTA will operate successfully. The main issue with AU ageements has not been the signing, ratification or accession, but the test lies in the effective implementation of what has been agreed upon and signed. Whereas African countries have always traded within their respective RECs, the AfCFTA has an additional dimension of connecting trade within the entire continent. Zimbabwe and Zambia, for example, have been trading duty free under the COMESA or SADC free trade regimes to which they both belong. The success of the AfCFTA also rests on the fact that the same Zimbabwe and Zambia, would under the AfCFTA, trade duty-free with countries outside their FTAs such as Niger in ECOWAS, Morocco in UMA, and Cameroon in ECCAS. As a result, the AfCFTA offers new opportunities for trade. It therefore broadens the market for African countries and creates an environment in which intra-African trade can grow.

The determination to establish and implement the AEC is evident when taking into account the progress made so far in adhering to the spirit of the Abuja Treaty and the initiatives being undertaken to have real trade.[865] Although the timelines stipulated in the Abuja Treaty is not on schedule, from the work and achievements so far attained the author considers that the AfCFTA and African economic integration will be accomplished.

[865] See section 3.8.2 for the AfCFTA Initiative on Guided Trade Scheme.

4.9 Conclusion

The AfCFTA is a continental FTA born out of the eight RECs which are recognised by the AU, and with the objective of fulfilling an African agenda. The AfCFTA has its historical foundations in the OAU and the AU and its legal treaties are aligned to these organisations. The AfCFTA is related to the RECs in that they are all institutions of the AU, and claim heritage from either the LPA or the Abuja Treaty, and with a common agenda directed towards economic integration on the continent. The legal texts of the AfCFTA are therefore made to comply with the trade liberalisation agenda under the Abuja Treaty and the AU. The AfCFTA is also part of the route leading to the AEC by 2034. It is a significant step toward the establishment of a continental CU, CM and an economic community.

From this narrative it is clear that the RECs and the AfCFTA are part of an African agenda meant to expand trade on the continent. As will be noted in Chapter Five, some of the RECs, as is the case with the AfCFTA, have trade facilitation instruments which are designed to facilitate or expand trade amongst their memberships. This shows common interests to expand trade at all levels be it at regional or continental levels, and ultimately this impacts positively on global trade. While making the needs of Africa, pre-eminent, the AfCFTA Agreement acknowledges the need to operate within international law of the WTO. From the start therefore, the AfCFTA Agreement recognised the need to comply with WTO rules. The entry into force of the AfCFTA Agreement in May 2019 was a game changer, as it was a major step towards fulfilling the aspirations of the AEC. It is also an indication of Africa's commitment to implementing its own agreed-upon treaties and programs, rather than simply making declarations. The AfCFTA thus connects political aspirations under the AU and the Abuja Treaty to the desired outcomes in economic integration, increased trade, economic growth, socio-economic development while at the same integrating Africa into the global trading arena.

CHAPTER FIVE

THEORETICAL AND PRACTICAL PERSPECTIVES OF TRADE FACILITATION

5.1 Introduction

The preceding chapters examined the relationship between the WTO and the AfCFTA in the context of their hierarchies and the latter's status as an RTA or an FTA which operates within WTO rules. The study established in Chapter Three that the purpose of an FTA, such as the AfCFTA, is to expedite trade for its members. The fact that the *raison d'être* of any FTA is trade facilitation prompts for an evaluation of the concept, with reference to what is laid down in the WTO and the AfCFTA.

There are numerous interpretations attached to the concept 'trade facilitation'. RTAs and international bodies define trade facilitation differently. This chapter begins by exploring the broad meaning of trade facilitation before narrowing it down to a more specific interpretation. It then examines the context and practical implementation of trade facilitation at regional, continental and international or global levels. Particular focus is given to the approaches by the WTO and AfCFTA since these are central to the study. The discussions provide valuable inputs into identifying the legal texts in Chapter Six and to the analysis undertaken in Chapter Seven.

5.2 General outlook on trade facilitation

Trade facilitation has existed for as long as trade has occurred. It can be argued that from ancient times up to the modern era, there have always been efforts to expedite international trade. Evidence of this can be found in many medieval European towns, which depict the efforts undertaken to make trade easier and faster.[866] Throughout the ages there have been innovations to create more convenient trade routes, indicating a desire to reduce trade costs and facilitate trade. Vasco da Gama opened a faster and less expensive alternative route to India in 1498 which facilitated trade between Europe

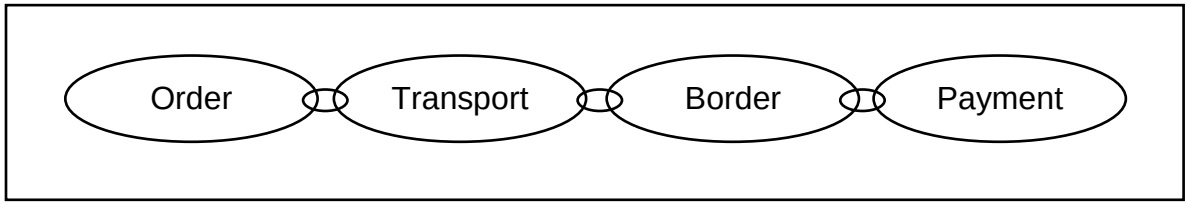
[866] Andrew Grainger, 'Customs and Trade Facilitation: From Concepts to Implementation' (2008) 2(1) WCJ 17, 20.

and the East and replaced the traditional long overland route used by the Venetian traders before him.[867] The trade route from Europe via Cape Town to the East ushered in a whole new era. This shows how transport routes can be a means of facilitating trade as opposed to the view that interprets trade facilitation purely on simplification of trade documents.

As reviewed in section 5.4 of this study, there are several legal definitions of trade facilitation. If the VCLT provisions that the interpretation of words used in international treaties is based on "the ordinary meaning" of "terms … in their context" and in accordance with the "purpose" was applied, trade facilitation would easily be defined.[868] The ordinary definition would therefore be derived from the meanings of the terms 'trade' and 'facilitation'.

A simple chain of activities in trade involving the ordering of goods, transport logistics, Customs formalities, and payment processes is depicted in Figure 5.1 below.

Figure 5.1: Chain process in the movement of goods from supplier to buyer



Source: Adapted from the National Board of Trade, Sweden, 'Trade Facilitation from a Developing Country Perspective'[869]

From Figure 5.1, trade facilitation therefore includes any processes designed to improve operational efficiencies along the logistics chain of ordering goods and delivering them to their destination. Other related activities would include insurance and port efficiency, as well as skilled personnel to ensure professional and effective service providers. Candidly put, trade facilitation involves implementing certain actions that

867 David Northrup, 'Vasco da Gama and Africa: An Era of Mutual Discovery, 1497-1800' (1998) 9(2) Journal of World History 189, 189-211.

868 VCLT Art 31. Also refer to the discussion in Chapter 1.

869 National Board of Trade, Sweden, 'Trade Facilitation from a Developing Country Perspective' <https://gfptt.org/sites/default/files/refread/2d3715d3-c38f-43e5-b640-aae43ed6be4a.pdf> accessed 27 September 2021.

ensure that exchange of goods between sellers and buyers, across borders, is expedited and not hindered.

As late as 2007, textbooks on international trade did not discuss or mention the term 'trade facilitation' despite the fact it is now a separate subject in academia and in global trade.[870] While observing that there is no generally accepted definition, Sengupta noted that 'trade facilitation' is a relatively new phenomenon.[871] This is despite the fact that activities to facilitate trade had been business routines for centuries while the words 'trade' and 'facilitation' have been common in the English vocabulary. Maur pointed out that, despite many elements of commonalities, there is no universally accepted definition or scope for trade facilitation, and the various different perspectives are dependent on the person defining the term.[872] While also remarking that the subject is a new area, Chauffour and Maur further noted that, in certain instances, trade facilitation is perceived as a component of Customs.[873] This thesis argues that trade facilitation encompasses certain issues that are not within the purview of Customs and cannot therefore be equalled to Customs. Customs or border issues are only but a subset of trade facilitation.

In general, trade facilitation includes removing bottlenecks in the international trade supply chain, resulting in the faster flow of trade. Portugal-Perez and Wilson defined and classified trade facilitation measures into two dimensions, that is, 'hard' and 'soft' infrastructure.[874] Hard infrastructure refers to infrastructural work that is done either to enable expeditious movement of goods or to support the process of trading. Hard infrastructure would include efficient modes of transportation networks, and the availability of physical facilities such as ports and warehouses to support trade. Soft infrastructure, on the other hand, refers to issues pertaining to documentation,

870 Sengupta, *Economics of Trade Facilitation* preface.

871 Sengupta, *Economics of Trade Facilitation* 13.

872 Jean-Christopher Maur, 'Trade Facilitation' in Jean-Pierre Chauffour and Jean-Christopher Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank 2011).

873 Jean-Pierre Chauffour and Jean-Christopher Maur, 'Overview' in Jean-Pierre Chauffour and Jean-Christopher Maur (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (World Bank 2011).

874 Alberto Portugal-Perez and John S Wilson, 'Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure (World Bank Policy Research Working Paper 5261)' (April 2010) <https://openknowledge.worldbank.org/handle/10986/3748> accessed 18 November 2022.

processes such as modernising border procedures, and bureaucracy in regulatory authorities involved in trade.

The Kazungula Bridge, across the Zambezi River and which connects Botswana and Zambia, is an example of a combined hard and soft infrastructure project to ease the flow of trade amongst countries in Southern Africa. It links the flow of trade not only between Botswana and Zambia, but due to its strategic positioning, the facility also benefits other countries such as Angola, Namibia and Zimbabwe. Prior to its construction, vehicles, including commercial trucks, used an antiquated ferry to cross the 400-metre divide. The new facility provides an alternative route, while easing congestion at Kazungula, to countries in Southern Africa who utilise its services to trade. The infrastructure also includes a one-stop border post (OSBP), a facility where authorities from both neighbouring countries at adjoining border posts, conduct formalities jointly to eliminate unnecessary stops and duplication.[875] Apart from decongesting other routes, it also reduced the amount of time spent in traffic at Kazungula. The hard infrastructure project was accompanied by soft issues such as closer cooperation between the Customs administrations who use the facility, the review of border procedures to modernise them in order to comply with a modern facility, and the elimination of duplication of procedures. When the OSBP opened, the road hauliers took advantage of the new facility and the first day recorded 162 trucks in contrast to about fifty vehicles per day who previously used the ferry.[876] The Botswana and Zambian Heads of State commissioned the road and rail bridge in May 2021. During the official opening, Zambia's then President Lungu acknowledged the bridge's importance for trade facilitation and stated:

> […] In addition to national and bilateral significance, this facility will promote regional and continental integration. The completion of the project is indeed timely as it will facilitate increased intra-African trade.
>
> This development will give impetus to the implementation of the SADC-Eastern African Community-Common Market for Eastern and Southern Africa (SADC-EAC-COMESA) Tripartite Free Trade Area and The African Continental Free Trade

875 The OSBP is discussed in detail in Chapter 7.

876 Edina Moyo Mudzingwa, 'The Benefits of Trade Facilitation Measures: The Kazungula Bridge Project' (tralacBlog, 7 September 2021) <www.tralac.org/blog/article/15350-the-benefits-of-trade-facilitation-measures-the-kazungula-bridge-project.html> accessed 27 September 2021.

> Area. This facility is a critical milestone in the development of the North – South Corridor as it will also facilitate access to international markets through linkages to major sea ports.
>
> In this regard, I wish to express my gratitude to the African Union and SADC for their relentless support and inclusion of this project in the SADC Regional Infrastructure Development Masterplan and the programme for infrastructure development in Africa […][877]

The above statement acknowledges that trade facilitation measures improve market access and promotes trade. Trade agreements, such as the AfCFTA, must therefore identify measures which parties must implement to facilitate trade. GATT 1947, which was the first agreement on global trade, instituted Articles V, VIII and X, which bound contracting parties to facilitate trade. This clearly demonstrates the importance placed on the subject from as far back as 1947.

5.3 Benefits of trade facilitation

According to research, there is a positive link between economic factors of trade facilitation, the extent to which a country trades, and economic development.[878] Trade facilitation is therefore significant in the development of a country. This demonstrates the benefits of enhanced trade facilitation measures to the AfCFTA and African countries. Since the mid-nineteenth century, there has been a noted increase in global trade, which has been attributed to factors such as lower international transport costs combined with technological advances.[879] Trade facilitation boosts economic activities in a country by lowering the costs of both exports and imports, resulting in competitive commodity prices while lowering the costs and simplifying the procedures of doing business. The WTO observed that despite efforts to facilitate trade through, for example, reductions in transport charges, introduction of modern information and

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877 Ministry of Foreign Affairs, Republic of Zambia, 'President Lungu and Botswana Counterpart Commission Kazungula Bridge: Statement by His Excellency, Dr Edgar Lungu C, President of the Republic of Zambia, on the Occasion of the Official Commissioning of the Kazungula Bridge Project' (10 May 2021) <www.mofa.gov.zm/president-lungu-and-botswana-counterpart-commission-kazungula-bridge/> accessed 27 September 2021.

878 Wilson, Mann and Otsuki, 'Trade Facilitation and Economic Development'.

879 David Hummels, 'Transportation Costs and International Trade in the Second Era of Globalization' (2007) 21(3) Journal of Economic Perspectives 131, 131-154.

communication technology (ICT), and removal of trade barriers, the cost of doing business remained high in many countries.[880]

5.4 Approaches to trade facilitation

Despite the lack of a standard definition of trade facilitation, experts and academia agree that it entails addressing the bottlenecks associated with cross-border trade.[881] The element of transport cannot be overlooked because both the infrastructure and the network systems facilitate trade. Goods can move efficiently, fast and at a lower cost if there is an adequate and efficient transport network to support trade. As discussed in section 5.2, the aspect of hard and soft infrastructure brings an additional dimension to the subject. Grainger, though with a bias towards soft infrastructure, concedes that the literal meaning of 'trade facilitation' extends to include reliable and effective transport infrastructure.[882]

For a broad appreciation of trade facilitation, the thesis has examined certain interpretations used by some organisations, in particular the WTO, WB, WCO, UNCTAD, selected RECs in Africa, and the AfCFTA. The background of these organisations and their involvement in trade facilitation is covered in Chapters 2 and 4 of the study. The thesis also examined the interpretation of the subject by ASEAN. As an RTA, ASEAN has contributed to the economic growth of the South East Asian region.[883] The differences in definitions used by these regional and international organisations will provide a clearer understanding of trade facilitation while demonstrating the universality of the concept. The survey will contribute towards an informed analysis in Chapter Seven.

880 WTO, *World Trade Organization Annual Report 2015* (WTO 2015) 4.
881 Wilson, Mann and Otsuki, 'Trade Facilitation and Economic Development' 4.
882 Grainger, 'Customs and Trade Facilitation' 20.
883 Patcharee Preepremmote, Sumalee Santipolvut and Thitima Puttitanun, 'Economic Integration in the ASEAN and Its Effect on Empirical Economic Growth' (2018) 13(4) Journal of Applied Economic Sciences 922, 924.

5.4.1 Processes definition by the WTO

GATT 1947 established some fundamental principles to facilitate world trade, laying the groundwork for GATT 1994 and the TFA, while serving as a reference tool for RTAs around the world. The WTO controls 98% of world trade – this figure is aligned to the estimate supplied by the WCO.[884] The WTO, through its influence in world trade, has been responsible for removing trade barriers and creating today's global market place.[885] As mentioned in Chapter Two, the WTO offers a legal framework and guiding principles for world trade.[886] By virtue of the WTO's mandate as custodian of global rules for trade relations amongst its members, its interpretation of trade facilitation enjoys persuasive authority.[887]

Although Articles V, VIII and X are the legal cornerstones of trade facilitation, they do not define the term. The closest reference to the term is found in Article XXIV, which gives the purpose of forming FTAs and CUs is to "facilitate trade".[888] The TFA does not define 'trade facilitation' either but it identifies the necessary activities that members must undertake in order to facilitate trade.[889] The definition provided by the WTO is found on its website, which states that trade facilitation is "the simplification, modernization and harmonization of export and import processes".[890] Although the definition is official, and used in a lot of literature, it is not backed by any legal instrument of the WTO. Any references to the WTO's definition have therefore always been drawn from either the website or literature issued by the WTO and not from any legal

884 WTO, 'The WTO' <www.wto.org/english/thewto_e/thewto_e.htm> accessed 1 July 2022; WCO, 'Discover the WCO' <www.wcoomd.org/en/about-us/what-is-the-wco/discover-the-wco.asp> accessed 1 September 2022.

885 Murray, Holloway and Timson-Hunt, *The Law and Practice of International Trade* 943.

886 Matthias Herdegen, *Principles of International Economic Law* (OUP 2013) 19.

887 WTO Agreement Art II.

888 GATT 1994 Article XXIV:4 reads: 'The members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the members to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other members with such territories.'

889 See section 5.4.2 and Table 5.1.

890 WTO, 'Trade Facilitation'.

instrument.[891] This is in contrast to RTAs or FTAs, who, though they are bodies subordinate to the WTO, have legal definitions derived from their treaties or some legal instruments.[892] This is a serious gap in the WTO jurisprudence considering its status and role in matters involving global trade.

Most of the literature in academia has adopted the above as the authoritative definition from the WTO. This definition is premised on reducing border delays and removal of 'red tape' at entry points.[893] The WTO is emphatic, in its own literature, in linking trade facilitation to border procedures.[894] It is also clear that border procedures are interpreted as any entry point of goods from one country to the other.

The thesis adopts the interpretation that a border includes interior international gateways like airports, railway stations and seaports.[895] Customs and border procedures would therefore involve export and import procedures as elements of trade. These elements are covered in GATT 1994 where it deals with transit,[896] import and export formalities,[897] and publication of trade laws.[898] The TFA is a separate agreement of the WTO that was negotiated to clarify and improve the provisions in GATT 1994. Its preamble reaffirms this when it states its mandate as:

> *Desiring to* clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit… [899]

It is certain that the intention of the TFA was to expand upon, and not to repeal, what is provided for in Articles V, VIII and X.[900] The provisions of the TFA are better

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891 Thomas Orliac, 'The Economics of Trade Facilitation' (PhD dissertation, Paris Institute of Political Studies 2005).

892 This is illustrated in sections 5.4 and 5.5 of this thesis.

893 WTO, 'Trade Facilitation'.

894 WTO, 'Trade Facilitation – Cutting "Red Tape" at the Border' <www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm> accessed 15 September 2021.

895 Michel Zarnowiecki, 'Borders, Their Design, and Their Operation' in Gerard McLinden, Enrique Fanta, David Widdowson and Tom Doyle (eds), *Border Management Modernization* (World Bank 2011) 38

896 GATT 1994 Art V.

897 GATT 1994 Art VIII.

898 GATT 1994 Art X.

899 TFA preamble.

900 Refer to discussion in Chapter 4.

understood when read with the three articles on trade facilitation in GATT 1994. The author considers that the TFA achieved its mandate of explaining and enriching the provisions in GATT 1994. It is therefore clear that the WTO's approach is to deal with soft infrastructural processes.

The definition is based on three separate, but interdependent, processes dealing with exports and imports, namely simplification, modernisation and harmonisation. Simplification entails the elimination of bureaucracies, the removal of unnecessary processes, and making processes easier and more understandable, whereas modernisation entails using the most up-to-date techniques to deal with processes. Harmonising involves replacing existing laws and procedures, or introducing common rules aligned to international standards.[901]

Other organisations such as UNECE introduce another term "standardisation" as an additional element of defining trade facilitation rather than use 'modernisation'. UNECE views trade facilitation as:

> the simplification, standardization and harmonization of procedures and associated information flows required to move goods from seller to buyer and to make payment.[902]

This thesis has not taken into account the element of standardisation, as proffered by UNECE, because the author considers it to be subsumed under harmonisation. In any case the definition by UNECE leaves out an important element of modernisation. The author argues that trade facilitation that does not include information and communication technology would be inadequate in this modern age.

Figure 5.2 below is a diagrammatic representation of the WTO's perspective of trade facilitation. It illustrates how the separate elements of simplification, modernisation and harmonisation individually and collectively contribute towards trade facilitation.

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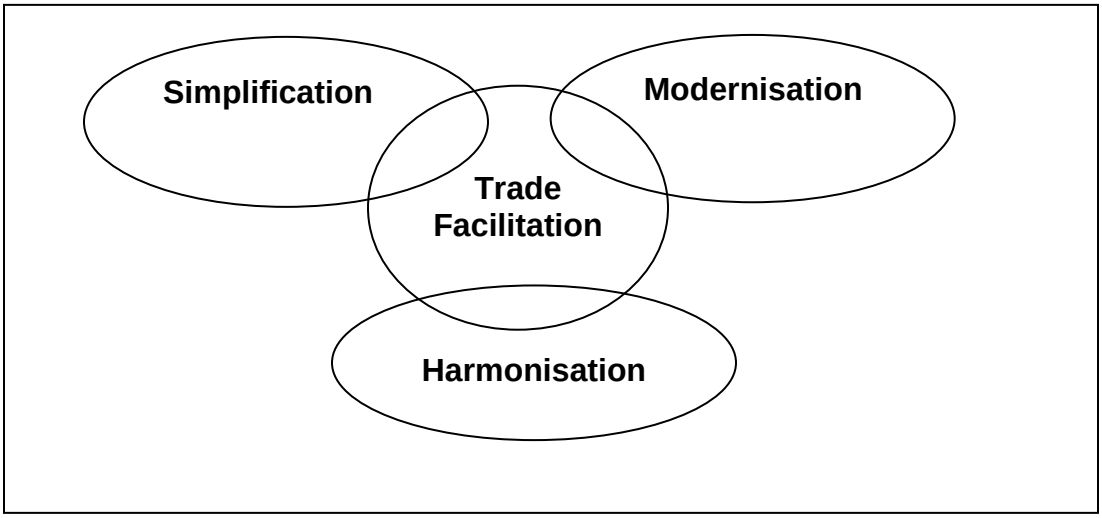
901 Marcel Fontaine, 'Law Harmonization and Local Specificities – A Case Study: OHADA and the Law of Contracts' (2013) 18(1) Unif L Rev 50, 51.

902 UNECE, 'Trade Facilitation Implementation Guide' <https://tfig.unece.org/details.html#:~:text=For%20UNECE%20and%20its%20UN,buyer%20and%20to%20make%20payment%E2%80%9D> accessed 31 January 2022.

Figure 5.2: Components of trade facilitation



Source: Author

5.4.2 Measures under the Trade Facilitation Agreement

The study has identified thirty-nine measures from the TFA that WTO members agreed to implement to ease trade. Table 5.1 below classifies the measures into five broad categories: transparency, simplification, harmonisation, predictability and cooperation. As will be noted in Chapter Seven, the measures were grouped into thematic areas in line with the Articles of the legal texts. The thematic areas formed the basis of the titles of the Articles of the legal texts. These measures are in accord with the WTO's definition of trade facilitation. Although the titles of the Articles and the relevant measures of the WTO have resemblances to the Articles and measures under the AfCFTA, the analysis in Chapter Seven will show that the legal texts being compared are not necessarily similar.

The measures represent the typical soft infrastructure approach which focuses on processes and systems. It does not even cover other soft infrastructure issues such as non-customs trade documentation, bank and payment systems, and availability of trade finance for cross-border traders. The author therefore considers the approach by the

WTO as 'process'-based, since the measures identify practices which must be implemented.

Table 5.1: Measures extracted from the Trade Facilitation Agreement[903]

TRANSPARENCY (13) • Publication of trade information • Availability of information on internet • Need for a facility to attend to enquiries • Notification of information to the WTO • Provisions to allow consultations • Opportunity for stakeholders to comment on proposed changes • Procedures for appeal or review • Notifications for enhanced controls • Detention procedures • Transparency in testing samples • General disciplines on fees and charges that affect international trade • Specific disciplines on fees and levies on Customs processes • Disciplines regarding penalties **HARMONISATION (2)** • Use of international standards • Use of common border procedures and uniform documents	**SIMPLIFICATION (17)** • Pre-arrival processing • Electronic payments • Splitting of release and payment functions • Use of risk management • Post clearance audits • Measures for authorised operators • Expedited shipments • Procedures for handling perishable goods • Movement of goods under Customs control • Simplified formalities and documentation • Policies regarding the acceptance of copies of documents • Single windows • Pre-shipment inspection • Engagement of Customs brokers • Re-export of rejected goods • Procedures for temporary imports • Formalities for goods in transit
PREDICTABILITY (4) • Advance rulings • Perishable goods • Expedited shipments • Publication of average release times	**COOPERATION (3)** • Customs cooperation • Cooperation amongst border agencies • Establishment of National Committees on Trade Facilitation to coordinate and enhance cooperation at national level

Source: Author. The author compiled the table using data obtained from WTO, 'Trade Facilitation Agreement Facility'. In most cases, the table has retained the names of the measures as found in TFA.

[903] WTO, 'Trade Facilitation Agreement Facility' <www.tfafacility.org/article-resources> accessed 1 October 2021.

The whole approach by the WTO, with a primary focus on Customs issues reaffirms its close partnership with the WCO. As noted, the WTO's approach is aligned with that of the WCO, and both of them respond to the need of a business-friendly operating environment.[904] It focuses on Customs and border issues whereas trade facilitation must include all trade-related activities.[905] Section 5.6 of this study identifies additional key measures, which are related to Customs and which, though not included in both the TFA and AfCFTA, would facilitate trade if implemented.

It should also be highlighted that there is a connection between trade facilitation and NTBs. The implementation of measures to remove bureaucratic procedures is on the inexorably related to the removals of barriers to trade. Both of them aid in the process of streamlining trade procedures and cutting down on unnecessary delays resulting in trade facilitation.

While criticising the WTO definition of trade facilitation, it must be said that its focused approach enables the WTO to deal with trade matters within a manageable framework. A judicious and well-advised approach would have been for the WTO to provide a comprehensive and all-inclusive definition, and then qualify and underline it with a rider delineating its areas of focus. It must, however, be noted that the focused scope and definition adopted by the WTO must have contributed towards the speedy delivery of the TFA, which stand out as the only tangible output out of the DDA after the creation of the WTO. With a broad approach, trade facilitation would have also been parked with the rest of the outstanding issues from the Doha Round.

Whether one agrees or disagrees with the narrow definition provided by the WTO, the fact is that it carries influence and authority. Despite its flaws, the WTO's definition of trade facilitation has served as a foundation for some other organisations in defining the term. Many RTAs have modified it to devise their own definitions.

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904 Refer to Section 5.4.4.
905 Refer to Section 5.2.

5.4.3 Perspective of the WCO

The WCO is one of the organisations involved in facilitating trade.[906] The RKC, an instrument of the WCO, focuses on the harmonising and streamlining of Customs processes.[907] The RKC is a major legal instrument outlining trade facilitation measures which must be implemented by Customs administrations.[908] The WCO's perspective on trade facilitation is however consistent with that of the WTO, and this demonstrates close collaboration between the two institutes.[909] Both the WTO and the WCO take a narrower approach than that followed by the WB, which includes hard infrastructure.[910]

5.4.3.1 Simplification, modernisation and harmonisation under the Revised Kyoto Convention

The RKC is a compendium of over 600 simplified standards negotiated and adopted by Customs administrations under the auspices of the WCO.[911] The standards are intended to simplify, modernise and harmonise Customs procedures, thereby promoting trade facilitation. As a means of harmonising procedures and promoting trade facilitation, Customs administrations must accede to the RKC and implement modern procedures. The preamble to the RKC makes it clear that its goal is to facilitate trade through making Customs procedures more uniform. It states:

> ENDEAVOURING to *eliminate divergence between the Customs procedures and practices of Contracting Parties that can hamper international trade and other international exchange*
>
> - DESIRING to contribute effectively to the development of such trade and exchanges by *simplifying and harmonizing* Customs procedures and practices and by fostering international co-operation […][912] (italics show the author's emphasis)

906 Refer to Chapter to 2 for an introduction of the WCO.
907 RKC preamble.
908 RKC preamble.
909 Refer to section 5.4.3.4.
910 Refer to section 5.4.3.5.
911 WCO, 'Kyoto Convention' <https://www.wcoomd.org/en/faq/kyoto_convention_faq.aspx> accessed 30 November 2022.
912 RKC preamble.

The preamble also lists the key principles which have guided the RKC when it states:

> RECOGNIZING that such *simplification and harmonization* can be accomplished by applying, in particular, the following principles:
>
> - the implementation of programmes aimed at continuously *modernizing* Customs procedures and practices and thus enhancing efficiency and effectiveness,
>
> - the application of Customs procedures and practices in a predictable, consistent and transparent manner,
>
> - the provision to interested parties of all the necessary information regarding Customs laws, regulations, administrative guidelines, procedures and practices…[913] (italics show the author's emphasis)

The above excerpt from the preamble emphasises the same terms used by the WTO to define trade facilitation, being simplification, modernisation and harmonisation. Whereas Articles V, VIII and X, originally negotiated in 1947, established the broad outline of the then GATT's approach to trade facilitation, the WCO developed the expressions that would be used to describe trade facilitation by the WTO in the twenty-first century. The WTO literally borrowed vocabulary from the RKC and used it to define trade facilitation. The WTO employs these phrases in the context of import and export procedures, in contrast to how the RKC uses them in the context of customs procedures.[914] It should be noted that the RKC also underscores the need for Customs procedures to be predictable, consistent and transparent.[915] The thesis has borrowed these terms to create the broad categories of trade facilitation measures shown in Table 5.1 above.

The three activities of simplification, modernisation and harmonisation are like trade facilitation trademark terms under the WTO. These concepts have become critical in describing or interpreting the meaning of trade facilitation. At the same time the synergies between the WTO and the WCO are cemented when considering that one

913 RKC preamble.
914 Refer to section 5.4.1 of the study.
915 RKC preamble.

of the roles of the WCO, through the RKC, is to harmonise, streamline and modernise global Customs procedures.[916]

5.4.3.2 Customs standards under the Revised Kyoto Convention

Some of the standards from the RKC have been incorporated into the TFA, demonstrating the synergy between the WCO and the WTO. The following examples illustrate the nature of the standards found in the RKC that are binding on all countries that are parties to it:

(a) Standard 3.3 requires two neighbouring countries that share common border crossings to ensure that their adjoining border posts operate during similar business hours and have correlated competencies so that trade is not hampered. This can be demonstrated from two adjoining border posts such as Beitbridge between South Africa and Zimbabwe.[917] The Standard is stated in the RKC, which states:

Standard 3.3

> Where Customs offices are located at a common border crossing, the Customs administrations concerned shall correlate the business hours and the competence of those offices.[918]

The standard is replicated in Article 8 of the TFA, which addresses issues of cooperation amongst border agencies. Article 25 of Annex 4 on Trade Facilitation of the Protocol on Trade in Goods contains comparable clauses.[919]

(b) Standard 27, in Chapter 1 of Specific Annex H to the RKC, and in respect of goods which are seized or detained by Customs, states:

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916 CCC Convention preamble; RKC preamble.

917 Refer to section 5.4.8.

918 RKC General Annex, Ch 3.

919 The corresponding provision to Standard 3.3 of the RKC is Article 8 of the TFA which reads: 'Each Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade … Such cooperation and coordination may include (a) alignment of working days and hours …'.

Standard 27

> Any person implicated in a Customs offence that is the subject of an administrative settlement shall have the right of appeal to an authority independent of the Customs unless he has chosen to accept the compromise settlement.[920]

Standard 27 requires countries to ensure that, in the case of Customs offences, national legislation includes provisions for the right of appeal to a body other than Customs. The standard is replicated in Article 4 of the TFA which addresses appeal and review procedures. Article 22 of Annex 4 on Trade Facilitation has similar provisions. Such a standard would be part of the transparency pillar of the TFA which calls for transparent procedures and a fair provision for appeals to be adjudicated by authorities independent of Customs administrations.[921]

The above cases demonstrate the complementarities between the WCO and the WTO as it shows that a number of provisions in the RKC, which was adopted in 1999, were carried over to the TFA, which was finalised later in 2013. Although the provisions in the RKC are geared towards Customs matters, it must be noted that trade facilitation goes beyond Customs and that some issues are crosscutting.[922] The RKC therefore provides a foundation for a modern Customs administration which facilitates trade by creating a modern, predictable, and level playing field for global trade.[923] Implementation of the RKC has therefore become a blue print for a modern Customs administration as well as a brand name for Customs procedures that can be used to attract foreign direct investment.[924] As of September 2022, the number of contracting

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920 RKC Specific Annex H, Ch 1.

921 The corresponding provisions to Standard 27 of RKC is Article 4(1) of the TFA on appeals, which reads: 'Each Member shall provide that any person to whom customs issues an administrative decision has the right, within its territory, to: (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision; and/or (b) a judicial appeal or review of the decision.'

922 Refer to section 6.2.

923 WCO, 'Overview' <www.wcoomd.org/en/topics/facilitation/overview.aspx> accessed 19 September 2021.

924 Tadashi Yasui, 'Benefits of the Revised Kyoto Convention (WCO Research Paper 6)' (February 2010) <www.wcoomd.org/en/topics/research/activities-and-programmes/~/media/D1549E77EF884FC7813E3AD2AB8C733D.ashx> accessed 18 October 2022.

parties to the RKC were 128 out of the WCO's total membership of 184.[925] The similarities between the RKC and the TFA shows that the WCO and the WTO cooperate with each other.

5.4.3.3 International Convention on the Harmonised Commodity Description and Coding System

In addition to the RKC, the WCO was instrumental in the development of the HS Convention which entered into force in 1988.[926] The HS Convention introduced a standard method of describing commodities and coding them, generally referred to as the 'Harmonised System' or simply 'HS'.[927] In addition to a standard way of describing products, the HS has ensured that each product used in world trade has a unique code to identify it.[928] It grouped commodities into over 5 000 clusters or tariff lines from which they are identified using a six digit code, arranged in a legal and logical structure.[929] With an increasing number of countries and economic regions adopting the HS nomenclature, it is usually recognised as the WCO's most successful legally binding instrument.[930] It has gained recognition in world trade and is now a multipurpose tool used, amongst others, as a basis to identify products, to allocate rates of duties to commodities, to collect statistics, for trade negotiations, and to identify products for duty-free trade in FTAs.[931] The WTO and RTAs, including the AfCFTA, uses the HS for identifying products and in trade negotiations. As an example, when trading in live animals, codes would be used to identify the animals more specifically.

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925 WCO, 'List of the Contracting Parties to the Revised Kyoto Convention' <www.wcoomd.org/Topics/Facilitation/Instrument%20and%20Tools/Conventions/pf_revised_kyoto_conv/Instruments> accessed 17 May 2022.

926 WCO, 'What is the Harmonized System (HS)?' <www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> accessed 30 September 2022.

927 HS Convention Preamble and Art 3.

928 As examples, live sheep are coded under tariff line 010410; live goats would be under 010420; and live camels under 010613.

929 WCO, 'What is the HS?'.

930 Carsten Weerth, 'Globally Uniform Harmonized System Nomenclature? Waivers for Developing Countries and Membership Development' (2017) 7(1) CSJ 50, 50-62.

931 WCO, *1988-2018, The Harmonised System: A Universal Language for International Trade, 30 Years On* (WCO 2018) 14.

The HS is regularly reviewed every five years to ensure that it is keeping up with technological and trade trends. The new version, HS 2022, entered into force in January 2022.[932] The HS has evolved into a universal language for describing and coding commodities being traded internationally.[933] In view of the fact that the HS is a standardised instrument that harmonises trade procedures in trade, it can be regarded as a trade facilitation tool.

5.4.3.4 Partnership between the WTO and the WCO

This thesis shows that there is a relationship between the WTO and the WCO on trade issues. Even though they are two separate organisations, with the WTO based in Geneva, Switzerland, and the WCO in Brussels, Belgium, they have a lot in common, particularly in facilitating trade. Both organisations strive for maximum harmony in trade facilitation. The use of similar terms by the WTO and WCO demonstrates partnership, cooperation and some shared goals between the two organisations. The WCO recognises this partnership. It has stated that the majority of the trade facilitation measures in the TFA are similar to the RKC and are Customs-related.[934] The WCO therefore acknowledges that the expertise to implement trade facilitation standards and measures would lie with Customs.[935] Independent analysts such as Wolffgang and Kafeero have also observed such synergies, interdependence and the need for collaboration.[936] This demonstrates that Customs is pivotal to the processing of import and export documentation, and hence to trade facilitation. As a result, the WCO has been a partner of the WTO prior to and after the TFA. As discussed in Chapter Two, the WTO and the WCO collaborate in trade facilitation issues, although the former is

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932 WCO, 'Amendments Effective from 1 January 2022' <www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2022-edition/amendments-effective-from-1-january-2022.aspx> accessed 30 January 2022.

933 Kunio Mikuriya, 'The Harmonized System, 30 Years Old and Still Going Strong!' (2018) 86 WCO News 9.

934 WCO, 'WTO Trade Facilitation Agreement' <www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/wto-agreement-on-trade-facilitation.aspx> accessed 25 September 2021.

935 WCO, 'Message from Secretary General'.

936 Hans-Michael Wolffgang and Edward Kafeero, 'Old Wine in New Skins: Analysis of the Trade Facilitation Agreement vis-à-vis the Revised Kyoto Convention' 2014 8(2) WCJ 27, 35.

considered to have a greater influence since its highest organ is a Council of Ministers, unlike the WCO, whose supreme body is a Council of Heads of Customs.

5.4.4 Functions of Customs vis-à-vis trade facilitation

The analysis in sections 5.4.1 to 5.4.3 above has demonstrated the synergies between the WTO and the WCO, which is confirmed by the correlation between their international agreements, the TFA and the RKC. Amongst others, the role of the WCO involves fostering cooperation in Customs matters and acting as a forum to establish the highest possible degree of harmonisation and uniformity of procedures.[937] The mandate of the WCO as the umbrella body would therefore be broad and defined by the role of its members. In general, the functions of Customs include revenue collection, protecting domestic producers against imports, controlling imports and exports by ensuring that such trade complies with national laws, implementing laws to ensure that trade complies with country commitments to the WTO, and monitoring and safeguarding the ICT of the supply chain involving the movement of goods in international trade.[938] It is therefore evident that in addition to levying customs duties, Customs laws also govern imports and exports and any issues involving the cross-border movement of goods.[939] As an example, the Zimbabwe Customs and Excise Act defines the purpose of Customs as follows:

> AN ACT to provide for the imposition, collection and management of customs, excise and other duties, the licensing and control of warehouses and of premises for the manufacture of certain goods, the regulating, controlling and prohibiting of imports and exports, the conclusion of customs and trade agreements with other countries, and forfeitures, and for other matters connected therewith.[940]

The same approach is replicated for Namibia whose laws state that the purpose of its Customs and Excise Act includes collection of revenue together with monitoring imports and exports.[941] Although Zimbabwe and Namibia would not be fully representative models (because they represent only two out of 184 countries in the WCO and 164

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937 CCC Convention.

938 Luc De Wulf, 'Strategy for Customs Modernization' in Luc De Wulf and José B. Sokol (eds), *Customs Modernization Handbook* (World Bank 2004).

939 WCO, *Glossary of International Customs Terms* 8.

940 Zimbabwe Customs and Excise Act [Chapter 23:02] preamble.

941 Namibia Customs and Excise Act 20 of 1998 preamble.

members in the WTO), the above introductory paragraphs capture the essence of the role of a Customs administration.

By virtue of being stationed at the borders to control imports and exports, Customs administrations have an impact on trade facilitation. Bureaucratic Customs administration with outdated or uncoordinated laws and procedures can hamper trade and destroy the very reason why FTAs, CUs and RTAs are being created. In this regard, while most Customs administrations are answerable to ministries responsible for finance or the treasury, they also have a functional connection to and accountability to other ministries. One such ministry is that in charge of foreign trade, whose role is to ensure that a government creates an operational environment that can promote foreign trade.

The WCO prioritises trade facilitation, and it collaborates with the WTO in implementing international trade instruments. The WCO stated:

> […] Trade facilitation, in the WCO context, means the avoidance of unnecessary trade restrictiveness. This can be achieved by applying modern techniques and technologies, while improving the quality of controls in an internationally harmonized manner.
>
> The WCO's mission is to enhance the efficiency and effectiveness of Customs administrations by harmonizing and simplifying Customs procedures. This in turn will lead to trade facilitation which has been a genuine objective of the WCO since its establishment in 1952. In order to further trade facilitation, the WCO has developed and maintained Conventions, standards and programmes and provided technical assistance and support for capacity building. Through these instruments and activities, its Member Customs administrations have been able to offer their governments and other stakeholders enhanced trade facilitation combined with effective Customs control […][942]

The above statement clearly spells out that the facilitation of trade is one of the principal missions of the WCO. It further affirms that trade facilitation involves the use of modern technology. It will be noted the trademark words of "harmonise" and "simplify" feature.[943] The WCO considers the RKC as a trade facilitation tool that promotes the

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942 WCO, 'What is Securing and Facilitating Legitimate Global Trade' <www.wcoomd.org/en/topics/facilitation/overview/customs-procedures-and-facilitation.aspx> accessed 18 September 2021.

943 Refer to sections 5.4.1, 5.4.2 and 5.4.3 as well.

application of simple and uniform procedures.[944] This is in accord with the WTO's approach that is discussed in sections 5.4.1 and 5.4.2 above. During negotiations on the TFA, the WCO was a key participant and represented the global voice of Customs by providing input on practical issues.[945] This demonstrates how the WTO and the WCO work together to promote international trade. The collaboration is cemented when considering that their definitions of trade facilitation are the same.

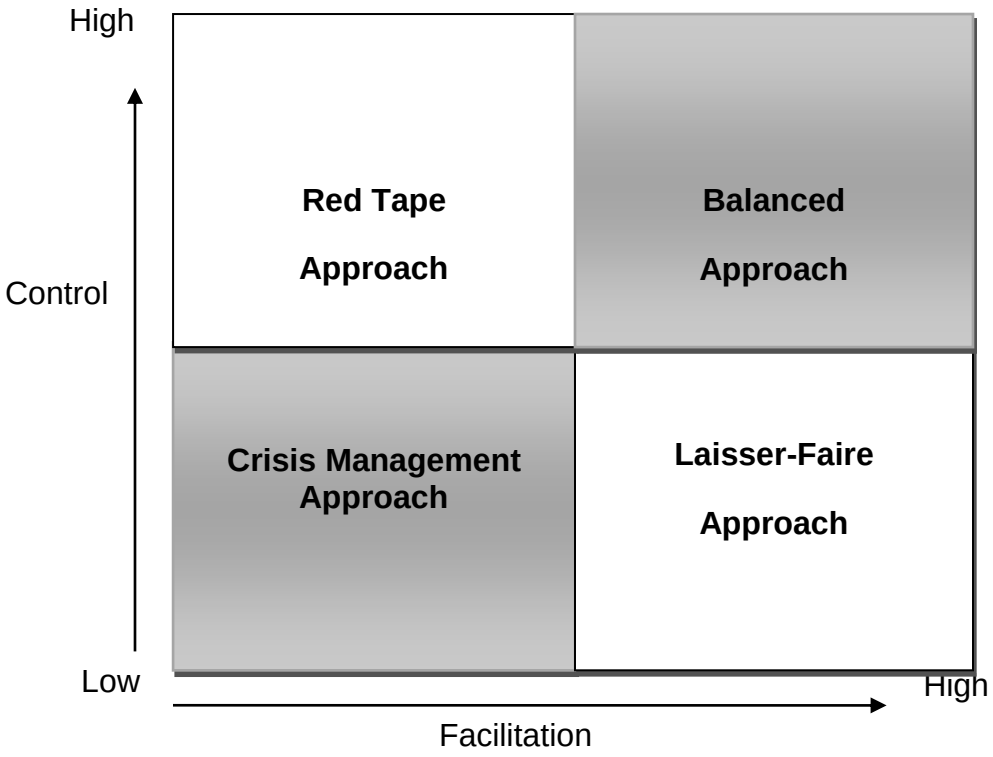
Because Customs is stationed at the border and has the mandate to inspect and regulate imports and exports, its security role has grown in importance. In response, the WCO developed the SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) in 2005, a strategic policy document whose goal is to improve and balance the security and facilitation roles of Customs globally.[946] The SAFE Framework sets out operational standards based on cooperation, resting on three pillars, being: Customs administrations themselves, Customs and its business stakeholders, and Customs and other government agencies.[947] It is mainly an optional policy document that is updated on a regular basis and carries some weight in setting international standards.

An efficient Customs administration must thus attain a balance between its various functions, some of which may appear to be mutually exclusive. This is a crux for Customs administrations, and in which professional expertise is required to balance these roles. Figure 5.3 below depicts an analysis by Widdowson in attempting to draw an appropriate proportion between these two Customs functions of control and trade facilitation.[948] The desired equilibrium is a balanced approach in which Customs exercises a high level of control while implementing high level trade facilitation measures. This optimal outcome balances the requirements of governments against that of importers and exporters. The Red Tape and Crisis Management matrices are undesirable because trade facilitation is low. The Laisser-Faire approach is not

944 WCO, 'The Revised Kyoto Convention' <www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx> accessed 13 February 2022.
945 WCO, 'Message from Secretary General'.
946 WCO, *WCO SAFE Framework of Standards* (WCO 2021) 1.
947 WCO, *WCO SAFE Framework of Standards* 1.
948 De Wulf, 'Strategy for Customs Modernization' 92

appropriate because it compromises the function of Customs on matters of security. The question which needs to be posed, and which can be subject matter of a separate study, is whether this balance is feasible or it only theoretical. The author considers that the aspect of 'control' involves law enforcement. Any efforts to enforce the law can never be completely efficient and successful but can be reasonably and relatively attained.

Figure 5.3: Balancing trade facilitation and control



Source: David Widdowson, in De Wulf[949]

The diagram shows the important role which Customs play in facilitating trade, without compromising the security and control function, which translates into another role: that of protecting society against illegal imports and exports or safeguarding the peace and stability of a nation.

949 De Wulf, 'Strategy for Customs Modernization' 92.

5.4.5 World Bank and inclusion of hard infrastructure

As discussed in Chapter Two of this thesis, the WB, the IMF and the WTO complement one another other in carrying out their respective mandates. The WB is involved in developmental issues, and this includes supporting work in infrastructure and promoting trade and development.[950] This incline towards reconstruction reminds of the Bank's purpose when it was established as the International Bank for Reconstruction and Development.[951]

The WB regards trade as a 24/7 business that necessitates efficient performance systems in all areas, including hard infrastructure such as transportation, telecommunications, information-processing logistics and trade related infrastructure.[952] In accordance with one of its mandates, it views trade facilitation as a multiplayer process that involves easing trade "at the border, behind the border, and beyond".[953] The WB takes a broad view of trade facilitation as opposed to the narrower approaches by the WTO and WCO, which are restricted to limited areas that focus on "red tape" at the border.[954] This comprehensive approach recognises the importance of both soft and hard infrastructural issues in addressing trade facilitation. The approach by the WB therefore includes all sectors involved in getting the goods from the seller to the buyer since they all actively participate in efforts to develop innovative means to facilitate trade. Mustra agrees with this approach and argues that trade facilitation entails "reforming and modernising border management institutions, changing transport regulation policy, and investing in infrastructure ...".[955]

This definition by the WB, which Mustra also subscribe to, therefore extends beyond the streamlining of procedures, and includes additional elements such as:

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950 International Development Association, World Bank Group, 'Financing' <https://ida.worldbank.org/financing/ida-financing> accessed 29 September 2021.

951 Refer to Chapter 1.

952 World Bank, 'Connectivity, Logistics and Trade Facilitation'.

953 World Bank, 'Connectivity, Logistics and Trade Facilitation'.

954 Refer to section 5.4.1.

955 Monica Alina Mustra, 'Border Management Modernization and the Trade Supply Chain' in Gerard McLinden and others (eds), *Border Management Modernisation* (World Bank 2011).

(a) identifying the bottlenecks in the logistics and regulatory framework;

(b) acknowledging that trade-related logistics are wide enough to cover all activities of the international trade supply chain;

(c) upgrading physical infrastructural facilities at borders; and

(d) reducing delays and costs in the movement of goods.

The definition by the WB, with a suitable caveat, would be most appropriate for adoption by the WTO. In accepting the definition by the WB, the WTO would then have delineated its own area of attention to be on soft infrastructure issues that precisely concern the simplification, modernisation and harmonisation of border procedures. This would have defended the WTO of coming up with an appropriate definition while defining its own area of focus in world trade.

The WB's perspective introduces the element of cost reduction, which, though not mentioned by the WTO, is a critical issue for concerned stakeholders such as importers, exporters, transporters and consumers. Some researchers view trade facilitation in terms of costs and equate it to a reduction in transaction costs.[956] Although it would be narrow to consider trade facilitation only in terms of costs reductions, it is, however, a fact that when processes are simplified and harmonised, transaction costs are reduced. The mode and effectiveness of the transport system together with geographical constraints encountered have an impact on the transportation of commodities, hence on trade facilitation, in international trade.[957] Some seemingly simple issues other than the efficiencies of Customs can also be added to the list, including service fees demanded by various agencies; availability of basic amenities, for example, fuel and vehicle service stations along a highway; and the skills of service providers such as shipping agents.

956 Sengupta, *Economics of Trade Facilitation* 19.

957 Jean-Francois Arvis, Gael Raballand and Jean-Francois Marteau, *The Cost of Being Landlocked: Logistics Costs and Supply Chain Reliability* (World Bank 2010) 41.

It should be noted that the variations in approach between the WB and the WTO do not imply a conflict but rather a selection of different focus areas by the respective organisations. The WB and the WTO collaborate, and the former has even funded some of the soft infrastructure interventions done in its member countries and in RTAs. In 2013, for example, the WB invested about $5.8 billion in funding trade facilitation initiatives such as the streamlining of documents, capacity building, and border management.[958]

5.4.6 UNCTAD and trade facilitation

UNCTAD is one of the UN agencies that focuses on trade and development issues affecting developing countries.[959] As a result, UNCTAD has a close relationship with the WTO and the AfCFTA. It has a mandate over the causes of both the WTO and the AfCFTA on issues of trade and trade facilitation.[960]

The UN and its agencies, such as UNCTAD, view trade facilitation more broadly than the WTO and they embrace both the soft and hard infrastructure approach.[961] It interprets trade facilitation to be any action that eases a trade transaction and reduces the time and cost in the transaction cycle.[962] As is the case with the WB, UNCTAD links trade facilitation to improvements in transport infrastructure, ICT and other broader services that support trade. It recognises that since the challenges existing with trade facilitation are regional, problems can be better handled within the regional integration arrangements, which would include UN commissions such as UNECA and UNECE, who strive to promote intra-regional trade within their own constituencies.[963] With that approach, UNCTAD is strategically positioned to collaborate with the WTO and the AfCFTA, together with the WB or any other organisation, on trade facilitation issues.

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958 World Bank, 'Trade Facilitation and Logistics' <www.worldbank.org/en/topic/trade/brief/trade-facilitation-and-logistics> accessed 3 October 2021.

959 Refer to Section 2.4.4.1

960 Herdegen, *Principles of International Economic Law* 30.

961 UNCTAD, *Trade Facilitation and Development: Driving Trade Competitiveness, Border Agency Effectiveness and Strengthened Governance* (UN 2016) 5.

962 UNCTAD, *Trade Facilitation Handbook Part I – National Facilitation Bodies: Lessons from Experience* (UN 2006) 6.

963 UNCTAD, *Trade Facilitation and Development* 5.

UNCTAD has been proactive in helping developing nations assess their requirements and priorities on trade and transport facilitation as well as assisting them put effective trade and transport facilitation measures into place.[964]

UNCTAD has made tangible efforts to facilitate trade by developing a computer software system, Automated System for Customs Data (ASYCUDA), which is used by Customs administrations to modernise and streamline Customs procedures.[965] The ASYCUDA system is used by over ninety countries and has several benefits, including the following: it simplifies Customs through automation; reducing border delays and business costs; it facilitates revenue collection; it is a reliable system for collecting trade data; and it promotes transparency by reducing human interventions at border posts, which can contribute to fraud and corruption.[966] As a result, UNCTAD has been effective in modernising Customs and trade processes. The impact of the UN on trade facilitation issues has also been felt through its agency, the UN Centre for Trade Facilitation and Electronic Business (UN/CEFACT), which maintains a Compendium of Trade Facilitation Recommendations that are classified according to subject matter and purpose.[967] The technical assistance provided by UNCTAD assists developing countries in accessing the benefits of a globalised economy in a more equitable and effective manner, allowing them to improve their participation in regional and global economic integration.[968]

5.4.7 Trade facilitation in selected RTAs

CUs and FTAs exist to facilitate trade amongst its members.[969] This means that, in addition to the TFA at the global level, FTAs can create their own preferential measures in order to meet the reasons for their existence. As discussed in Chapter Three, the MFN principles do not apply in an FTA as long as the measures introduced do not leave

964 UNCTAD, 'Trade Facilitation' <https://unctad.org/topic/transport-and-trade-logistics/trade-facilitation> accessed 22 September 2021.
965 Sengupta, *Economics of Trade Facilitation* 105-106.
966 UNCTAD, 'ASYCUDA: Delivering Goods Across Borders in the Digital Era' <https://unctad.org/topic/youth/asycuda-and-youth-entrepreneurship> accessed 22 September 2021.
967 Sengupta, *Economics of Trade Facilitation* 108-109.
968 UNCTAD, 'About UNCTAD' <https://unctad.org/about> accessed 22 September 2021.
969 GATT 1994 Art XXIV:4.

non-FTA members worse off than before the formation of the FTA.[970] In theory, FTA members may choose to automate their own procedures to speed up the flow of trade inside an FTA, as long as doing so does not slow down trade with non-FTA participants. In practice, the introduction of automation in a country would not create room to discriminate in trade between members and non-members. A country which ordinarily requires five different sets of import documents under the WTO's MFN can operate in other FTAs whose requirements of the number of sets documents can differ. It would be conceivable to decrease the number of import documents required with a partner in one FTA to three, and to decrease the number to only one document for trade with a different partner in a different FTA.[971] This is within WTO rules, in that each FTA can liberalise to its own requirement in order to ease the trading environment for its members as long as that does not bring additional burdens to non-members of the FTA.[972] With most trade facilitation measures in an FTA, the practical effect is that their implementation also benefit non-members of the FTA. As an example, the establishment of a OSBP at Chirundu, between Zimbabwe and Zambia, also benefits non-members of the SADC and COMESA blocs.

This study has examined how some of building blocks of the AfCFTA, that is the EAC, ECOWAS, COMESA, and SADC, define the term of trade facilitation. The four RECs were chosen based on an assessment by the AU in that they generally outperform the rest in respect of trade integration.[973] Further, as discussed in Chapter Four, the four RECs have advanced deeper in implementing an FTA compared to the other four.[974] To get a more balanced picture of trade facilitation, the research also examined the approach taken by ASEAN, a regional trading arrangement which has played a central

970 GATT 1994 Art XXIV:5(b).

971 Shintaro Hamanaka, Aiken Tafgar, and Dorothea Lazaro, 'Trade Facilitation Measures Under Free Trade Agreements: Are They Discriminatory Against Non-Members?' (ADB Working Paper Series on Regional Economic Integration No 55) (ADB, July 2010) <www.adb.org/sites/default/files/publication/28529/wp55-trade-facilitation-measures.pdf> accessed 16 October 2022 6.

972 See Chapter 3, and discussions on GATT 1994 Art XXIV:5(b).

973 AU, *African Integration Report 2020* (AU 2020) 31.

974 As discussed under sections 4.5.1, 4.5.3, 4.5.5 and 4.5.7, AMU, CEN-SAD, ECCAS and IGAD have not advanced as much compared to the other four RECs.

role in advancing economic integration in Asia.[975] ASEAN has had a positive impact on South East Asia, in a variety of ways, politically as well as socially. It has streamlined trade regulations, encouraged free trade, benefitted from foreign investment, and its members are integrated in trade both regionally and globally.[976] This section is intended to analyse the interpretation of trade facilitation from the perspective of selected RTAs, unlike the discussions in Chapter Four of the study,[977] which give general background information on all eight RECs of the AU. The AfCFTA is discussed separately in section 5.6 below.

5.4.7.1 Common Market for Eastern and Southern Africa

As established in Chapter Four, COMESA is one of the largest RECs in Africa, with a membership of twenty-one countries spread over Eastern, Southern and Northern Africa and with the goal of increasing intra-African trade. COMESA defines trade facilitation as:

> The coordination and rationalization of trade procedures and documents relating to the movement of goods from their place of origin to their destination.[978]

The treaty further defines the meaning of procedures, and these are:

> Activities related to the collection, presentation, processing and dissemination of data and information concerning all activities constituting international trade.[979]

The definition concentrates on soft issues with a focus on the rationalisation of procedures as goods move from the seller to the buyer. COMESA's definition does not confine itself to border issues because trade procedures and documentation extend beyond Customs to include aspects such as insurance, payment systems, and banking formalities used to procure goods. Based on this definition, COMESA has established

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975 The ten members of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Refer to ASEAN, 'ASEAN Member States' <https://asean.org/about-asean/member-states/> accessed 4 October 2021.

976 Ryan Zhang, 'Beating the Odds: How ASEAN Helped Southeast Asia Succeed' (*Harvard Political Review*, 15 March 2020) <https://harvardpolitics.com/asean-beats-the-odds/> accessed 3 October 2021.

977 Refer to sections 4.5.1 to 4.5.8.

978 COMESA Treaty Art 2.

979 COMESA Treaty Art 2.

its own institutions such as the African Trade Insurance Agency (ATIA), PTA Reinsurance Company (ZEP-RE) and the Trade and Development Bank (TDB) to facilitate trade and provide financing. It should be noted that the lesson that can be learnt from COMESA is that trade is increased through the implementation of measures, rather than the creation of institutions.[980] The author considers that the implementation of trade facilitation measures, creates a conducive environment for goods to move across borders unhindered and thus enable trade. Institutions are a tool to support the implementation of various actions that enable the movement of goods.

COMESA has been leading in facilitating trade, be on the soft issues such as modernisation of Customs procedures or the hard infrastructure which involves developing transport networks.[981] The trade facilitation tools being implemented in the COMESA region include automation of Customs procedures; use of a single Customs declaration form which replaced the previous system where some members used a total of about 27 documents to process cross border movement of goods; and measures to streamline transit procedures.[982] One of the trade facilitation instruments developed by the REC is the COMESA Yellow Card scheme which is a facility that provides a common third party insurance scheme for vehicles moving in member countries.[983] This scheme facilitates the movement of vehicles and consequently people and goods in a region that is strongly reliant on transportation by road. Non-COMESA members are involved in the program in that South Africa and Mozambique issue insurance for vehicles traveling to the COMESA region, while Tanzania, a non-COMESA member, implements it. Tanzania's full-time membership, as well as the presence of South Africa and Mozambique, demonstrates COMESA's impact to its non-members on matters involving trade and development.

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980 Mangeni and Juma, *Emergent Africa* 115.

981 Mangeni and Juma, *Emergent Africa* 113.

982 Francis Mangeni, 'Trade Facilitation and Regional Economic Integration in Eastern and Southern Africa' in Ann Mugunga (ed), *Key Issues in Regional Integration Volume III* (COMESA 2014).

983 COMESA, 'Yellow Card has Settled Over $1m Insurance Claims' <https://www.comesa.int/yellow-card-has-settled-over-1m-insurance-claims/> accessed 19 March 2023.

5.4.7.2 East African Community

The EAC takes a broader approach to trade facilitation. The definition in the EAC Treaty is aligned to that of its subsidiary texts, the East African Customs Union (hereafter Protocol on the East African CU).[984] Typically, once defined in the treaty, the same definition would be applicable across subsidiary instruments that are part of the main treaty. The EAC uses the same words as those found in the COMESA Treaty.[985] Following the definition of trade facilitation provided in the EAC Treaty, the Protocol on the East African CU identifies the trade facilitation activities that must be implemented in the CU. These involve: reducing trade documentation; use of common standards; cooperation with the transport sector; and capacity building activities on matters of trade.[986]

A comparison of the approaches of COMESA, SADC, and the WTO regimes reveal that their focus is on the soft features of procedures and trade documentation. The EAC, however, goes a step further and mentions the aspect of transport facilitation as a measure to facilitate trade within the REC.[987] The inclusion of transport activities, which are ordinarily not included in other RECs, must be noted. An additional trade facilitation measure for the EAC, which can make a major contribution, is conducting joint training programs and capacity building in matters of trade.[988] This is also in line with the proposal discussed in Chapter Two of the study for the WTO to stipulate capacity building as one of its functions.[989]

Aside from the addition of transport, trade facilitation issues in the EAC are similar to those of COMESA and the WTO. One possible explanation for this complementarity is the overlapping membership of countries in the RTAs. The other side effect is that

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984 EAC Treaty Art 1; Protocol on the Establishment of the East African Customs Union (adopted 2 March 2004, entered into force 1 January 2005) (Protocol on the East African CU) Art 1.
985 EAC Treaty Art 1; COMESA Treaty Art 2.
986 Protocol on the East African CU Art 6.
987 Protocol on the East African CU Art 6(c).
988 Protocol on the East African CU Art 6(g).
989 Refer to discussions in section 2.4.5 of this study together with the recommendations in Chapter 8.

discussions on a subject matter would be guided by the approach of the respective REC. In this case, a country such as Kenya, would use a narrower approach when discussing trade facilitation within the COMESA set up of the twenty-one member. The same Kenya would adopt a more loaded approach when deliberating on the subject within the EAC configuration of seven partner countries, in which the definition of trade facilitation includes transport issues.[990]

5.4.7.3 Economic Community of West African States

While not explicitly defining trade facilitation, the ECOWAS Treaty however implies the role thereof when it states:

> Member States shall …. take appropriate measures to harmonise and standardise their Customs regulations and procedures to ensure the effective application of the provisions of this Chapter and to facilitate the movement of goods and services across their frontiers[991]

The emphasis by ECOWAS is on harmonising and standardising Customs regulations and procedures for the fast movement of goods. As already discussed in section 5.4, limiting trade facilitation to only Customs issues is a narrow approach considering the breadth of activities found in the chain involving the movement of goods. The REC has developed an ECOWAS Trade Liberalisation Scheme (ETLS) as an operational tool for facilitating trade between its member states.[992]

5.4.7.4 Southern African Development Community

The SADC addresses trade facilitation issues in its Annex III of its Protocol on Trade. The REC takes a similar approach to COMESA and the EAC in viewing trade facilitation as an issue involving trade procedures.[993] Unlike COMESA, but similar to the EAC, the SADC Trade Protocol outlines the activities that must be undertaken in order to facilitate trade, and these include the rationalisation of documentation and its

990 See also Chapter 4 on EAC.
991 ECOWAS Treaty Art 46.
992 ECOWAS,' About ETLS' <https://etls.ecowas.int/about-etls/> accessed 23 September 2021.
993 SADC Trade Protocol Annex III, Art 1.

processing in order to reduce costs of business; continuous review of processes; capacity building; engagements with the transport sector; and reducing the costs of business.[994] The legal texts for SADC, one of the four RECs selected for discussion in this chapter, links the concept to the cost of doing business. The linkage between trade facilitation and costs is a general note, that would be applicable to all RECs and stakeholders. It must be noted that throughout history, all the efforts towards trade facilitation were designed to reduce the costs of doing business.[995] Yet, SADC has just gone a step further by including the cost issue in its legal texts. There is however no indication that it has done anything unusual in terms of implementing trade facilitation measures.

The story of the Beitbridge border post is a practical example of trade facilitation measures being implemented in RECs, and in this case, SADC. Beitbridge is a common border crossing between South Africa and Zimbabwe, where the two countries are separated by the Limpopo River, illustrates the theoretical and practical aspects of trade facilitation. The Zimbabwe town and border side are called Beitbridge, while the South African town is Musina and the border is also called Beitbridge. The two border posts, which share a common name, have also been referred to in section 5.4.3.2 of this study. This is unlike the common border crossing between Mozambique and South Africa, which is called Ressano Garcia on the Mozambique side and Lebombo in South Africa.

The hours of operation of the two borders at Beitbridge are aligned in that they both conduct all border functions for twenty-four hours per day. The two border offices are on either side of the river, about half a kilometre apart, and office complexes are constructed from the point where the bridge starts. The border is the busiest one between Zimbabwe and South Africa, with claims that it could be the busiest in Africa, in terms of vehicle and human traffic.[996] Beitbridge is of strategic importance to the

994 SADC Trade Protocol Annex III, Art 5.
995 Refer to discussions in Section 5.2 and 5.3.
996 Zimbabwe Revenue Authority, 'Beitbridge Border Upgrade Takes Shape' <www.zimra.co.zw/news/2129:beitbridge-border-upgrade-takes-shape> accessed 11 July 2022.

SADC's North-South Corridor.[997] The corridor connects various transport links to improve the movement of goods. One of the strategic interventions taken along the corridor has been to upgrade the Beitbridge Border Post. At the time of the study, the mentioned upgrade was still ongoing. The finance to upgrade the border has been provided by African financial institutions. Upgrades include modernising the border post to reduce border delays and boost intra-African trade, together with improving the infrastructural back-up services in Beitbridge town.[998] The upgrade has implications for trade facilitation in Zimbabwe, its neighbouring countries, the SADC and COMESA as RECs, and the AfCFTA. Some of the key interventions are as follows:

(a) upgrade infrastructure at the border post with clear facilities to hold freight;

(b) separate cargo into distinguishable groups such as commercial traffic, passenger vehicles, and transit lanes, in order to ease and process the flow of traffic;

(c) establish a OSBP and thus reducing the duplication of systems;

(d) improve interconnectivity, joint border agency collaboration and communication between the two adjoining border offices of Beitbridge in the two countries;

(e) joint border coordination amongst the border agencies operating on either side of the border;

(f) congenial border facilities for travellers and stakeholders who use the border – this includes adequate space, health facilities and washrooms.

There are several implications involving trade facilitation which can be drawn from the Beitbridge case.

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997 The North South Corridor is a transport corridor that links Botswana, DRC, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe. These countries are all SADC member states.

998 Afreximbank, 'Afreximbank Approves US$70 Million for the Upgrade of Beitbridge Border Post to Facilitate Trade in Southern Africa' (3 March 2021) <www.afreximbank.com/afreximbank-approves-us70-million-for-the-upgrade-of-beitbridge-border-post-to-facilitate-trade-in-southern-africa/#:~:text=Cairo%2C%2003%20March%202021%3A%20%E2%80%93,Beitbridge%20border%20post%20in%20Zimbabwe> accessed 11 July 2022.

The upgrade is an example of the modernisation of borders as evidenced by introducing modern facilities and the use of ICT. Improved infrastructure will create a congenial environment for implementing other trade facilitation measures. This is also a clear demonstration of how hard infrastructure issues can ease the flow of goods. The diversion of traffic into separate lanes illustrates simplification of procedures and compliance with the requirements of the TFA.[999] The fact that the border posts operate 24/7 shows that the hours are aligned, and because both sides handle all business it also follows that the two sides have the same competencies as stipulated in the TFA,[1000] the RKC[1001] and the AfCFTA.[1002] Both Zimbabwe and South Africa belong to the SADC and the AfCFTA and are therefore bound by the trade facilitation instruments of the two RTAs. The issue of multiple membership in RECs features again when considered that South Africa is a member of SACU, while Zimbabwe is not. South Africa is not a member of COMESA, which Zimbabwe is. In addition to belonging to these RTAs and RECs, both Zimbabwe and South Africa are members of the AfCFTA, WCO, WTO and are party to the AfCFTA Agreement, RKC and the TFA. It therefore follows that both Zimbabwe and South Africa are obliged, under the international undertakings binding them, to implement trade facilitation measures at their common border. This illustrates the need for programs of activities amongst RECs, RTAs, the WCO and the WTO to have some degree of alignment so that members do not end up with conflicting activities and timelines. This is one of the objectives of the TFTA as discussed in Chapter Four of the study.

Though the envisaged OSBP between Zimbabwe and South Africa is a trade facilitation measure on its own, it will enhance coordination amongst border agencies at both the interstate and intrastate levels for the two countries. The AfCFTA instrument is more detailed than the TFA,[1003] obliging Customs administrations to cooperate, additional to a principle contained in RKC.[1004] The creation of a OSBP will eliminate duplication of

999 TFA Art 11:5.
1000 TFA Art 8.
1001 RKC General Annex, Standard 3.3.
1002 AfCFTA Agreement Annex 4, Art 25.
1003 Refer to the comparative analysis in section 7.3.14 of the study.
1004 RKC preamble.

processes while harmonising Customs procedures. All taken into consideration, it is evident that the upgrading of Beitbridge will facilitate trade through faster and more efficient border formalities.

5.4.7.5 Association of Southeast Asian Nations

ASEAN has developed a comprehensive trade facilitation program and an ASEAN Economic Community Trade Facilitation Action Strategic Plan 2017-2025 to reduce transaction costs, increase intra-ASEAN trade and improve global ratings on ease of doing business.[1005] The framework was built on the principles stipulated in the ASEAN Trade in Goods Agreement (ATIGA), which includes: transparency in the application of laws; communication and consultations between authorities and businesses; cooperation between authorities and stakeholders; simplification of procedures; non-discrimination in the application of laws; consistency and predictability in the application of laws; harmonisation of laws and procedures; use of technology to modernise processes; and the use of appeals to courts.[1006] A number of these measures are consistent with the RKC and the TFA. The trade facilitation measures being implemented by ASEAN go beyond Customs procedures and, amongst others, its objectives are to have an efficient movement of goods and eliminate NTBs.[1007] It has measurable deliverables for both the member states and ASEAN as an RTA. These include: reduction in trade costs; doubling of intra-ASEAN trade between 2017 and 2025; and improved performance in global rankings such as the World Bank's Ease of Doing Business.[1008] The trade facilitation initiatives are further enhanced by the agenda on Customs cooperation, whose objective is to simplify Customs procedures, leading to a reduced cost of doing business.[1009] It can, however, be argued that Customs

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1005 ASEAN, 'AEC Trade Facilitation Strategic Action Plan 2025' <https://asean.org/wp-content/uploads/2020/12/AEC-2025-Trade-Facilitation-Strategic-Action-Plan.pdf> accessed 30 September 2021.

1006 ASEAN Trade in Goods Agreement (adopted 26 February 2009, entered into force on 17 May 2010) (ATIGA) Art 46.

1007 Tham Siew Yean, 'Trade Facilitation Synergies Between WTO and ASEAN Initiatives (Iseas Yusof Ishak Institute Perspective No 47' (4 July 2017) <https://think-asia.org/handle/11540/7214> accessed 18 October 2022.

1008 ASEAN, *ASEAN Integration Report 2019* (ASEAN 2019) 24.

1009 ASEAN, *ASEAN Integration Report 2019* 159.

cooperation is part of trade facilitation, considering that it is a necessary ingredient in simplifying and harmonising procedures, a lot of which originates from Customs. The TFA recognises this and includes the necessary provisions for Customs cooperation.[1010]

The number of activities highlighted shows the importance of trade facilitation in a regional trading arrangement. It must be noted that all this work was developed before the TFA came into force. Although there is a correlation with the WTO in terms of certain activities, ASEAN's work program goes beyond the TFA.

5.5 Trade facilitation in the AfCFTA

While an examination of trade facilitation from other organisations and RTAs is necessary to provide a foundation for an informed comparative analysis in Chapter Seven, the perspectives of AfCFTA and the WTO are critical because they are central to the study. The definition by the WTO has already been analysed in sections 5.4.1 and 5.4.2.

The AfCFTA Agreement and its accompanying instruments are the result of negotiations between fifty-five members of the AU who drew influences from their eight RECs, acting as building blocks. As mentioned in Chapter Four, these instruments were driven by member states and built upon what they were implementing in their individual RECs, existing acquis and best practices from other institutions.

The preamble to the AfCFTA Agreement acknowledges the importance of trade facilitation, and using preambular language, it states:

> […] CONSCIOUS of the need to create an expanded and secure market for the goods and services of State Parties through adequate infrastructure and the reduction or progressive elimination of tariffs and elimination of non-tariff barriers to trade and investment;

[1010] TFA Art 12.

> ALSO CONSCIOUS of the need to establish clear, transparent, predictable and mutually-advantageous rules to govern Trade in Goods and Services, Competition Policy, Investment and Intellectual Property among State Parties […][1011]

The preamble therefore underscores those markets can be secured and expanded with the support of adequate infrastructure and elimination of trade barriers. It also acknowledges the need for a fair and business-friendly trading environment. Although reference is made to infrastructure, none of the Agreement's protocols or annexes expand on this. The preamble sets the tone for trade facilitation measures in the AfCFTA despite not using the term. The Agreement, however, becomes more explicit when it refers to specific objectives, and it states:[1012]

> For purposes of fulfilling and realising the objectives set out in Article 4, State Parties shall: …
>
> (d) cooperate on all trade-related areas; […]
>
> (e) cooperate on customs matters and the implementation of trade facilitation measures; […]

The preceding provisions show that the trade facilitation instruments of the AfCFTA are specific and were designed for Africa, considering that these were recognised form the beginning in the framework agreement itself. The highlighted provisions specifically mention the need for cooperation as a measure to facilitate trade. The two activities, "cooperate on Customs matters" and "implementation of trade facilitation measures", are joined into one clause implying a connection.[1013] That relationship is relevant when dealing with trade procedures, such as import and export processes, and Customs matters in respect of border delays. This correlates with the approach taken by the WTO and the WCO together with the TFA and the RKC, both of which illustrate complementarity between trade and Customs.[1014] Chapter Seven will address the aspect of Customs cooperation in detail.[1015]

1011 AfCFTA Agreement preamble.
1012 AfCFTA Agreement Art 4.
1013 AfCFTA Agreement Art 4(e).
1014 Refer to sections 5.4.1 and 5.4.2.
1015 Refer to sections 7.3.14 and 8.2.

The AfCFTA Agreement is followed by the Protocol on TiG, which is more specific and whose preamble states:

> COMMITTED to expanding intra-African trade through the harmonisation, coordination of trade liberalisation and implementation of trade facilitation instruments across Africa, and cooperation in the area of quality infrastructure, science and technology, the development and implementation of trade related measures […][1016]

As expected from a protocol, it provides more detail and is more explicit on trade facilitation issues when compared to the AfCFTA Agreement. The Protocol on TiG spells out in more specific terms in its objectives as follows:[1017]

> 2. The specific objective of this Protocol is to boost intra-African trade in goods through:
> (a) progressive elimination of tariffs;
> (b) progressive elimination of non-tariff barriers;
> (c) enhanced efficiency of customs procedures, trade facilitation and transit […]

The objectives include the high ideals of a liberalised market and the need for efficiency when dealing with cross-border trade. The real crux of the matter in the Protocol on TiG is Part IV, which stipulates cooperation amongst Customs, trade facilitation and transit and then makes reference to Annexes 3, 4 and 8.[1018]

The process outlined above illustrates the hierarchical levels followed by international treaties and their instruments when issues are first dealt with from a broad perspective in the framework agreement and then becomes more specific in subsidiary instruments such as protocols, annexes or appendices. As discussed in Chapter Six, the order under the AfCFTA is to move from the AfCFTA Agreement, followed by protocols, and lastly to annexes and appendices. As a result, and in keeping with the progressive tendency towards precision, Annex 4 of the Protocol on Trade in Goods provides the following definition of trade facilitation:

1016 Protocol on TiG preamble.
1017 Protocol on TiG Art 2.
1018 Protocol on TiG Arts 14-16.

> [...] the simplification and harmonisation of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data for the movement of goods in international trade.[1019]

This definition is derived from the objectives of Articles V, VIII and X. Though similar in context to the definition of the WTO, it is distinct and not an exact duplicate. It does not mention modernisation, and it goes a step further when it refers to international trade procedures, indicating that it is not as restrictive as the WTO and the WCO, who limit themselves to border issues and documentation. The specificity of international trade procedures would therefore extend beyond Customs procedures to include payment systems, insurance and banking processes, transport system or any such systems which involve the movement of goods. The scope of the approach by the AfCFTA, however, differs from that of the WB in that it does not include hard infrastructure issues.

5.6 Integrity action plans to enhance trade facilitation

Table 5.1 identified thirty-nine measures from the TFA which also applies to the AfCFTA. These measures form the themes of the comparative analysis which have been extensively covered in Chapter Seven. This study identified that implementing an integrity action plan can be an effective measure to facilitate trade.

According to a study by de Jong and Bogmans, despite benefiting those who engage in it, corruption negatively affects nations and global trade.[1020] As discussed, trade facilitation involves a broader perspective than that used by the WTO, WCO, some RTAs and the AfCFTA.[1021] The WTO and the AfCFTA follow the soft infrastructure processes approach in which Customs is a significant, but not the only, agency. In view of the significant role played by Customs administrations in national functions such as economic development, trade facilitation, revenue collection, and security, they have become vulnerable have and have always been cited as among the most corrupt of all

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1019 Protocol on TiG Annex 4 on Trade facilitation, definitions.

1020 Eelkede Jong and Christian Bogmans, 'Does Corruption Discourage International Trade?' (2011) 27(2) Europ J Pol Econ 385, 385-398.

1021 Refer to sections 5.4.2, 5.4.3, 5.4.7 and 5.5 of this chapter.

government agencies.[1022] Since ancient and biblical times, it has been known that Customs, as a revenue collector or border control agency, is susceptible to corrupt practices. There are biblical references to tax collectors such as Matthew (or Levi),[1023] and Zacchaeus,[1024] and how society disapproved of their corruption.[1025] Due to its visibility at the border, Customs at times would be blamed for corrupt activities committed by other government departments. The integrity of Customs is therefore crucial to trade facilitation procedures and affects the flow of goods across borders.

Before its reformation in the 1990s, the Philippine Customs Service was regarded as one of the most corrupt governmental organisations in that country.[1026] A number of actions were taken to combat corruption and strengthen the integrity of Customs, including the automation of systems in order to reduce human contact in practices; the introduction of paperless and cashless processes; the modernisation of systems; the simplification of procedures; the introduction of pre-clearances; consultations with stakeholders; and engagements with other international organisations such as the WCO and UNCTAD.[1027] These practical actions indicates that there is a direct connection between the processes to streamline, modernise, and harmonise trade procedures on the one hand, and the actions to combat corruption and instil integrity in Customs or other agencies on the other.

The link between the integrity of Customs and the impact of corruption in trade is acknowledged in the Revised Arusha Declaration, which was made during the 101st/102nd Session of the WCO's Meeting of Heads of Customs in Arusha, Tanzania, in June 2003 and which, in part, states:

1022 Gerard McLinden, 'Integrity in Customs' in Luc De Wulf and José B Sokol (eds), *Customs Modernization Handbook* (World Bank 2004).

1023 The Bible (Revised Standard Version), Matt 9:9; Mark 2:14-17; and Luke 5:29-32.

1024 The Bible (Revised Standard Version), Luke 19:1-10.

1025 Examples,The Bible (Revised Standard Version), Matt 21:27-32; Luke 3:12-13; and Luke 7:28-31.

1026 Guillermo Parayno Jr, 'Combatting Corruption in the Philippine Customs Service' in Peter Larmour and Nick Wolanin (eds), *Corruption and Anti-Corruption Book* (ANU Press 2001) 204-205, 212 213.

1027 Parayno Jr, 'Combatting Corruption in the Philippine Customs Service' 213-214, 218-220.

> ACKNOWLEDGING that integrity is a critical issue for all nations and for all Customs administrations and that the presence of corruption can severely limit Customs capacity to effectively accomplish its mission. The adverse effects of corruption can include:
>
> - a reduction in national security and community protection;
> - revenue leakage and fraud;
> - a reduction in foreign investment; […]
> - the maintenance of barriers to international trade and economic growth […][1028]

The above declaration acknowledges that corruption, among others, adversely affect the mission of Customs and creates a barrier in the smooth flow of imports, exports and transit. A corrupt Customs administration can curtail national development. It is therefore important that measures are put in place to promote the integrity of Customs together with those involved in cross-border movement in order to facilitate trade. Corruption can lead to an environment in which trade procedures are purposefully made complex, unpredictable, unfair and ambiguous, resulting in border delays. This is in direct contrast to the desired environment in which trade is facilitated through implementing simplified, transparent, automated and modernised procedures. While the WCO has developed an Integrity Development Guide (IGG) as an advisory manual for its members to promote integrity, there is need for other agencies involved in trade to also draw from such lessons.[1029]

One of the conclusions from this research is that there is a need to adopt and implement integrity action plans to promote the integrity of Customs administrations and fight corruption as a trade facilitation measure. Corruption is a barrier that hinders trade. This thesis considers that the implementation of an integrity action plan by WTO members and AfCFTA State Parties would be an effective measure to facilitate trade. Such a plan would lay a framework to instil professionalism and ethical conduct in those governmental agencies involved in trade facilitation. Trade facilitation would be improved if parties to an FTA or involved in global trade undertake to implement such

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1028 WCO Customs Cooperation Council, '101st/102nd Council Sessions: Revised Arusha Declaration, Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in Customs' (7 July 2003) <http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/declarations/revised_arusha_declaration_en.pdf?la=en> accessed 18 October 2022.

1029 WCO, *Integrity Development Guide* (WCO 2021) 10.

integrity action plans. Although some Customs administrations might be implementing integrity action plans, there is a need to ensure that other governmental agencies involved in trade also embrace this principle.

5.7 Conclusions

In view of the fact that the goal of FTAs, such as the AfCFTA, is to facilitate trade among their members, 'free trade area' cannot therefore be separated from the term 'trade facilitation'. An FTA is created to facilitate trade while trade facilitation is an inseparable ingredient of an FTA.[1030] Some definitions of trade facilitation focus on soft infrastructure issues such as Customs documentation, while others include hard infrastructure issues such as transportation networks and port facility upgrades. Both the WTO and the AfCFTA consider trade facilitation as the streamlining and continuous improvement of trade procedures. Various measures or actions have been identified to ease trade and these are grouped under the broad themes of transparency, simplification, harmonisation, predictability and cooperation. The study found integrity as an additional factor in trade facilitation, although neither the WTO nor the AfCFTA have recognised this.

Considering the status and authority of the WTO on global trade issues, the study found that the WTO's definition and approach is restrictive compared to that offered by some RECs and the AfCFTA which are broader. Unlike the position existing in the AfCFTA, RECs and some RTAs, the study found that the WTO's definition of trade facilitation lacks a legal reference to support it. This creates a legal defectiveness for the WTO, given its stature as the custodian of global trade rules.

Both the WTO and the AfCFTA focus on the narrow border issues pertaining to soft issues on imports and exports, and influenced by the RKC. The WCO, as an organisation dealing with Customs, understandably expresses trade facilitation in terms of Customs and soft infrastructural matters such as imports, exports and border issues when defining trade facilitation. The WB, on the other hand, adopts a more

[1030] GATT 1994 Art 4.

comprehensive approach that includes the logistics of transferring goods from one place to the other.

The author however advocates for the broad approach in which trade facilitation includes all measures which are required to ease the flow of goods from the seller to the buyer as defined by the WB. Whatever definition is used, the goal of trade facilitation is to move goods quickly and efficiently from the supplier to the buyer. Trade facilitation measures therefore reduce business delays and costs. This thesis stayed within the confines of the definitions provided by the WTO and the AfCFTA for the comparative analysis. Though the definitions are not identical, they have comparable focuses in that they both deal with soft infrastructure procedures. The discussions in this chapter provide a solid foundation for the comparative analysis.

CHAPTER SIX

LEGAL TEXTS ON TRADE FACILITATION FOR THE WTO AND THE AfCFTA

6.1 Introduction

Following an examination of the definitions of trade facilitation and discussions in Chapter Five, it is key that the legal texts relevant for this thesis are identified. It has been noted that both the WTO and the AfCFTA have a common approach which emphasises on streamlining trade processes.[1031] The identified legal texts are important in that they illustrate that trade facilitation is meant to support trade and contribute towards the rapid movement of goods, both regionally or globally.The legal texts under study have the same functionality and share common features. This chapter will therefore present an overview and structure of the legal instruments being compared. The outline will be descriptive and fact-finding while also filling in any of the necessary gaps emanating from the previous chapters. This will lay a solid foundation for comparing and contrasting the legal points.[1032] The outcomes will serve as a foundation for the legal analysis covered in Chapter Seven, while the discussions will contribute to the study's conclusions in Chapter Eight.

6.2 WTO legal texts on trade facilitation

The WTO has constructed the TFA to be a comprehensive and stand-alone agreement on trade facilitation. It is clear that the TFA is derived from Articles V, VIII and X of GATT 1994.[1033] Disputes arising out of any of the agreements under the WTO are dealt with in terms of the DSU.[1034] In this study, the legal texts of the WTO on trade facilitation are therefore comprised of the following: the WTO Agreement; Articles V, VIII and X of GATT 1994;[1035] the TFA; and the DSU. The trade facilitation measures, as identified in

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1031 Refer to section 5.4.1 in Chapter 5 of the study

1032 Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) Wash U Global Stud L Rev 451.

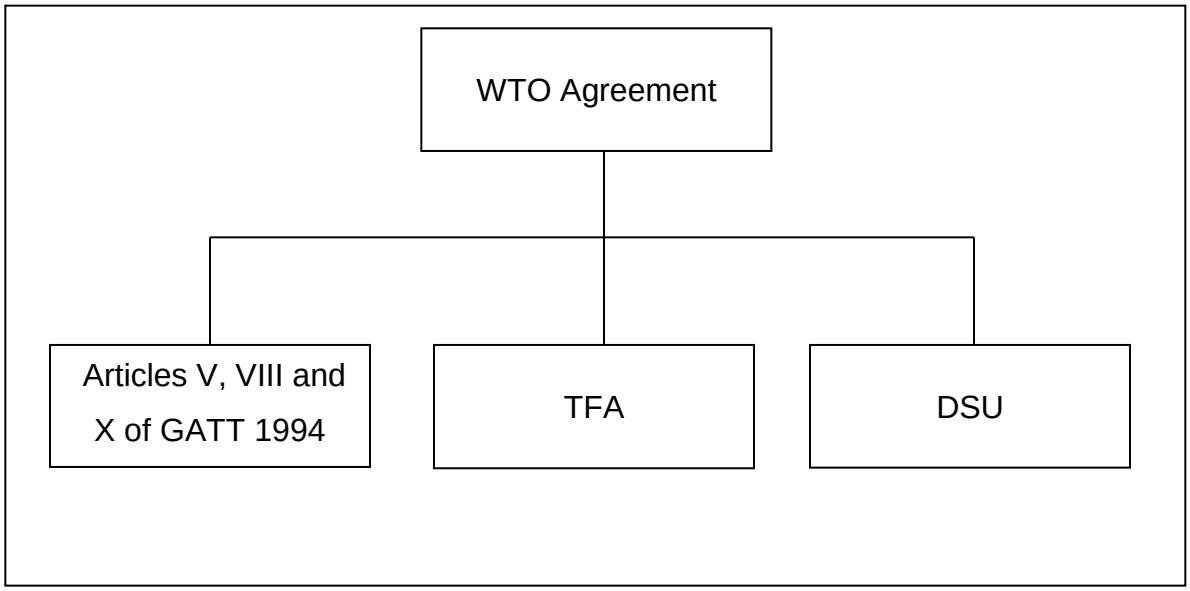
1033 TFA preamble.

1034 DSU Art 1.

1035 Article V covers transit; Article VIII deals with levies and procedures involving imports and exports; and Article X is concerned with the transparency of trade laws.

Chapter Five, have been covered comprehensively in the TFA. The study therefore considered the TFA as the main legal text for comparative analysis since it incorporates the provisions in Articles V, VIII and X of GATT 1994. In addition, the study examined the DSU in view of the fact that it handles disputes from the TFA.[1036] Figure 6.1 below depicts the architecture of the WTO's legal texts on trade facilitation.

Figure 6.1: Legal texts of the WTO on trade facilitation



Source: Author

The WTO Agreement is a framework agreement that created the organisation, the WTO. It gives credence to the creation of any other agreement of the WTO.[1037] Although not explicitly pronounced, it can be argued that each of the multilateral agreements resulting from the WTO Agreement is free-standing and independent of the others. Each agreement is a negotiated international treaty centred on a subject area. The multilateral agreements are however part of the WTO Agreement and binding on the members.[1038] The WTO Agreement even includes an interpretive note to guide how any possible conflicts among the treaties must be dealt with.[1039] The DSU, which

1036 DSU Art 1.
1037 WTO Agreement Arts I and III.
1038 WTO Agreement Art II.
1039 WTO Agreement Annex 1A, General interpretative note to Annex 1A.

is an international treaty of the WTO Agreement on how to handle disputes between members, also has the same standing.[1040] The DSU also has a stipulation to the effect that it cannot add to or subtract from the provisions of any of the agreements.[1041] Another argument in favour of the agreements in Figure 6.1 being at the same level is that all of the separate multilateral agreements of the WTO Agreement are integrated aspects of the WTO Agreement, albeit with distinct scopes of application.[1042]

The following discussions focus on the legal texts on trade facilitation of the WTO which have been identified for analysis during the study.

6.2.1 GATT 1994

As earlier noted, GATT 1994 has a history firmly founded in GATT 1947.[1043] GATT 1947, which consisted of thirty-eight Articles, continued to be in force until it was replaced by GATT 1994 when the WTO Agreement entered into force on 1 January 1995.[1044] Articles V, VIII and X of GATT 1947, which dealt with various aspects of trade facilitation, became Articles V, VIII and X of GATT 1994 (hereafter Articles V, VIII and X) without any amendment, apart from such other cursory adjustments such as replacing the term 'contracting party' with the word 'Member'.[1045] These three articles are an important anchor without which no discussion on trade facilitation would be complete.

6.2.2 Articles V, VIII and X of GATT 1994

Article V asserts the principle of freedom of transit. It addresses transit-related concerns and mandates that members permit freedom of transit in order to facilitate trade amongst themselves.[1046] Article V establishes a framework for accelerating the

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1040 DSU Art 1.
1041 DSU Arts 3.2 and 19.2.
1042 Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2007) 17 (5) EJIL 972
1043 See Chapters 1 and 2.
1044 Final Act of the Uruguay Round para 3; GATT 1994 Art II.4.
1045 WTO Agreement Annex 1A; GATT 1994 para 2.
1046 GATT 1994 Art V:2.

movement of goods in transit, reducing delays at borders and thus lowering the cost of doing business. Members are required not to discriminate against or obstruct the movement of such goods by levying exorbitant service fees and procedures.[1047] Overall, parties are required to give each other MFN treatment when it comes to the implementation of regulations and formalities.[1048] The principle of freedom of transit had been the focus of earlier agreements, most notably the Barcelona Statute on Freedom of Transit, which laid the foundation for transit matters in landlocked countries, based on the principle that transit facilities such as water and railway networks must not be sources of control or abuse.[1049] Scholars have noted that the Barcelona Statute on Freedom of Transit provides an important framework in facilitating transit of goods.[1050]

The most comprehensive scope is provided in Article VIII, which deals with fees and requirements related to importation and exportation of products and it includes issues of: service charges imposed by members in respect of imports and exports, and which must primarily represent the approximate cost of services rendered;[1051] and that the fees and charges must not be used to raise revenue for fiscal purposes.[1052] Furthermore Article VIII, inter alia, calls for the need to streamline import and export formalities.[1053] As a result, Article VIII has the effect of rationalising service levies raised and simplifying procedures, resulting in easing trade and reducing the cost of doing business. Unlike Article V, which deals with transit, and Article X, which requires transparency in the administration of trade laws, the scope of Article VIII goes beyond dealing with red tape at the border. It includes government requirements regarding

1047 GATT 1994 Art V:4.
1048 GATT 1994 Art V:5.
1049 Barcelona Convention and Statute on Freedom of Transit (adopted 20 April 1921, entered into force 31 October 1922) 7 LNTS 11 (Barcelona Convention) Art 5.
1050 Kishor Uprety, 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea – A Retrospective Review' (2003) 7 SJICL 201, 203-208.
1051 GATT 1994 Art VIII:1(a).
1052 GATT 1994 Art VIII:1(a).
1053 GATT 1994 Art VIII:1(c).

imports and exports, procedures for international purchasing of goods, as well as the logistics of moving goods from the supplier to the consumer.

Article X compels members to ensure that trade laws are publicised and implemented in a transparent manner. In summary, its scope includes the need for members to publish regulations and general administrative rulings,[1054] and to establish independent processes that can expeditiously attend to reviews, appeals or grievances pertaining to Customs matters.[1055] The overall goal of Article X is to ensure that buyers and sellers have easy access to information so that they can make informed decisions and operate businesses in a predictable environment. In addition, it assures that violations of trade laws are dealt with transparently and objectively.

Some legal scholars have argued that the core of GATT 1947 was to address trade restrictions and other business practices that limit the access that nations have to one another's export markets.[1056] It is, however, clear that Articles V, VIII and X went beyond dealing with trade barriers and intended to create a trade liberalisation regime in which the movement of goods amongst contracting parties proceeded as smooth and unhindered as possible, while addressing both tariff and NTBs, with the former receiving greater attention.

Articles V, VIII and X require that international trade laws must be simple and transparent and allow for the speedy movement of goods across borders. These three articles laid a legal foundation of what is considered to be as trade facilitation today.[1057] Articles V, VIII and X are the cornerstones of trade facilitation in GATT 1994, the TFA, and in other trade liberalisation regimes involving regional, continental or global trade.[1058] The expression 'trade facilitation' was coined in the late 1960s and was never

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1054 GATT 1994 Art X:1.

1055 GATT 1994 Art X:3(b).

1056 Jock A Finlayson and Mark W Zacher, 'The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions' (1981) 35(4) IO 561, 562-566.

1057 Sengupta, *Economics of Trade Facilitation* 134-135.

1058 The TFA preamble acknowledges the importance of GATT 1994. It states the objectives as: '[…] *Desiring to* clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit […]'.

explicitly mentioned, as such, in Articles V, VIII and X of GATT 1947.[1059] The term features in Article XXIV, but not as boldly as it currently does in matters involving international trade. Article XXIV makes a case and states that FTAs and CUs are formed to facilitate trade amongst members. Trade facilitation has become a key cog in moving goods within RTAs, FTAs and globally.

6.2.3 The Trade Facilitation Agreement

The TFA was conceived during the Doha Round and was an inclusive part of the negotiations. The Doha Ministerial Declaration issued on 14 November 2001, which launched the negotiations, declared:

> […] Recognising the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations take place… In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of member, in particular developing and least-developed countries […][1060]

According to the above declaration, it can be deduced that the parameters for negotiations on the TFA included:

(a) a review of Articles V, VIII and X with the aim of speeding up global trade;

(b) determining the requirements and priorities of developing LDCs;

(c) highlighting the need of technical support and capacity building.

Following that, in October 2004, the WTO established a working group, the Negotiating Group on Trade Facilitation (NGTF),[1061] which was comprised of representatives from members and was in charge of negotiating the TFA. As stated in Chapter Two, the

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1059 Sengupta, *Economics of Trade Facilitation* 13.

1060 WTO, 'Doha WTO Ministerial 2001: Ministerial Declaration Adopted on 14 November 2001: Special and Differential Treatment' <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special> accessed 13 August 2021 para 27.

1061 WTO, 'Trade Facilitation – Cutting "Red Tape" at the Border'.

negotiations were concluded in December 2013. As of September 2022, the TFA remained the first and only agreement concluded under the Doha Round since the establishment of the WTO in 1995.[1062]

The TFA is a comprehensive agreement that incorporates provisions from GATT 1994. Although based on Articles V, VIII and X, it can be identified as a stand-alone agreement. This raises the question that, far from its original intent of clarifying and reviewing Articles V, VIII and X, in reality the TFA has replaced the three articles. Although the three articles still exist in law, their substances have been incorporated into the TFA. The TFA requires the members of the WTO members to implement the given actions all of which are designed to improve global trade. The TFA incorporated various developments and lessons learnt since the 1940s and as of September 2022, it can be argued that it is the most comprehensive, all-inclusive and up-to-date global text on trade facilitation. In accordance with the terms of the WTO Agreement,[1063] and as noted in Chapter One, the TFA came into effect on 22 February 2017.[1064] As noted in section 6.2 above, the analyses of the legal instruments of the the WTO is based on the TFA.

The TFA is comprised of twenty-four articles and one annex and these are grouped into four broad divisions, being: Preamble; Section 1; Section II; and Section III.[1065] The preamble defines the purposes and principles of the TFA. Section I lists the commitments and Section II deals with SDT issues, whereas Section III deals with institutional arrangements. The TFA, is central to the comparative analysis in this thesis. Chapter 7 of this study examines, in detail, the similarities and divergences between the TFA and the legal texts of the AfCFTA.

1062 WTO, ‘Trade Facilitation’

1063 WTO Agreement Art X:3.

1064 WTO, ‘Trade Facilitation’.

1065 Section I consists of Articles 1 to 12, Section II covers Articles 13 to 22, and Section III includes Articles 23 and 24.

6.2.4 Understanding on Rules and Procedures Governing the Settlement of Disputes

The WTO has rules which must be followed when dealing with disputes.[1066] As discussed in Chapter Two, the DSU is an important tool in resolving trade disputes under the WTO system.[1067] The DSU establishes procedures to be followed when dealing with disputes. It is an improvement on the previous GATT 1947 system which was re-negotiated during the Uruguay Round, resulting in more elaborate procedures.[1068] The dispute settlement system is a crucial tenet of the multilateral trading system, and it has made a significant contribution to creating a stable global trading environment.[1069] The credibility of multilateral trade is enhanced when a set of rules for resolving disputes is agreed upon. Any disputes arising under the TFA are resolved under the DSU, which is thus a component part of the legal texts on trade facilitation.[1070]

6.3 AfCFTA legal texts on trade facilitation

The AfCFTA Agreement is a framework agreement whose thematic areas exist in the form of protocols.[1071] The protocols are defined as instruments which are an integral part of the AfCFTA Agreement.[1072] This is consistent with international law, which interprets a protocol to be a legal instrument that elaborates on a primary treaty.[1073] The AfCFTA's Protocol on Trade in Goods, Protocol on Trade in Services, and Protocol on Rules and Procedures for Settlement of Disputes were adopted during the 10th Extraordinary Summit held on 21 March 2018 and they entered into force on 30 May 2019.[1074] As of 1 November 2022, negotiations in respect of the remaining three

1066 WTO Agreement Art III:3.
1067 DSU Art 4:1.
1068 Jackson *The World Trading System* 124.
1069 WTO, *Understanding the WTO* 55.
1070 TFA Art 24:8.
1071 See also section 6.3.1 below.
1072 AfCFTA Agreement Art 1 for the definitions of 'agreement', 'protocol', 'annex' and 'appendix'.
1073 Berridge and James, *Dictionary of Diplomacy* 108, 217.
1074 AU Assembly of Heads of State and Government, 'Tenth Extraordinary Session of the Assembly: Decision on the Draft Agreement Establishing the African Continental Free Trade Area (AfCFTA)' (21 March 2018) Ext/Assembly/AU/Dec.1(X) AU Doc Ext/Assembly/AU/2(X).

Protocols on Investment, Intellectual Property Rights, and Competition Policy had not been concluded. In addition, there are plans to cover other subject areas such as e-commerce and Women in Trade.

Figure 6.2 below depicts the AfCFTA Agreement and the completed protocols which are already operational. It shows the three Protocols which were finalised together with and at the same time with the AfCTA Agreement.

Figure 6.2: AFCFTA Agreement and its Protocols

<table>
<tr><td rowspan="3">AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA</td><td>Protocol on Trade in Goods</td></tr>
<tr><td>Protocol on Trade in Services</td></tr>
<tr><td>Protocol on Rules and Procedures for Settlement of Disputes</td></tr>
</table>

Source: Author

Where necessary, the protocols have their own annexes which deals with more focused subject areas, followed by the appendices. As is the case with the protocols, the annexes and appendices are also an integral part of the Agreement.[1075]

Trade facilitation issues fall under the Protocol on TiG and the Protocol on Rules and Procedures for Settlement of Disputes (hereafter Protocol on Dispute Settlement or PSD).[1076] As is the case with the WTO, issues pertaining to trade facilitation has been considered as part of the legal texts.

1075 AfCFTA Agreement Art 1 for the definitions of ‘agreement’, ‘annex’ and ‘appendix’.

1076 AfCFTA Agreement Art 21; Protocol on TiG Art 29; PSD Art 2; Annex 3, Art 14; Annex 4, Art 30; and Annex 8, Art 16.

It should be noted that the AfCFTA legal texts are subject to amendments every five years from the date the AfCFTA Agreement came into effect.[1077] From this, it follows that the first amendments for the AfCFTA Agreement will be due after 30 May 2024. The process requires that proposals for amendments are initiated by the State Parties and would be circulated to other State Parties for their consideration.[1078]

The AfCFTA legal texts on trade facilitation are as follows:

6.3.1 AfCFTA Agreement

The AfCFTA Agreement is a framework agreement and umbrella treaty that defines the scope of what has been agreed upon, with the understanding that any outstanding issues would be resolved incrementally.[1079] In essence, it acknowledges that a liberalised market for goods and services would require a series of additional negotiations.[1080] As a result, it contains provisions for specific issues to be addressed in other negotiated agreements such as protocols, annexes and appendices, all of which are an integral part of the AfCFTA Agreement.[1081] The AfCFTA Agreement is a legally binding international treaty that, amongst others, establishes a continental FTA for Africa, sets principles on the structure and governance of the FTA, and lays out broad obligations for parties. This thesis centred on the PTiG and some of its annexes. As noted in Chapter Four, the objectives of the AfCFTA Agreement are aligned to those of the Abuja Treaty, which include laying the groundwork for a CU.[1082]

1077 AfCFTA Agreement Art 28.
1078 AfCFTA Agreement Art 29.
1079 David Luke and Simon Mevel, 'The Option of a Framework Agreement in the Continental Free Trade Area (CFTA) Negotiations. A Non-Paper' (UNECA African Trade Policy Centre, May 2015) <https://archive.uneca.org/sites/default/files/PublicationFiles/cfta_framework_agreement_non-paper-rev1_en.pdf> accessed 16 July 2021.
1080 AfCFTA Agreement Art 3(b).
1081 AfCFTA Agreement for the definition of 'agreement'.
1082 AfCFTA Agreement Art 3(d).

6.3.2 Protocol on Trade in Goods

The Protocol on TiG establishes the general principles governing the AfCFTA regime on trade in goods.[1083] The fundamental objective of the protocol is to liberalise trade in goods.[1084] The specific objective of the protocol is to boost intra-African trade, which is accomplished, amongst others, through the progressive elimination of barriers to trade; improved Customs formalities, implementation of processes that facilitate trade and collaboration in issues regardiing technical barriers to trade (TBTs) and sanitary and phytosanitary (SPS) measures.[1085] Part IV of the Protocol on TiG addresses issues such as Customs procedures, trade facilitation and transit.[1086] As illustrated in Figure 6.3 below, the protocol has nine annexes, each dealing with an aspect regarding trade in goods.

Figure 6.3: The Protocol on Trade in Goods and its nine Annexes

	Annex number	**Name of Annex**
PROTOCOL ON TRADE IN GOODS	1	Schedules of Concessions
	2	Rules of Origin
	3	Customs Cooperation and Mutual Administrative Assistance
	4	Trade Facilitation
	5	Non-Tariff Barriers
	6	Technical Barriers to Trade
	7	Sanitary and Phytosanitary Measures
	8	Transit
	9	Trade Remedies

Source: Author: Data was obtained from the Protocol on Trade in Goods and its Annexes

The annexes of the Protocol on TiG that are the subject matter of this thesis are Annex 3 on Customs Cooperation and Mutual Administrative Assistance (hereafter Annex 3), Annex 4 on Trade Facilitation (hereafter Annex 4), and Annex 8 on Transit (hereafter Annex 8). These three annexes are examined in in sections 6.3.4 to 6.3.6 of this chapter.

1083 Protocol on TiG.
1084 Protocol on TiG Art 2:1.
1085 Protocol on TiG Art 2:2.
1086 Protocol on TiG Arts 14, 15 and 16.

The Protocol on TiG covers all six constituent elements of an FTA which were evaluated in Chapter 3 of this thesis.[1087] One of the goals of the Protocol on TiG is to facilitate trade amongst participating members, and as already noted in Chapter Three, this is consistent with the purpose of an FTA.[1088] The Protocol on TiG therefore contains important elements to ease the movement of goods, the creation of a CU and the deepening of economic integration towards the AEC.

6.3.3 Protocol on Rules and Procedures for Settlement of Disputes

As noted in Chapter One, the VCLT establishes the fundamental principle that a treaty is legally binding and must be observed in good faith.[1089] Trade agreements involve commercial competition and such activity requires agreed rules on how disputes will be resolved. It is important for trade agreements to have a dispute resolution process in place since there will inevitably be some parties who break the rules. The PSD was is referred to in the AfCFTA Agreement, which states:[1090]

> 1. A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties.
>
> 2. The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.
>
> 3. The Protocol on Rules and Procedures on the Settlement of Disputes shall establish, *inter alia,* a Dispute Settlement Body.

Consequently, the PSD stipulates how disputes in the AfCFTA would be resolved. Like other Protocols of the AfCFTA Agreement, the PSD is also a component of the AfCFTA Agreement.[1091] It provides a transparent, accountable, fair, predictable and consistent framework to deal with disputes.[1092] Since disputes involve State Parties, it follows that

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1087 The six elements defining an FTA are: it must be a group of two or more Customs territories; the purpose must be to facilitate trade; duties must be eliminated; restrictive regulations must be eliminated; liberalisation must be on substantially all trade; and preferential trade must be in respect of originating products.

1088 Protocol on TiG Art 2:2(c); GATT 1994 Art XXIV:4.

1089 VCLT Arts 31, 46 and 69.

1090 AfCFTA Agreement Art 20.

1091 AfCFTA Agreement Art 8:1.

1092 PSD Art 2.

the proceedings would be in the name of State Parties rather than under individual trading companies. The PSD stipulates the procedures to be followed for the resolution of disputes together with clearly laid down time limits. The process begins with a mandatory consultation,[1093] after which the subject would be brought to the AfCFTA's Dispute Settlement Body for adjudication if no agreement could be reached.[1094] The PSD plays a key role in providing the continental trading system with security and predictability.[1095] The AfCFTA Agreement came up with its own system and did not duplicate those found in the treaties of RECs such as COMESA,[1096] the EAC[1097] and ECOWAS.[1098]

6.3.4 Annex 3: Customs cooperation and mutual administrative assistance

Annex 3 deals with matters involving Customs cooperation issues in the AfCFTA. The AfCFTA concerns fifty-five Customs administrations, each with its own Customs laws and procedures. Even CUs like SACU and ECOWAS, or CMs such as the EAC maintain separate Customs authorities, as evidenced by the existence of the South African Revenue Services (SARS),[1099] Botswana Unified Revenue Services (BURS),[1100] Nigeria Customs Service,[1101] and Tanzanian Revenue Authority.[1102] Differences in Customs laws and procedures can stymie intra-African trade. At the same time, cooperation amongst Customs administrations and the harmonisation of different Customs laws and procedures can reduce delays at borders and contribute to increased intra-African trade. Annex 3 contains provisions for Customs administrations to cooperate and collaborate in order to modernise their operations and facilitate the movement of goods across borders.[1103] When Customs administrations cooperate,

1093 PSD Art 4:3 and 4:7.
1094 PSD Art 6:2.
1095 PSD Art 4:1.
1096 COMESA Treaty Art 28.
1097 EAC Treaty Art 32.
1098 ECOWAS Treaty Art 16.
1099 The authority responsible for Customs administration in South Africa.
1100 The authority responsible for Customs administration in Botswana.
1101 The authority responsible for Customs administration in Nigeria.
1102 The authority responsible for Customs administration Tanzania.
1103 Protocol on TiG Art 14 and Annex 3.

procedures and Customs laws are harmonised, resulting in a coordinated approach in border management, and thus facilitating the movement of goods. Cooperation in Customs is therefore an important component of trade facilitation. The TFA also recognises Customs cooperation as a component of trade facilitation.[1104]

6.3.5 Annex 4: Trade facilitation

An FTA consists of various individual Customs territories, each with its own Customs laws and procedures, as opposed to a CU whose Customs laws are expected to be more harmonised because they belong to one customs territory and implement a CET.[1105] The objectives of Annex 4 are to eliminate border delays by improving international trade procedures.[1106] Whereas Annex 3 deals with cooperation amongst Customs administrations on issues within their control, Annex 4 has a broader scope. It includes other stakeholders involved in the trade chain, for example, transporters. Annex 4 covers a number of issues along the lines of the TFA although the two are not identical. Some of the areas under Annex 4 include the publication of trade laws,[1107] risk management,[1108] use of international standards,[1109] border agency cooperation,[1110] and committees to coordinate implementation of trade facilitation measures at national llevels.[1111]

6.3.6 Annex 8: Transit

Article 16 of the Protocol on TiG makes reference to Annex 8 that deals with facilitating the movement of goods in transit.[1112] Annex 8 defines “Customs transit”, in technical language, as “the Customs procedure under which goods are transported under Customs control from one Customs office to another as defined in the Convention on

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1104 Protocol on TiG Art 14 and Annex 3.
1105 Refer to discussions in section 3.3.2.
1106 Annex 4, Art 2 (a).
1107 Annex 4, Art 4.
1108 Annex 4, Art 10.
1109 Annex 4, Art 16
1110 Annex 4, Art 25.
1111 Annex 4, Art 28.
1112 Protocol on TiG Art 16 and Annex 8.

Temporary Admission and specifically Annex E to the Revised Kyoto Convention".[1113] Generally, goods are in transit when they pass through another country en route to its final destination. Some of the principles governing transit traffic are that State Parties shall permit goods to transit through their respective countries,[1114] and goods in transit shall not be liable to any duties.[1115]

The illegal disposal of goods in the transit country amounts to smuggling since it translates into the importation of goods without payment of duties. To monitor the movement of goods in transit, some Customs controls are therefore required to safeguard revenue. A poor transit system is a barrier to trade; hence transit procedures should be streamlined to prevent delays and unnecessary costs.[1116] A dysfunctional transit system can therefore be costly to landlocked countries. When dealing with transit traffic, Customs administrations must therefore be able to balance their roles of trade facilitation, enforcing controls, and revenue protection. Some of the control measures designed to invigilate goods in transit include the use of convoys or escorts to monitor the movement of goods within a country; highway patrols by authorities to supervise and prevent the disposal of goods during transit; prescriptions of the maximum time limit within which goods in transit must leave the country; and the use of radio frequency devices to monitor traffic.

There are also several international transit provisions which have been developed over the years to facilitate traffic in transit. These include GATT 1994, TFA, and the International Convention on the Harmonisation of Frontier Control of Goods.[1117] Annex 8 establishes a framework for the movement of transit goods within the AfCFTA

1113 Annex 8, Art 1 on definitions; Convention on Temporary Admission (adopted 26 June 1990, entered into force 27 November 1993) (Istanbul Convention) Annex A; and RKC Specific Annex E.

1114 Annex 8, Art 2:1.

1115 Annex 8, Art 2:2.

1116 Jean François Arvis, 'Transit and the Special Case of Landlocked Countries' in Luc De Wulf and José B Sokol (eds), *Customs Modernization Handbook* (World Bank 2004).

1117 International Convention on the Harmonisation of Frontier Controls of Goods (adopted 21 October 1982, entered into force 15 October 1985) (Frontier Control of Goods Convention); Jean François Arvis, 'Transit Regimes' in Gerard McLinden and others (eds), *Border Management* (World Bank 2011) 284.

borrowed from the WCO.[1118] One of the weaknesses of Annex 8 is that it is only applicable to road traffic and has no bearing on other modes of transportation such as air or rail.[1119]

6.4 Conclusion

Amongst other things, one of the objectives of the study was to compare the similarities and differences in the legal instruments on trade facilitation of the WTO and the AfCFTA.[1120] This chapter has identified the requisite texts upon which the thesis is based. These legal texts focus on thirty-nine measures for trade facilitation, which are designed to enable trade and have been discussed in Chapter Five.

In respect of the WTO, the study has identified that the legal texts are drawn from GATT 1994. The TFA, an outcome of the DDA, is the key multilateral agreement in expediting the movement of imports, exports and transit goods in global trade. With regards to the AfCFTA Agreement, the comparative analysis revolved around Annexes 3, 4 and 8 of the Protocol on TiG which entered into force in May 2019. The examination also covers the legal texts addressing dispute resolution, namely the DSU for the WTO and PSD for the AfCFTA.

1118 The Istanbul Convention and Specific Annex E to RKC apply.
1119 RKC Specific Annex: definitions.
1120 Refer to Chapter 1.

CHAPTER SEVEN

COMPARATIVE ANALYSIS OF THE LEGAL TEXTS

7.1 Introduction

The study has so far examined the relationship between the WTO and the AfCFTA and discovered how trade facilitation is a common phenomenon for both trade regimes. Accordingly, the legal texts of the WTO and the AfCFTA, each address, trade facilitation with the goal of fostering an environment that will promoting trade. In comparing the legal texts, this chapter integrates the all previous analyses from the study.

As noted in Chapter Six of this study, the TFA is sufficiently comprehensive and it incorporates the measures covered in Articles V, VIII, and X. For the comparative analysis, the author first examined the legal texts of the WTO, specifically the TFA. The provisions of the TFA were then compared to the stipulations in the legal texts of the AfCFTA. Any additional measures or themes that were not addressed in either the TFA or the AfCFTA were also identified and examined.

In conducting the comparative analysis, the study not only identified similarities and differences, but also critically examined the implications thereof. This also addressed some of the objectives of the study by identifying the strengths and weaknesses of the legal texts and pointing out any areas where the AfCFTA instruments provided any alternatives to advance continental integration.

The study drew lessons from Kamba, who identified three constituent phases in a comparative study. He argued that these phases did not have to occur in any specific order, but could be intertwined throughout the same discussion.[1121] The phases involve: a description of the concepts; identification of similarities and differences, and an explanation to account for divergencies and resemblances.[1122] The descriptive phase entails a discussion of the isolated subject matter that will be compared or

[1121] WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23(3) ICLQ 485, 511-512.
[1122] Kamba, 'Comparative Law: A Theoretical Framework' 511-512.

analysed.[1123] It involves an interpretation or explanation of the subject before proceeding into the analysis. The identification phase will, in this case, analyse the two texts from the WTO and the AfCFTA on a given subject or theme in order to identify similarities and differences.[1124] Based on the identified thematic and textual analysis, the final phase explains the resemblances and divergencies while drawing conclusions on each of the themes discussed.[1125]

7.2 Themes for analysis

Chapter Five identified thirty-nine measures relevant to trade facilitation in the TFA. As noted, most of the measures listed in Table 5.1 have been derived from the RKC and are common to both the WTO and the AfCFTA. The relevant Articles of the TFA and the AfCFTA grouped the measures according to related themes or subject areas. For the comparative analysis, the study categorised the measures into eighteen thematic areas.

The comparison was in respect of the legal texts, rather than the measures themselves. The focus was to identify the key provisions of the legal texts that would answer the research questions and achieve the objectives of the study. The analysis was therefore based on the following thematic areas which were all drawn from the legal texts of the WTO and AfCFTA:[1126] preamble; accessibility of trade information; right to comment on proposed changes to procedures; advance rulings; appeal procedures; general measures to improve on impartiality; levies associated with imports and exports; penalties; release of goods from Customs control; border agency coordination; movement of goods under Customs control; formalities connected with importation, exportation and transit; freedom of transit; Customs cooperation; special and differential treatment; institutional arrangements; dispute settlement; and other measures to facilitate trade.

1123 F Gustavo and J Cirigliano, 'Stages of Analysis in Comparative Education' (1966) 10(1) Comparative Education Review 18, 18-20.

1124 Gustavo and Cirigliano, 'Stages of Analysis in Comparative Education' 18-20.

1125 Kamba, 'Comparative Law: A Theoretical Framework' 511-512.

1126 These legal texts are discussed in Chapter 6; All the 18 thematic areas were drawn from the TFA, DSU, AfCFTA Agreement and PSD.

The research found that the thirty-nine measures and eighteen thematic areas, upon which the analysis was based, constituted the major features of the legal texts on trade facilitation in respect of the WTO and the AfCFTA.

7.3 Comparison of the legal texts

The analysis was carried out based on the content of thematic texts, or the overall message conveyed by the relevant articles. The analysis focused on both textual language as well as themes, in some cases. In respect of theme or measure, the corresponding references from the WTO, mainly from the TFA, was given. This was cross-referenced with the respective provisions from the AfCFTA Agreement, and in most cases, this was derived from the Annexes of the Protocol on TiG. A conclusion was provided for each of the themes analysed while section 7.4 of this thesis covers an overall conclusion for the chapter.

7.3.1 Preamble (preamble of the TFA and the preambles to the AfCFTA Agreement, its Protocols and Annexes)

Description

Treaties, international agreements and constitutions normally start with introductory statements in the form of preambles, which explain the backgrounds and objectives of these instruments. There have been arguments, especially influenced by US practices, about whether preambles serve any purpose or whether they are merely ceremonial opening remarks.[1127] Some preambles to both domestic and international legislation chronicle historical backgrounds and are couched in diplomatic language used to introduce laws. Whereas national practice and constitutions determine the relevance of preambles in domestic legislation, the VCLT makes a pronouncement on the case of international agreements. Aside from providing an overview of the vision of the treaty or agreement, the preamble is increasingly being used as a reference in legal interpretation, and the courts are taking that authority into consideration.[1128] Both the

[1127] Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164(5) U Pa L Rev 1281, 1281-1343.
[1128] Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 4) I-CON 714, 715.

TFA and the AfCFTA Agreement, as discussed in Chapter One, are international agreements whose interpretation are governed by the VCLT. The VCLT acknowledges the binding influence of the preamble in interpreting international law.[1129] In interpreting a treaty, there is a need to bear in mind its overall aim and purpose while not relying upon any of its provisions in isolation.[1130] This gives preambles a high measure of influence when interpreting legal instruments.[1131] The study considers preambles to be component parts of legal texts since they postulate the scope of the agreement into proper perspective. Nevertheless, it cannot be overlooked that the ordinary meaning used in the interpretation could be at variance with the compromised language agreed upon during negotiations in an effort to reach consensus. It is, however, important to note that the VCLT provides an unambigous way of dealing with differences in the interpretation of international treaties. Crema contends that when the meaning of an expression is unclear, the interpretation of international law ought to be guided by the objective and purpose rule.[1132]

Both legal texts of the WTO and the AfCFTA on trade facilitation begin with preambles, which must be examined to understand the underlying backgrounds, messages and objectives of these texts. In the WTO jurisprudence, the case *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, is an example where the AB drew guidance from the preamble of the WTO Agreement and decided:

> […] An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement') acknowledges that the rules of trade should be 'in accordance with the objective of sustainable development', and should seek to 'protect and preserve the environment' [...][1133]

1129 VCLT Art 31(1) reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

1130 McNair, *The Law of Treaties* 380-381.

1131 Hulme, 'Preambles in Treaty Interpretation' 1299.

1132 Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) EJIL 681, 688-689.

1133 United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body AB/1998/4 (adopted 12 October 1998) WT/DS58/AB/R [12].

It is clear that the contents of a preamble are part of an international agreement and have an impact on the interpretation of legal texts.

Comparison

The TFA derives its existence from the WTO Agreement and GATT 1994, whose objectives include trade liberalisation through, for example, the removal of trade barriers.[1134] The TFA's preamble introduces the Agreement and traces its historical background from the Doha Ministerial Declaration. While not defining what trade facilitation is, the preamble to the TFA sets out its mandate as follows:

> […] *Desiring* to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit […][1135]

These words are borrowed from the Doha Ministerial Declaration.[1136] It is evident that the TFA's purpose is to speed up border procedures so that goods are not delayed. It further acknowledges that its goal is to improve Articles V, VIII and X, while also making them more understandable. This provides the context of the TFA in that it is a clarification and improvement of what already exist. It did not repeal the provisions in GATT 1994. Despite its completeness, the TFA exists alongside Articles V, VIII and X. The preamble presents and summarises the context of the TFA while introducing new aspects such as SDT and Customs cooperation.

The AfCFTA Agreement, as a framework treaty, does not mention trade facilitation in its preamble. It does, however, recognise the need for the gradual removal of trade barriers. To this extent, it would be normal for the protocols and annexes to contain more detail than the framework agreement. As a result, the Protocol on TiG is more comprehensive than the AfCFTA Agreement regarding matters pertaining to trade facilitation. It reads:

1134 WTO Agreement preamble; GATT 1994 preamble.
1135 TFA preamble.
1136 Refer to section 6.2.3 of the study.

> […] COMMITTED to expanding intra-African trade through the harmonisation, coordination of trade liberalisation and implementation of trade facilitation instruments across Africa […][1137]

The preamble to the Protocol on TiG further expands on the subject, stating that the entire purpose of implementing trade facilitation instruments is to increase intra-continental trade. The preamble even mentions one of the terms used to describe trade facilitation, namely 'harmonisation', which appears frequently in Chapter Five of the study. As delineated in Chapter Six, the study focuses on three annexes of the Protocol on TiG which deal with trade facilitation issues.[1138] Each of these annexes has its own 'mini preamble' or introduction, which spells out its objectives without using the same ceremonial or preambular language found in the AfCFTA Agreement and the Protocol on TiG. Apart from Annex 8 which does not state its own objective, Annexes 3 and 4 each have their own respective objectives. Annex 3 states that its scope is Customs cooperation and mutual administrative assistance with an objective to improve Customs operations in order to speed up trade.[1139] Annex 4 explains that its scope is to rationalise international trade processes and logistics.[1140] Annex 8, however, proceeds directly into its offering, which is to simplify transit procedures.[1141] As discussed in section 7.3.13, Annex 8 can be improved upon if it is amended to include its own objectives as is the case with Annexes 3 and 4 and the other annexes of the Protocol on TiG.[1142] Although Annex 8 has some detailed technical information, the author considers that unlike other Annexes, it leaves gaps to the reader. Annex 8 does not have a preamble or a statement of intent and neither does it define its objectives. The details provided, and the focus of the Annex would have been clearer if it had been nested within a defined framework.

1137 Protocol on TiG preamble.

1138 Refer to Chapter 6; These are: Annex 3 on Customs Cooperation and Mutual Administrative Assistance, Annex 4 on Trade Facilitation, and Annex 8 on Transit.

1139 Annex 3, Art 2.

1140 Annex 4, Art 2.

1141 Annex 8, Art 2.

1142 The others are Annexes 5, 6 and 7.

Conclusion on the Preambles

The differences in this theme show that the objectives of the two sets of legal texts under comparison are not the same. The approaches used by TFA and the AfCFTA Agreement are different. The TFA contextualises the history of trade facilitation in global trade and succinctly captures its purpose and intended outcome. The AfCFTA Agreement, and the Protocol on TiG, does not put trade facilitation into the global perspective. The Annexes do not even refer to the Protocol on TiG, from which they derive their existence. The Protocol on TiG fails to provide a comprehensive preambular background on trade facilitation and its other focus areas. The TFA focuses on global trade, whereas the AfCFTA Agreement, its protocols and annexes are focused on expanding trade amongst African countries. The scopes of the preambles of the WTO and the AfCFTA legal texts are therefore dissimilar. Despite the different focuses, implementation of trade facilitation measures by any few parties to an international trade agreement has spillovers over global trade. As an example, modernised African Customs administrations will not only ease the flow of goods within the continent but will also improve the trading environment between Africa and the world.

7.3.2 Publication and availability of information (TFA, Article 1; and Annex 4, Article 4 and 5)

Description

International trade can take place more effectively when information is available and shared. The seller must be aware of the market's location, and the buyer must be aware of potential suppliers. As goods cross borders, both the seller and the buyer must be aware of the regulatory requirements of the exporting and importing countries, as well as the territories through which the goods will transit. The publication of trade information is a requirement that dates back to GATT 1947, when the first international agreement to liberalise trade was signed. The importance of the publication of information was highlighted in the GATT 1947 case, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile (EEC – Dessert*

Apples), in which Chile, among other issues, complained about the EEC's backdating of import quotas.[1143] In the case, the panel ruled that the operation of a backdated import restriction was incompatible with the requirement for information publication outlined in Article X.[1144]

Advancements in technology have resulted in modern methods of disseminating information. Furthermore, the number of RTAs has increased substantially. As discussed in Chapters Three and Four, some countries are members of more than one RTA as well as many other international organisations. These formations all call for the availability of information for each RTA or international organisation to achieve its goals. Some of the information required include regulatory requirements, fees and charges levied, duties and taxes payable upon either exportation or importation, and documentation involved. Any trade regime that is committed to creating a trade-friendly environment would make relevant information publicly available to importers, exporters, manufacturers and other stakeholders.

Comparison

Article 1 of the TFA addresses these issues under the headings of "Publication, Information available through the Internet, Enquiry points, and Notification".[1145] These concerns are addressed in various articles in Annex 4. The major similarities and differences are as follows:

Publication

Both the TFA and the AfCFTA Agreement require the non-discriminatory publication of certain identified areas of information. There are similarities in the identified areas that must be published, such as applied rates of duty, ROO, valuation rules, and appeal for

1143 *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*: Report of the Panel (circulated 25 May 1989, adopted 22 June 1989) L/6491 - 36S/93 [5.26].

1144 *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*: Report of the Panel (circulated 25 May 1989, adopted 22 June 1989) L/6491 - 36S/93 [5.26].

1145 TFA Art 1.

review.[1146] However, Annex 4 identifies additional types of information, that are not specified in the TFA and must be published. These pertain to: the data required for completion on the mandatory forms used in the movement of goods;[1147] laws, policies and processes relating to the movement of goods;[1148] and publication of import and export guidelines.[1149]

Through the use of the word 'shall' the TFA makes the publication of information mandatory, being an imperative command.[1150] The same measure is provided for as a desired effort in Annex 4 by using the phrase 'shall, to the extent possible'.[1151] This distinction is significant for the AfCFTA because the availability of information facilitates easy access to trade. The fact that the publication of information is not a strict requirement for the AfCFTA can have a negative impact on continental trade. In effect, this means that AfCFTA countries who are not WTO members are under no duty to share trade information with other AfCFTA members because the continental trade regime is not binding.

Information available through internet

The TFA makes provision for information to be published on the Internet.[1152] Under Annex 4, the use of the Internet is a best endeavor and State Parties can use any other means to publish.[1153]

Enquiry points

Both texts recognise the need for at least one enquiry point to handle queries from traders and stakeholders, including other governments.[1154] The TFA makes it a best endeavour through the use of the phrase "Each Member shall, within its available

1146 TFA Art 1:(a)-(j).
1147 Annex 4, Art 4:1(b).
1148 Annex 4, Art 4:1(c).
1149 Annex 4, Art 4:1(n).
1150 TFA Art 1:1.1 prescribes: 'Each Member State shall promptly publish …'.
1151 Annex 4, Art 4:1 provides: 'Each State Party shall, to the extent possible …'.
1152 TFA Arts 1:1 and 2:2.
1153 Annex 4, Art 4:2.
1154 TFA Art 1:3.1; Annex 4, Art 5:1.

resources …''[1155] Annex 4 makes it mandatory when it reads: "Each State Party shall establish and maintain one or more enquiry points …"[1156] The TFA, being a WTO instrument, already has contact points in place, usually through ambassadors and the ministries responsible for trade, as mentioned in Chapter Two. It therefore experiences less challenges when communicating with its members. By making enquiry points mandatory, the AfCFTA shows its commitment to implement the Agreement. It goes further to highlight that there can be one or more enquiry points. Practically the AfCFTA also falls under the ministry responsible for foreign trade, but this leeway gives State Parties the option of a Customs contact point to deal with trade facilitation issues.

In addition, the TFA encourages that WTO members not to raise fees for answering enquiries and issuing forms, and if any amount is to be paid, it must then be limited to the service fees.[1157] The principle applied in respect of fees for enquiry points, applies in respect of other service fees covered under the TFA.[1158] The AfCFTA does not cover any issues in respect of service fees for enquiry points. This has a negative implication to trade under the AfCFTA, in that without appropriate regulations service providers can charge exorbitant fees.

Conclusion on publication and availability of information

Although there are some similarities, there are also significant differences on the publication of information for WTO members and under the AfCFTA. The AfCFTA requires more details to be published in respect of the completion of forms. The AfCFTA recognises that some of its members may face constraints when it comes to publishing information and encourages the use of any other means to disseminate information.[1159] The AfCFTA, therefore considers Africa's situation in respect of availability of resources and use of ICT. The TFA, on the other hand, makes information dissemination on the Internet mandatory. The similarity between the TFA and the RKC regarding the

1155 TFA Art 1:1.3.
1156 Annex 4, Art 4:2.
1157 TFA Art 1:3.3.
1158 TFA Art 6:1.2 and 6.2.
1159 Annex 4, Art 4:2.

availability of information is also an indication that the provisions in the TFA were borrowed from the RKC.[1160] The RKC, however, focuses on Customs whereas both the TFA and the AfCFTA extend beyond Customs and include other governmental agencies.

7.3.3 Opportunity to comment on information (TFA, Article 2; no equivalent provision in AfCFTA)

Description

This measure is based on the precept that before any country implements new legislation or policy changes, the affected stakeholders must be consulted. Trade laws, for example, have an impact on a wide range of stakeholders, including transporters, importers, exporters, manufacturers and shipping agents. Allowing consultations and inputs before implementing any changes is a critical trade facilitation measure. In some cases, certain changes may necessitate stakeholders to seek resources and make necessary preparations prior to implementation. To the extent possible, the introduction of new laws or policies in a country should involve consultation with stakeholders prior to publication. Modern governance increasingly recognises the importance of stakeholder consultation in policy- and law-making.[1161] Several jurisdictions recognise the principle of consultation. In certain jurisdictions the affected groups often participate freely in the law-making process.[1162] Draft laws in the form of bills are published in other jurisdictions to allow the public to engage with their legislators before the law is presented to parliament for debate. Murphy contends that in the Anglo-American democracy, the public has a right to full access to the law-making process.[1163] Allowing

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1160 RKC General Annex, Ch 9:9.2.

1161 Bert Fraussen, Adrià Albareda and Caelesta Braun, 'Conceptualizing Consultation Approaches: Identifying Combinations of Consultation Tools and Analyzing Their Implications for Stakeholder Diversity' (2020) 53 Policy Sciences 473.

1162 Gilbert Bailey, 'The Promulgation of Law' (1941) 35(6) APSR 1059, 1084.

1163 Joseph E Murphy, 'The Duty of the Government to Make the Law Known' (1982) 51(2) Fordham L Rev 255.

consultations and inputs before implementing any changes is a critical trade facilitation measure.

Comparison

The TFA obliges its members to consult stakeholders for comments on any proposed new laws related to cross-border movement of goods.[1164] These provisions are in line with what is provided for in the RKC.[1165] The TFA, however, mentions that such a process must be conducted within the framework provided by national laws.[1166] The reference to domestic laws is important because it recognises that laws are promulgated in line with national constitutions or domestic laws. The provision in the TFA is an improvement and restructuring of Article X of GATT 1994, which was very general and lacked specificity. The AfCFTA does not cover this measure, whose appropriate place would have been in Annex 4.

Conclusion on opportunity to comment on information

Practically, there is no basis for a comparison because these provisions are not covered under AfCFTA. This however demonstrates that the legal texts of the AfCFTA do not necessarily duplicate WTO law.

The lack of provisions on the opportunity to comment in the AfCFTA's legal texts raises the question why the AfCFTA did not incorporate the concept of consultations into its legal texts. This is a modern and democratic principle and the AfCFTA would have been expected to encourage consultations, at least "in a manner consistent with its domestic law and legal system".[1167] This is a progressive measure which allows stakeholders to provide inputs while adequately preparing themselves for the implementation of any pending changes. This provision is related to, but distinct from, the one discussed in

1164 TFA Art 2:1.1.

1165 RKC Annex A, Standard 9.2 reads: 'When information that has been made available must be amended due to changes in Customs law, administrative arrangements or requirements, the Customs shall make the revised information readily available sufficiently in advance of the entry into force of the changes to enable interested persons to take account of them, unless advance notice is precluded.'

1166 TFA Arts 2:1.1, 2:1.2 and 2:1.3.

1167 TFA Arts 2:1.1, 2:1.2 and 2:1.3.

section 7.3.2 of this Chapter regarding the publication of information. This measure shows that stakeholders have better opportunities to make inputs into international trade law under the TFA framework than under the AfCFTA regime.

7.3.4 Advance rulings (TFA, Article 3; and Annex 4, Article 6)

Description

The movement of commercial goods across borders necessitates the submission of certain mandatory information and documents to facilitate clearance and payment of any duties that may be due.[1168] These particulars form the minimal requirements for a commercial consignment. Non-commercial goods or importations by travellers would not be subject to the above requirements. In terms of traveller's effects, most Customs administrations follow the provisions of the RKC, which advocate for more convenient procedures for travellers.[1169] According to the author, the most basic information required, which must be supported by documentary evidence, where possible are:

- Details or nature of goods – this is the description of goods. From this, Customs authorities are able to determine if the goods are subject to any health or other regulatory controls. As an example, the importation of firearms and ammunition might require an import licence issued by the relevant security organs, whereas the importation of some agricultural products might require relevant permits.

- Tariff classification – this is the coding of goods using the HS, which has been discussed in Chapter Five, and which is a tool used in allocating the rates of duty. Before importing goods into a country, a trader would want to know the tariff classification so that he can prepare to comply with requirements such as customs duties or any controls which may apply.

1168 Using Customs terminology, and as borrowed from the definition in the Zimbabwe Customs and Excise Act [Chapter 23:02], commercial goods usually refer to goods used for the generation of profits as opposed to goods for personal use.

1169 RKC Specific Annex J: Travellers.

- Origin of the goods – ROO are used to determine if goods produced in an FTA comply with the stipulated origin criteria.[1170] This determines if the goods qualify for preferential treatment or not. A trader wishing to export or import goods may wish to confirm if the origin criteria used would qualify the commodity as an originating product.

- Value – this is needed for reasons such as levying duties and trade statistics. There are various valuation methods in use, and the WTO has its own valuation system that is stipulated in GATT 1994.[1171]

Based on the above, an importer or exporter might seek an advance ruling to confirm certain details so that border clearances are prepared correctly in advance. Advance rulings are a recent phenomenon in trade. They are used to enhance the transparency and predictability of border requirements.[1172] Although not covered under Article V, VIII and X, the aspect of advance rulings is also part of the RKC, which states:

> The Customs shall issue binding rulings at the request of the interested person, provided that the Customs have all the information they deem necessary.[1173]

With all the required information available, Customs officials would be able to reasonably advise on advance rulings to enable importers and exporters to process their documentation. In this respect, the facility to provide advance rulings is regarded as facilitating trade. The facility provides importers and exporters with binding information before goods arrive at the border.

Comparison

Both the TFA and AfCFTA share the same definition of the concept in that an advance ruling is a written commitment given to an applicant outlining the treatment that shall be accorded to goods at the border on issues such as tariff classification and origin.[1174]

1170 Refer to the discussion in Chapter 3 on ROO.
1171 GATT 1994, Art VII.
1172 WCO, 'Advance Rulings, a Key Element of Trade Facilitation' (2014) 74 WCO News 18.
1173 RKC General Annex, Standard 9.9.
1174 TFA Art 3:9; Annex 4:6.

There are, however, inherent differences in the two texts. Three of the significant differences are as follows:

Definition of applicant

Both texts define an applicant for an advance ruling. The TFA states that:

> An applicant is an exporter, importer or any person with a justifiable cause or a representative thereof.[1175]

The definition by the AfCFTA is more comprehensive. It states:

> 'Applicant' in relation to advance rulings means the exporter, importer, producer or any person with justifiable cause or a representative thereof;[1176]

Although on the surface, the definitions appear to be similar, there is a distinction. A producer or manufacturer of goods would not be an automatic applicant under the TFA but would need to demonstrate an interest in the case. Under the AfCFTA trade regime, the producer or manufacturer does not need to justify any interest in order to be deemed an applicant. The definition already recognises a producer as an applicant.

Validity of an advance ruling

An advance ruling must be valid for a specific duration.[1177] The TFA provides:

> The advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts, or circumstances supporting that ruling have changed.[1178]

The AfCFTA is different in that it states:

> The Advance Ruling shall be valid for at least six (6) months from the date of its issuance unless the law, facts, or circumstances supporting that ruling have changed.[1179]

1175 TFA Art 3:9(c).
1176 Annex 4, Art 1: b.
1177 TFA Art 3:6(d); Annex 4, Art 6:7(d).
1178 TFA Art 3:3.
1179 Annex 4, Art 6:6.

The TFA leaves it up to each member to decide what counts as a reasonable amount of time. There is no set standard for its members and the validity period is open-ended. The AfCFTA requires a minimum validity period of six months and any period longer than that is acceptable. As a result, the AfCFTA is more flexible in that applicants are guaranteed that the advance ruling will be valid for a minimum period of six months,[1180] whereas under the TFA it may be less than six months depending on what the Customs administration considers to be a reasonable period.[1181] The maximum duration for either scenario is not specified.

These two approaches are not the same, and each has advantages and disadvantages. A minimum period of six months allows an importer or exporter sufficient time to plan for the importation or exportation of goods, whereas defining a statutory period as 'reasonable' is open for debate and different interpretations. The legal texts of both the WTO and the AfCFTA prescribe that the procedures and requirements for applying for an advance be made public so that potential applicants can access such information.[1182] Both texts require that an effort be made to publish advance rulings while keeping commercially confidential information in mind.[1183] The AfCFTA proceeds to clarify that to uphold confidentiality, a State Party may redact elements of an advance ruling in accordance with national law.[1184] This makes the process transparent, and the published information may also be useful to the general public. The AfCFTA has an additional provision not found in the TFA in which an advance ruling may be denied on the basis that it does not relate to the intended use.[1185]

Conclusion on advance rulings

Though the themes on advance rulings bear resemblance, it can be noted that there are differences between the application of the measures on advance rulings in respect

1180 Annex 4, Art 6:6.
1181 TFA Art 3:3,
1182 TFA Art 3:6; Annex 4, Art 6:7.
1183 TFA Art 3:8; Annex 4, Art 6:11.
1184 Annex 4, Art 6:11.
1185 Annex 4, Art 6:4.

of the legal texts of the TFA and the AfCFTA. The AfCFTA identifies some areas of detail which brings a differentiation between the two texts. In addition to the three cases discussed, each of the seven paragraphs in the TFA is different from the related eleven paragraphs in the AfCFTA.

7.3.5 Appeal procedures (TFA, Article 4; no provisions in the AfCFTA)

Description and comparison

This measure is based on the fundamental principle that a person has the right of appeal to an independent body if it is considered that a regulatory body, such as Customs or any other government department, has not fairly resolved a case. The person filing an appeal must be given the reasons for the decision so that it helps the appellant to present a focused and appropriate appeal.[1186] This measure is similar to specific prescriptions for Customs in the RKC.[1187] The measure to appeal and review decisions by Customs or other agencies enhances trade facilitation.[1188] The right to appeal improves trade accountability, transparency and predictability. It also serves as an effective control measure against rent seeking and corruption. The provision implies that there must be procedures and timelines in place to handle appeals and reviews.[1189]

Table 7.1 is a practical illustration of an attempt by the Zimbabwe Customs laws to comply with the transparency procedures for appeal and review in respect of goods seized on import or export and the necessary steps that Customs or the owner of the items must take. The table illustrates that, after formal seizure of goods, the importer will get a formal notice advising that goods have been taken away and the reasons why the goods have been seized. The owner of the goods is also advised of the steps he must take to reclaim the goods. The person from whom the goods have been seized

1186 TFA Art 4:5.
1187 RKC General Annex, Ch 10.
1188 Saloni Khanderia Yadav, 'Weighing India's Trade Facilitation Commitments in the Light of the WTO Disciplines' in Sheela Rai and Jane K Winn (eds), *Trade Facilitation and the WTO* (Cambridge Scholars 2019) 140.
1189 TFA Arts 4:2, 4:3 and 4:4.

is advised of the time limits within which to apply or engage in a judicial process of appeal for their release.

Table 7:1 Appeal process in respect of goods seized by Customs in Zimbabwe

Action taken	Relevant sections of the Customs and Excise Act
Goods may be seized for a suspected offence	193(1)
Notice of seizure is issued in writing	193(10)
Person from whom goods have been seized is informed to make an appeal to the Commissioner of Customs in order to recover his goods	193(9) and 193(10)
Appeal for recovery of goods must be made to the Commissioner of Customs and Excise within three months of the date of seizure	193(12)
Person from whom goods have been seized has a right to institute a judicial appeal	196

Source: Author; using data collected from the Zimbabwe Customs and Excise Act [Chapter 23:02]

The intention of this measure is to ensure that Customs or other regulatory agencies do not become final arbiters in their own cases, as this could create power bases that infringe on traders' freedoms and rights. Even though the TFA specifically mentions Customs, it concludes by suggesting that the provisions also apply to other regulatory agencies.[1190] Zimbabwe therefore complies with the provisions of the WTO, as a member.

Conclusion on appeal procedures

Although the procedures for appeal are not covered in the AfCFTA, this discussion also makes it obvious that the legal texts under comparison are different. The AfCFTA must have its own legal texts, spelling out the appeal procedures, as this would encourage the trading system to be seen to be open and predictable. The provisions on appeal or review procedures are critical in holding border or regulatory agencies accountable for their decisions. The accessibility and dependability of the appeals process reflects the fairness and transparency of administrative decisions.

[1190] TFA Art 4:6.

7.3.6 General measures to improve on impartiality (TFA, Article 5; no corresponding measures in AfCTFA)

Description and comparison

Most countries have sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) policies in place to prevent the importation of goods that are substandard or unfit for consumption or endanger the lives of humans and other living species (including plants). This theme concerns the uniform implementation of border control measures governing the movement of food, beverages and feedstuffs to ensure that control measures for the importation of human and animal foods are applied consistently and transparently. Although the WTO has adequate measures to cater for these through its SPS Agreement[1191] and TBT Agreement,[1192] the AfCFTA does not have enough border control measures regarding the detention and testing of human and animal foodstuffs, despite the provisions in Annex 6 which deals with SPS. It has been observed that the TFA facilitates the movement of goods whereas the SPS Agreement and TBT Agreement emphasises public health issues to the extent that they may slow down the movement of goods and be an NTB.[1193] Some of the key measures in implementing this Article are:

- provide the carrier or importer information in respect of detained goods;[1194]
- make the recommended laboratories for such tests public;[1195]
- where the results of a test reveal adverse results, members shall not deny a request for a second test whose outcome must be taken into consideration.[1196]

1191 Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493 (SPS Agreement).

1192 Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995), 1867 UNTS 120 (TBT Agreement).

1193 Heng Wang, 'The Agreement on Trade Facilitation and Its Implications: An Interpretative Perspective' (2014) 9(2) Asian Journal of WTO and International Health Law and Policy 445, 470.

1194 TFA Art 5:2.

1195 TFA Art 5:3.

1196 TFA Art 5:3.

The following words used in Article 5 of the TFA implies that these provisions apply to imports only:

- "protecting … life or health within its territory";[1197]
- "… points of entry";[1198]
- "inform the exporting country or the importer";[1199]
- "goods declared for importation";[1200]
- "declared for importation".[1201]

In a globalised world, these provisions should apply to both imports and exports. Both exports and imports should be concerned about the exportation of contaminated and uncontaminated foodstuffs. This will, however, only be possible if standards are harmonised.

Conclusion on general measures to improve on impartiality

Although these provisions in TFA are not covered under AfCFTA, the discussion underscores a key finding in this study in that the legal texts under comparison are not duplicates. The author advocates that similar provisions must be extended to facilitate trade under the AfCFTA to avoid dumping of inferior goods. African countries must take steps to control trade in substandard and contaminated food, which endangers people's lives. Furthermore, the provisions must apply to exports for global trade in order to take a comprehensive approach on controlling the movement of such goods. As long as product and food standards are different, WTO members together with State Parties will be enforcing different standards in line with their national laws.

1197 TFA Art 5:1.
1198 TFA Art 5:1(a).
1199 TFA Art 5:1(d).
1200 TFA Art 2.
1201 TFA Art 5:3.

7.3.7 Levies associated with imports and exports (TFA, Article 6; and Annex 4, Article 21)

Description

Expenses other than import duties connected with importations and exportation can be a trade barrier if they are numerous or exorbitant. This can be illustrated by examining the SADC's North-South Corridor, which connects the seaports of Durban in South Africa and Dar-es-Salaam in Tanzania.[1202] As of 1 September 2022, various service fees were levied along the road highway between Durban in South Africa and Lusaka in Zambia. The fees included:

- port charges at Durban raised by the South African regulatory company, Transnet National Ports Authority;[1203]
- at least ten tollgate collection points along the corridor in South Africa and Zimbabwe, raised by the national road authorities;
- other road authority charges, for example, for the use of certain bridges;
- parking charges levied by town authorities along the route;
- other service fees collected by either South Africa or Zimbabwe to recover costs from the transporter.

Both the TFA and the AfCFTA consider that the diversity and quantum of these fees can be a non-tariff barrier.[1204] A multiplicity of or high charges along a transport route

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1202 The North South Corridor is a transport route and network which covers eight SADC states which are Botswana, DRC, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe.

1203 Transnet National Ports Authority is the government agency which operates ports. The various charges can be viewed on the authority's tariff book, available at Transnet National Ports, 'Tariff Book, April 2022 to March 2023' <www.transnetnationalportsauthority.net> accessed 1 September 2022.

1204 TFA Art 6; Annex 4 Art 21.

would force transporters to seek alternative routes in order to either save costs or avoid delays.

Comparison

The TFA addresses the subject under the title "Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties"[1205] while the AfCFTA covers it under "Fees, Charges and Penalties".[1206] It should be noted that the title adopted by the TFA leaves the reader with no doubt on what the subject matter is. The title used by AfCFTA is brief, and such brevity fails to convey the full subject matter covered under the title. There are also other similarities and differences in the manner in which issues have been presented in the texts.

Unlike the AfCFTA Agreement, the TFA divided fees and charges into three broad categories, that is: General;[1207] Customs fees;[1208] and Penalties.[1209] The TFA therefore distinguishes fees and charges belonging to other agencies from those of Customs. However, the service charges raised by Customs are more related to import and export procedures when compared to other service fees such as scanning fees or road fees. The TFA borrowed this approach from the RKC.[1210] This distinction shows that it is not only Customs which raises charges connected to imports and exports, but other agencies also do the same. It also gives particular attention to Customs which is at the centre of trade issues. The AfCFTA has an omnibus approach on these costs and refers to "fees and charges of whatever character other than customs duties …"[1211] The approach is general. The provisions in the TFA, which are comparable to those in the RKC are more modern, clearly demarcated and easy to follow. Being a later agreement

1205 TFA Art 6.
1206 Annex 4, Art 21.
1207 TFA Art 6:1.
1208 TFA Art 6:2.
1209 TFA Art 6:3.
1210 RKC General Annex, Ch 3.3:2; Specific Annex, Ch 1:19.
1211 Annex 4, Art 21:1.

than the TFA, it could have been expected that the provisions in the AfCFTA would be more comparable to the RKC and TFA.

Both the texts of the TFA and AfCFTA however emphasise that fees and charges must be raised for services rendered and not as a revenue generation measure.[1212] These provisions resemble what is found in the RKC.[1213] They are, however, very general since reference to fair and reasonable charges is subjective and can be interpreted differently.

Although the issue of penalties is covered under Article 6 of the TFA, it is discussed and dealt with separately in section 7.3.8 below. The author considers penalties to be different from other fees and charges which connotes levies for services rendered. Penalties are a punishment for non-compliance.

The AfCFTA further mentions that fees and charges should not represent an indirect protection of domestic taxes.[1214] This aspect is implied in the TFA in respect of the fees levied by Customs.[1215] This element has been drawn from GATT 1994.[1216] The principles pertaining to the reasonableness of service fees and that charges must not be used for fiscal purposes was tested in the case of *US – Customs User Fee*.[1217] The said *US – Customs User Fee* was heard before the DSB in 1987 when the US Customs Service introduced, amongst others, a 'merchandise processing' fee for passengers. The fee was based on *ad valorem* rates, without an upper limit, to which Canada and the European Commission argued that the fee was a tax and disproportionate to the cost of services. This led to the following Panel decision:

1212 TFA Arts 6:1 and 6:2; Annex 4, Arts 21:1 and 21:3.

1213 RKC General Annex, Ch 3.3:2 and Specific Annex, Ch 1:19.

1214 Annex 4, Art 21:1.

1215 TFA Arts 6:2.

1216 GATT 1994 Art VIII:1(a) which reads: 'All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) … in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.'

1217 *US – Customs User Fee*: Report of the Panel (circulated 25 November 1987, adopted 2 February 1988) L/6264 - 35S/245 [125(a)].

> […] The term 'cost of services rendered' in Articles II:2(c) and VIII:1(a) must be interpreted to refer to the approximate cost of customs processing for the individual entry in question, and that consequently the ad valorem structure of the United States merchandise processing fee was inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent it caused fees to be levied in excess of these approximate costs […].[1218]

In a different case, *Argentina – Textiles and Apparel*, concerning an *ad valorem* rate-based fee on statistical services introduced by Argentina, the panel reasoned as follows:

> An *ad valorem* duty with no fixed maximum fee, by its very nature, is not 'limited in amount to the approximate cost of services rendered'. For example, high-price items necessarily will bear a much greater tax burden than low-price goo ds, yet the service accorded to both is essentially the same. An unlimited ad valorem charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered [….] [1219]

In the same *Argentina – Textiles and Apparel* case, Argentina also argued that since the collection was in line with an undertaking under the IMF, it justified the fee to be for fiscal reasons. The panel ruled that the provisions of Article VIII were mandatory and did not allow the collection of fees and charges for fiscal purposes.[1220] Following an appeal, the AB confirmed the panel's ruling.[1221] Drawing from these GATT/WTO experiences, the AfCFTA explicitly prohibits the use of *ad valorem* rates when calculating the service fees, and it states:

> Each State Party shall ensure … that all fees and charges of whatever character other than customs duties imposed on or in connection with importation, exportation or Transit shall be limited in amount to the approximate cost of services rendered, which shall not be calculated on an ad valorem basis, and shall not represent an indirect protection to domestic goods or a taxation of imports, exports or goods in transit for fiscal purposes.[1222]

1218 *US – Customs User Fee*: Report of the Panel (circulated 25 November 1987, adopted 2 February 1988) L/6264 - 35S/245 [125(a)].

1219 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other:* Report of the Panel (circulated 25 November 1997) WT/DS56/R L/6491 - 36S/93 [6.75].

1220 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other:* Report of the Panel (circulated 25 November 1997) WT/DS56/R L/6491 - 36S/93 [6.78-6.80].

1221 *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other:* Report of the AB Panel (circulated 27 March 1998, adopted 27 April 1998) WT/DS56/R [87(c)].

1222 Annex 4, Art 21:1.

The TFA does not have corresponding provisions. Practically both the AfCFTA and the WTO do not entertain the use of *ad valorem* rates in levying fees and charges. The AfCFTA is guided by its own instrument whereas the WTO is guided by decisions from previous disputes.

Conclusion on levies associated with imports and exports

Although there are similarities, the major difference is that, in addition to provisions on fees and charges by other agencies, the TFA provides detailed guidance on fees and charges by Customs, which the AfCFTA does not mention. The provisions in the TFA pertaining to fees and charges have subheadings and are readable. The TFA provisions are therefore user-friendly compared to the three paragraphs of Annex 4 which cover the two demarcated areas without subheadings.[1223]

7.3.8 Penalties (TFA, Article 6; and Annex 4, Article 21:4-21:6)

Description

The import and export of goods together with the Customs declarations must comply with trade and fiscal laws. The Customs enforcement role involves ensuring that the correct declarations for goods are tendered in respect of the nature of goods, its origin and HS tariff classification. This applies to imports, exports or goods in transit. From the declarations submitted Customs are able to determine the correct duties, where due, or to ensure that other regulatory measures such as prohibitions, restrictions or product requirements are complied with. As a trade facilitation measure, and in order not to delay goods at the border, a number of Customs administrations are implementing the post-clearance audit (PCA).[1224] PCAs or audit-based controls entail Customs confirming the accuracy and authenticity of declarations after goods have left the border by inspecting the relevant data, records, and systems held by the parties

[1223] Annex 4, Arts 21:1-21:3.
[1224] TFA Art 7:5; Annex 4, Art 11.

involved.[1225] Incorrect declarations can be costly and damaging, and Customs must impose penalties or prosecution for non-compliance with the laws.[1226]

Comparison

There are parallels in the legal texts being analysed in this section. Both texts adopted a similar definition of 'penalties'.[1227] In terms of penalties for violations, both texts state that fines must be fair, proportionate to the offence,[1228] and accompanied by a written explanation clarifying the specifics of the offence and the rationale for the penalty.[1229] These provisions are similar to those in the RKC.[1230] Both the texts of the TFA and the AfCFTA emphasise that sanctions must be meted out only to those responsible for violating the laws.[1231] This is significant because global trade involves many parties, such as exporters based outside the importing country, importers based outside the exporting country, transporters, and numerous other interested parties in the chain.

Conclusion on penalties

There are similarities regarding the texts on penalties.

7.3.9 Release of goods from Customs control (TFA Article 7; Annex 4, Articles 7-15)

Description

The clearance of goods through Customs and their release to the importer or exporter involves stand-alone processes within the trade supply chain. The goods must comply with Customs requirements before they are released for either import, export or transit.

1225 RKC General Annex, Ch 2: Definitions.

1226 Tristan Wegner, 'Why Customs Compliance is so Important for Managing Directors' German Customs Law (*O & W Attorneys at Law*, 9 August 2018) <www.owlaw.com/german-customs-law/10129-why-customs-compliance-is-so-important-for-managing-directors> accessed 19 February 2022.

1227 TFA Arts 6, 3:1; Annex 4, Art 21:10.

1228 TFA Arts 6, 3:3; Annex 4, Art 21:5.

1229 TFA Arts 6, 3:5; Annex 4, Art 21:7.

1230 RKC General Annex, Ch 3.

1231 TFA Art 6:3; Annex 4, Art 21:4.

These processes can be a hindrance to trade if procedures are not simple and transparent. Upon arrival at borders or entry points, goods must comply with Customs formalities before they are released for export or for use in the country of import or for transit. The RKC defines clearance as:

> […] the accomplishment of the Customs formalities necessary to allow goods to enter home use, to be exported or to be placed under another Customs procedure […][1232]

The processing of Customs processes involves many parties. Apart from Customs authorities, there are beneficiary persons interested in the goods, such as the owner of the goods, the clearing agent responsible for handling the Customs clearances, and the transporter who is responsible for moving the goods. All these parties have various roles to play in order to clear the goods and comply with Customs laws.[1233] The shared formalities entail a number of activities which include: completing declaration forms; obtaining supporting documents to substantiate the declaration, for example invoices, evidence of where the commodities were manufactured, in case there are concessions; confirmation by Customs on if the declaration has been properly done; assessment of the duties due; and physical inspection of goods, if required by Customs. The final stage of clearance is when the goods are released from Customs control. There are requirements which must be complied with to enable the clearance and release of goods within the border complex or the Customs-controlled area where goods would be held. The various activities are covered in both the TFA[1234] and Annex 4.[1235]

Comparison

There are similarities in both the formalities which must be completed and in the legal texts dealing with these formalities. Amongst others, the provisions in the TFA and the AfCFTA deal with the following activities surrounding clearance and release of goods: pre-clearance of goods before they arrive at the border; electronic payment of duties to avoid cash exchanging hands and also to modernise Customs systems; making sure

1232 RKC Ch 2: Definitions.
1233 RKC Ch 2: Definitions.
1234 TFA Art 7.
1235 Annex 4, Arts 7-15.

that the release of goods and the assessment are not conducted by the same Customs officer to avoid conflict between these two important roles; reducing the time goods spend on a border by performing selective searches and ensuring that certain documentary checks are conducted after the goods have been released; the facilitation of urgent cargo; and how to expedite the release of perishable goods. Table 7.2 show the subject headings covered by the TFA and the corresponding Articles in the Annex 4. The table follows the order as presented in the TFA.

Table 7.2 Comparison of Article 7 of the TFA and Annex 4 on Trade Facilitation

Provisions in Article 7 of the TFA		**Corresponding provisions in Annex 4**	
Paragraph in Article 7	**Heading used in Annex 4**	**Article**	**Heading used in Annex 4**
1	Pre-arrival Processing	7	Pre-arrival Processing
2	Electronic Payment	8	Electronic Payment
3	Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges	9	Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges
4	Risk Management	10	Risk Management
5	Post-clearance Audit	11	Post-clearance Audit
6	Establishment and Publication of Average Release Times	12	Establishment and Publication of Average Release Times
7	Trade Facilitation Measures for Authorised Operators	13	Trade Facilitation Measures for Authorised Operators
8	Expedited Shipments	14	Expedited Shipments
9	Perishable Goods	15	Perishable Goods

Source: Author[1236]

All the measures listed have to do with Customs clearances and the final release of the goods from Customs control. There is resemblance in the two legal texts under study. The similarity can also be detected from the headings of the paragraphs used in the TFA and the order of the numbering in the AfCFTA. Whereas the TFA grouped all these under one article with paragraphs, the AfCFTA used the paragraphs in the TFA to compile its own Articles. While maintaining the theme and meaning, there are instances

[1236] The headings in Table 7.2 have all been extracted from Article 7 of the TFA and Annex 4

where the AfCFTA simplified the text to make it more understandable.[1237] This makes the AfCFTA text more readable and easier to follow.

Conclusion on release goods from Customs control

This theme covers some of the recent modernisation tools which have been used by the WCO to facilitate trade such as PCA, electronic payment and risk management. Article 7 of the TFA is one of the few whose text have been carried over to the AfCFTA, with minor adjustments that do not change the meaning.

7.3.10 Border agency cooperation (TFA, Article 8; Annex 4, Article 25)

Description

Chapter Five demonstrated that a number of organisations, including the WTO, WCO and AfCFTA, regard border issues as critical to trade facilitation. A border post or entry point into a country serves as a hub for many border agencies, each with its own legitimate reason for being present. Some of the agencies with interests at the border are as follows:

- Customs, whose interest is on goods;
- Immigration, whose focus is on the traveller and not his goods;
- the Police and other security agencies, whose mandate is to ensure the safety of activities at the border and the country at large;
- regulatory authorities responsible for matters such as health, transport, agriculture, standards or quality of goods;
- private sector agencies who offer necessary services at the border, such as shipping agents and insurance companies.

[1237] For example, TFA Art 7:1.2 reads: “Each Member shall, as appropriate, provide …” and Annex 4, Art 7:2 reads: ‘Each State Party shall, *where* appropriate, provide …’ (my emphasis).

A border post can be a source of delay for travellers or traffic if border agencies do not cooperate or coordinate their activities. Lack of clear roles and responsibilities, as well as overlaps in the functions of agencies, can lead to chaos and duplication of efforts. Such disorder can irritate clients while also creating a serious non-tariff barrier of corruption. Regardless of the definition used, one of the essences of trade facilitation is to streamline border processes to reduce delays. Eliminating border delays has a cascade of positive consequences, including faster delivery of goods, lower landed costs of goods, a congenial working environment for border agencies and stakeholders, and user-friendly entry points. Some of the measures put in place to speed up the movement of travellers and traffic across borders which are based on cooperation among border agencies include the OSBP and coordinated border management (CBM).

A OSBP is a 'one-stop' facility at a border crossing where both exit and entry formalities are handled seamlessly while any required inspections and searches of goods are carried out in the territory of one of the countries as per their agreement.[1238] It is based on the principle of combining the processes of two border posts and having them conducted in either of the territories. It therefore involves the extraterritorial application of laws and collaboration among associated border agencies. It is a tool for trade facilitation because it simplifies procedures and eliminates delays at border crossings. Chirundu and Kazungula are examples of OSBPs.[1239] Such facilities are also available at some border posts in East Africa.[1240] According to studies conducted in East Africa,

1238 Erich Kieck, 'Coordinated Border Management: Unlocking Trade Opportunities Through One Stop Border Posts' (2010) 4(1) WCJ 3, 6-7.

1239 Refer to the discussion in Chapter 5 of the OSBPs at Chirundu between Zimbabwe and Zambia, as well as Kazungula between Botswana and Zambia.

1240 Some of these border posts in East Africa are at Elegu/Nimule (between Uganda and South Sudan Border), Tunduma/Nakonde (between Tanzania and Zambia) and Moyale (between Kenya and Ethiopia). Refer to EAC, 'EAC Operationalizes 13 One Stop Border Posts' (2 November 2018) <www.eac.int/press-releases/142-customs/1276-eac-operationalizes-13-one-stop-border-posts> accessed 7 October 2022.

OSBPs have resulted in reduced paperwork, less duplication, and closer cooperation among border agencies, all of which have speeded up the flow of traffic.[1241]

Unlike OSBPs which involve two countries, a CBM or integrated border management involves collaboration between border agencies in their operations. As an example instead of each of the party at a border post conducting its own searches, these can be coordinated and conducted either jointly or by a designated agency. It relates to closer coordination of the activities of various border agencies, or even the merging of the operational activities of the agencies, thus reducing the number of reporting points at the border and facilitating trade.[1242] A CBM is more efficient because it results in the smooth flow of traffic and the balancing of security requirements at a border post. It also allows a seamless flow of goods and processes at the borders instead of agencies conducting various activities in an uncoordinated manner and duplicating of various control measures.

Comparison

The provisions in both the TFA and the AfCFTA on cooperation by border agencies are similar and require members to coordinate their procedures at common border crossings.[1243] Some examples of areas of cooperation include the correlation of the hours of operation at the borders, the sharing of border facilities, and the coordination of processes.[1244]

Conclusion on border agency cooperation

The TFA and the AfCFTA have similar provisions in this thematic area. Given that the WTO text was adopted and implemented earlier, it is reasonable to believe that the AfCFTA adopted its version from the TFA. This measure shows that border formalities can hinder trade if the border agencies do not cooperate. It also emphasises the fact

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1241 Paul Nugent and Isabella Soi, 'One-Stop Border Posts in East Africa: State Encounters of the Fourth Kind' (2020) 14(3) Journal of Eastern African Studies 433, 448.

1242 Mariya Polner, 'Coordinated Border Management: From Theory to Practice' (2011) 5(2) WCJ 49, 54.

1243 TFA Art 8; Annex 4, Art 25.

1244 See discussion in Chapter 5.

that the border or any entrance point is a multi-stakeholder facility that requires the collaboration of stakeholders, one of which is Customs.

7.3.11 Movement of goods under Customs control (TFA, Article 9; no similar provisions in the AfCFTA)

Description

The provisions of Article 9 of the TFA, which are not covered in the AfCFTA, specify that goods arriving at a border must be removed to an inland office for final processing of Customs paperwork. This amounts to authorised deferred clearance or payment of duty to another office. The movement of goods referred to in this Article can be considered as a national transit procedure.[1245] Since it decongests border crossings, it facilitates trade. By deferring full Customs clearance to an inland office, this regime eliminates the need for an inland importer to travel to a border post to submit Customs papers. These provisions, as with some other TFA measures, were copied from the RKC.[1246]

Comparison

Although this is an important measure in decongesting ports, the legal text of the AfCFTA does not cover this.

Conclusion on movement of goods under Customs control

These provisions are important because they decongest the border and facilitate the smooth flow of trade. As a result, it falls to national legislation to allow goods to be removed from the border for final clearance at an inland office. The absence of such provisions in the AfCFTA Agreement implies that AfCFTA members prefer imported goods to be cleared and duty to be paid at the borders, and goods to only proceed inland once import requirements have been complied with. Considering that an FTA

1245 Wolffgang and Kafeero, 'Old Wine in New Skins' 27, 33.
1246 RKC Specific Annex E, Ch 1.

must have a better trade facilitation regime for its members compared to the global regime, the AfCFTA needs such provisions in its legal texts.

7.3.12 Formalities connected with importation, exportation and transit (TFA, Article 10; Annex 4, Articles 20, 23 and 24)

Description

Delays in the movement of goods can be attributed to the various procedures that must be followed when goods cross borders. The border post has evolved into a convergence point for many stakeholders involved in the formalities regarding the cross-border movement of goods. In addition to Customs officials, there are other regulatory authorities,[1247] transportation companies, shipping companies and many others who need to comply with cross-border requirements. Border formalities, as discussed in section 7.3.10 above, can be a nightmare if they are not coordinated. Issues concerning trade facilitation and border formalities are of common interest to the WTO, WCO and RTAs, and these are also provided for under the RKC.[1248]

Comparison

A comparison of the legal texts will be made on the following: single window; Customs brokers; pre-shipment inspection; goods whose importation is denied; temporary imports; and formalities and documentation requirements.

Single window

A single window is:

1247 Apart from Customs and Immigration there can be more than ten regulatory authorities depending on domestic legislation, eg Agriculture, Health, Plant Inspectorate, Police, Army, Intelligence Services, Transport Authorities, Drug Enforcement Authorities, Bureau of Standards, Road Authorities, Vehicle Inspection Department, and Specialists on Minerals.

1248 Refer to discussions in Chapters 2, 3 and 5.

> … a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single-entry point to fulfil all import, export, and transit-related regulatory requirements.[1249]

It is a one-stop facility where import, export and transit documents are submitted for processing and confirming that the regulatory requirements have been complied with. Practically, a trader lodges an electronic declaration to a single agency, and other governmental or regulatory agencies can subsequently verify the accuracy of the declarations and conformity with rules regarding their areas of interest.[1250] As a result, the traditional approach of an importer or exporter moving from one office to the next, at multiple locations, with a set of documents for each regulatory authority to ensure required compliance, would not be necessary.

One of the major drawbacks in establishing a single window is the high initial and ongoing costs of setup and maintenance. The implementation of a single window reduced cargo turnaround time in Benin from thirty-nine to six days, while Customs procedures in Cameroon was reduced from six days to three hours, and document handling in Senegal improved from four days to one day.[1251] The single window concept is thus a trade facilitation measure in the sense that it streamlines formalities associated with international trade. Both the TFA and the AfCFTA have similar texts that are best endeavours, and which require that members:

> […] shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the

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1249 UN, 'Trade Facilitation Implementation Guide: The Single Window Concept' <https://tfig.unece.org/contents/single-window-for-trade.htm> accessed 31 October 2021.

1250 As an example, export of beef usually involve: the exporter who obtains an export permit from veterinary authorities who authorises, through issuance of a permit, that the beef is healthy for human consumption; a bank who approves payment arrangements; transport authorities who confirms that the appropriate transport arrangements for such a perishable product are secured; and Customs who ensures that a correct declaration has been made. The single window concept, which basically involves the electronic movement of documents, obviates the traditional approach where the trader would physically move from one office to the next to get such endorsements.

1251 Edvard Tijan and others, 'The Single Window Concept in International Trade, Transport and Seaports' (2019) 33 Scientific Journal of Maritime Research 130, 130-139.

documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.[1252]

The fact that the texts are similar indicates that the tool is widely accepted in global trade. Under both the TFA and the AfCFTA the measure is not mandatory, but a best endeavour.

Customs brokers

The issue regarding Customs brokers[1253] features in both the TFA and the AfCFTA since they process documents involved in global trade. The engagement of Customs brokers has been a debatable issue with some arguing for the mandatory use of professional experts in the handling of Customs documentation in order to facilitate trade, while another school of thought contends that the mandatory use of Customs brokers is an additional cost to doing business, which will not facilitate trade.[1254] Both the TFA and the AfCFTA have similar provisions to the effect that the use of Customs brokers should not be mandatory.[1255] The effect of this is that an importer or exporter has the option to engage a Customs broker to process documentation. Whereas their use is generally agreed upon as optional, the author notes that professional Customs brokers are a vital specialised service in facilitating trade, just as a judicial system is considered fair when legal matters are argued in court by professional lawyers as prosecutors with counter-arguments being delivered by a defence team made up of competent lawyers. Competent Customs brokers facilitate trade by ensuring that the interpretation of Customs laws, as well as importers, exporters and regulatory authorities, comply with national laws.

There are differences in the legal texts in respect of the following four areas, and these have an impact on trade facilitation:

1252 TFA Art 10:4; Annex 4, Art 18.

1253 Customs brokers are agents who process and handle the necessary border documentation or declarations with Customs on behalf of importers or exporters. Some jurisdictions refer to them as clearing agents, shipping agents or freight forwarders.

1254 Hege Medin, 'Customs Brokers as Intermediaries in International Trade' (2021) 157 Review of World Economics 295, 295-322.

1255 TFA Art 10:6.1; Annex 4, Art 23:1.

(a) The texts regarding the use of pre-shipment inspection (PSI) companies are not the same. PSI activities involve the verification of goods on behalf of governments by third parties, who usually are non-governmental. This would usually cover features such as quality, currency exchange rates and financial terms of payments, quantity, price, Customs values, and tariff classification of goods in international trade.[1256] If not properly monitored and coordinated, PSI companies can easily take over the role of governmental agencies, when in actual fact, the ideal situation is for a government to strengthen its professional skills in the appropriate fields such as Customs and trade banking. The Agreement on PSI notes that a number of developing countries employ PSI services.[1257] Those who advocate for PSI consider it as an engagement of external expertise to combat border fraud and corruption, while those opposed to it see it as introducing an additional layer of bureaucracy to a service already mandated to government agencies.[1258] The business model for PSI services is that they usually collect their fees through service charges on work assigned to existing governmental departments. They are therefore perceived as an additional cost to both importers and exporters. The author argues that PSI services can, however, be of national benefit if they are engaged for a specific non-renewable agreed term during which time they must transfer skills to the relevant governmental agencies. As discussed in Chapter Five, revenue collection is at the core of Customs functions. The basic data required in assessing duties is the HS tariff code, value and origin of the goods. Through capacity building programs such skills can be easily incorporated into a Customs administration, which is in any case the core function of Customs.

Both the TFA and AfCFTA prohibit the use of PSI to do tariff classification or Customs valuation.[1259] In addition to prohibiting PSI on tariff classification and valuation, the TFA, unlike the AfCFTA, proceeds further to discourage its

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1256 Agreement on Pre-shipment Inspection (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 368 (Agreement on PSI) Art 1.

1257 Agreement on PSI preamble.

1258 James T Walsh, 'The Role of the Private Sector in Customs Administration' in Michael Keen (ed), *Changing Customs Challenges and Strategies for the Reform of Customs Administration* (IMF 2003) 171.

1259 TFA Art 10:5; Annex 4, Art:24.

members from introducing any other forms of PSI. Because Customs was heavily involved in the TFA negotiations, it cannot be ruled out that Customs used the opportunity to protect its own area of expertise and ensure that its functions would not be subcontracted. Whereas the TFA goes on to discourage any other form of PSI, AfCFTA simply prohibits PSI on tariff classification or valuation while remaining silent on other forms of PSI such as quality and currency exchange rates.

(b) It often happens that regulatory authorities deny the importation of goods if they do not meet the prescribed safety requirements, technical standards or sanitary and phytosanitary regulations. Products such as human and animal feeds and certain manufactured commodities are therefore denied entry into the importing country if they do not conform to the prescribed standards. There is a continuous process to harmonise standards both in global trade and under the AfCFTA.[1260] The easy interpretation under Customs law is to confiscate and destroy such goods for non-compliance with import requirements. The TFA includes provisions for the re-exportation or reconsignment of such goods to another person as designated by the exporter.[1261] These provisions are very important to ensure certainty for both the importer and the exporter on how such goods will be dealt with at the border. If law enforcement is too open to discretion, it could result in rent-seeking and corruption. The AfCFTA, however, does not have similar provisions, thus leaving this matter to national legislation or to the discretion of border officials. It therefore means that under the AfCFTA, State Parties have no obligations on this matter. The result is that this aspect would not be harmonised under the AfCFTA.

(c) The TFA contains concessionary provisions requiring its members to facilitate the importation of temporary imports when they enter a country for a specific period

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1260 In respect of the WTO, these are governed by the WTO Agreement on Technical Barriers to Trade and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. Under the AfCFTA it is Annex 6 on Technical Barriers to Trade and Annex 7 on Sanitary and Phytosanitary Measures.

1261 TFA Art 10:8.

together with goods being imported for processing, manufacture or repair.[1262] The temporary importation of such goods is also covered in the RKC.[1263] The AfCFTA does not include such provisions. It must, however, be noted that some countries adopted the provisions in the RKC into their national legislation. Ghana[1264] and Zambia[1265] are examples of State Parties of the AfCFTA who have domesticated provisions of temporary admissions into their national laws.

(d) There are also other cosmetic differences between the TFA and the AfCFTA. The changes do not affect the meaning, but they make the AfCTFA more readable and understandable. The TFA includes a subheading, "Formalities and Documentation Requirements",[1266] dealing with the need to review formalities and documentation to continuously simplify them. The AfCFTA captures these matters under a simpler heading, "Documentation".[1267] Without defining the concept, it mentions that reviews should be periodic, as opposed to the TFA, which simply refers to reviews.[1268] In the text the AfCFTA uses the term 'procedures' where the TFA refers to 'formalities.[1269]

Conclusion on formalities connected with importation, exportation and transit

The heart of trade facilitation is the element of formalities related to border processes. Both the WTO and the AfCFTA almost declare that trade facilitation hinges on how simple and modern the border formalities are. The subject matter is broad and overlaps into other areas such as risk management and electronic payments. There are similarities between the legal texts on trade facilitation of the WTO and the AfCFTA. These similarities show the equal weight which the WTO and AfCFTA give to formalities involved in the movement of goods across borders. There are also instances where there are some differences in their textual language, but with the same message being

1262 TFA Art 10:9.
1263 RKC Special Annex F, Chs 1-3.
1264 Customs Act 891, 2015 (Ghana) ss 74-78.
1265 Customs and Excise Act [Chapter 322) (Zambia) ss 89-90.
1266 TFA Art 10.1.
1267 Annex 4, Art 20.
1268 Annex 4, Art 20.3
1269 Examples are in Annex 4, Art 20:1, Annex 4, Art 20:2 and Annex 4, Art 20:3.

implied. Further there are differences in the texts on PSI, the re-export of goods, and the handling of temporary imports.

7.3.13 Freedom of transit (TFA, Article 11; Annex 4, Article 19, and Annex 8)

Description

Landlocked countries are adversely affected in trade since they use seaports belonging to other countries. Africa has sixteen landlocked countries which must use ports from other countries to trade.[1270] All landlocked countries need the services of seaports rather than have their imports or exports must transit through other countries.[1271] As a practical example, a landlocked country like Zambia utilises seaports such as Durban (South Africa), Beira (Mozambique), Walvis Bay (Namibia) and Dar es Salaam (Tanzania). Zambia, as an individual country, has no mandate over the administration of these seaports belonging to other sovereign nations. Further, goods being transported to and from Zambia transits through South Africa and Zimbabwe, where Zambia has no control over the efficiencies of institutions and infrastructure belonging to these other counties. This brings to the fore an important element for RECs. In their efforts to facilitate intra-regional trade, RECs can intervene and coordinate the efficiencies of ports and appropriate infrastructures for the benefit of all members. An example is the Kazungula OSBP and bridge which has been discussed in Chapter Five, where a structure built by Zambia and Botswana has a positive impact on regional trade. The same can be said of transport highways connecting countries. Although they are national to the extent that they traverse through national territories, it must be noted that they also provide regional benefits and RECs should therefore have interests in their efficiencies. Studies have shown that being landlocked increases a country's trade costs by 50% and reduces trade volumes by 30-60%, but the availability or access to

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1270 UNCTAD, 'List of Landlocked Developed Countries' <https://unctad.org/topic/landlocked-developing-countries/list-of-LLDCs> accessed 20 July 2021.

1271 Ernesta Swanepoel, 'The Law of the Sea and Landlocked States (Policy Briefing 205)' (*South African Institute of International Affairs*, August 2020) <https://media.africaportal.org/documents/Policy-Briefing-205-swanepoel_1.pdf> accessed 20 July 2021.

hard and soft transport infrastructure can offset this geographical disadvantage.[1272] The whole crux of facilitating transit traffic is to allow for the expeditious movement of goods until they reach their destination.

The entire purpose of the provisions on transit is to facilitate rather than deny or delay transit traffic as it traverses through foreign territory. The movement of goods in transit has long been regarded as an area that requires facilitation at a global level, resulting in appropriate provisions at global levels[1273] and in RTAs such as COMESA[1274] and the SADC.[1275] As discussed in Chapter Six, the expedited processing of traffic in transit must be balanced against regulatory requirements to ensure that goods do not end up being consumed in the market through which they are transiting. Transit fraud has become very common. Zambia had a reported case in which fuel declared as a transit cargo to the DRC was allowed to enter the country duty-free, but was then offloaded in Zambia and the paperwork was fraudulently processed to give the impression that the consignment has left Zambia for its destination.[1276] South Africa also had incidents of cargo entering the country and being declared as transiting, one such case being *Savanna Tobacco Company (Pty) Ltd v the Minister of Finance, the Commissioner of Customs, SARS and the Controller of Customs, Musina.*[1277] The Savanna Tobacco Company was a Zimbabwean-based cigarette manufacturer whose consignment of ten million cigarettes was declared as transiting through South Africa, destined for the overseas market. The consignment was seized and based on the evidence surrounding the importation, the court ruled that the cigarettes were not in transit but was for consumption in South Africa. As a result of transit fraud, most Customs administrations

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1272 Alberto Behar and Anthony J. Venables, 'Transport Costs and International Trade (Paper Written for *Handbook of Transport Economics*, eds André de Palma, Robin Lindsey, Emile Quinet and Roger Vickerman)' <www.freit.org/WorkingPapers/Papers/TradePatterns/FREIT179.pdf> accessed 20 July 2021.

1273 Global levels would include GATT 1947, GATT 1994 and the TFA.

1274 COMESA Treaty Art 85(h).

1275 SADC Trade Protocol Annex IV.

1276 Zambia Revenue Authority, 'ZRA Closes in on Fuel Smuggling Scams' (*ZRA News*, 8 July 2020) <www.zra.org.zm/zra-closes-in-on-fuel-smuggling-scams/> accessed 23 October 2021.

1277 *Savanna Tobacco Company (Pty) Ltd v The Minister of Finance, The Commissioner of Customs, SARS and the Controller of Customs* (High Court of SA, Transvaal Provincial District) (unreported) case number SA 23708/2005 (2005).

are implementing control measures, some of which create barriers to trade while others are facilitative. Some of these involve: seeking a guarantee of the customs duty from a financial institute and acquitting it once the goods have left; escorting the trucks and ensuring that the cargo leave the country; and designating routes for transit traffic. Modern technology, such as radio frequency detectors which can be used to monitor movement, routes used and any stops by trucks, can also be used. Burkina Faso is one example of a country that has partnered with private firms, such as Cotecna Inspection SA, to monitor the movement of goods transiting the country.[1278]

Comparison and identification of similarities and differences

The TFA has improved on GATT 1994 to ensure that there is no disguised restriction on transit.[1279] The TFA deals with the strategic issues that must be addressed to facilitate goods in transit. Some of the identified restrictive measures which members are not allowed to implement are transit fees[1280] and burdensome formalities.[1281] In addition to these prohibitions on transit traffic, the TFA encourages some transit facilitation measures such as creating separate lanes and giving transit traffic preference,[1282] and clearing goods in advance before arrival.[1283]

The AfCFTA uses a different approach and builds upon existing WTO instruments. It states:

> Each State Party shall ensure the freedom of transit through its territories in accordance with Article V of GATT 1994 and Article 11 of the WTO Agreement on Trade Facilitation.[1284]

From this, it can be concluded that not only has the AfCFTA adopted WTO transit facilitation, but it goes beyond that and proceeds to define it in its own way. Annex 8,

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1278 Cotecna, 'Case Study: Monitoring of Goods in Transit in Burkina Faso' (18 July 2022) <www.cotecna.com/en/media/case-studies/monitoring-of-goods-in-transit-in-burkina-faso> accessed 23 October 2021.
1279 TFA Art 11:1.
1280 TFA Art 11:2.
1281 TFA Art 11:6.
1282 TFA Art 11:5.
1283 TFA Art 11:9.
1284 Annex 4, Art 19.

which is separate from but supportive of the TFA, has unique additional features regarding transit goods being transported by road.[1285] Whereas the TFA details freedom of transport and gives strategic positions on what is required, Annex 8 provides operational details on how goods in transit should be handled. The Annex covers the entire process of how goods in transit by road should be processed, beginning with the documentation and moving onto what is expected from the transporter as well as how Customs can play a role in facilitating trade. It is therefore focused on meeting the African problem involving the movement of goods in transit and by road. Some highlights are:

- the legal entity, which include the transporter and agents responsible for moving goods in transit, must be registered with Customs;[1286]
- traffic in transit require a bond or guarantee issued by a financial institution;[1287]
- a common transit declaration form shall be used;[1288]
- limited inspections by Customs of goods in transit;[1289]
- State Parties shall share the operational hours of their offices.[1290]

Annex 8 addresses the simplification, modernisation and harmonisation of transit procedures in more detail, all of which are not even addressed in the TFA. The focus of the two legal texts on this matter is different, but complementary. Annex 8, as a AfCFTA-specific instrument, demonstrates that an FTA can develop its own rules and regulations to deepen collaboration and facilitate trade while adhering to WTO rules as long as it does not burden non-members of the FTA. This has been covered in detail in section 3.8.2 of the study.

1285 Annex 4, Art 3:3.
1286 Annex 8, Art 5.
1287 Annex 8, Art 6.
1288 Annex 8, Art 7.
1289 Annex 8, Art 8.
1290 Annex 8, Art 11:6.

Conclusion on the freedom on transit

It should also be noted that the legal texts on transit for both the TFA and the AfCFTA emphasise that their members must cooperate and coordinate activities in order to enhance freedom of transit.[1291] The TFA establishes the fundamental principles that must apply when goods are in transit, and it underscores the fact that they must be granted freedom of transit. Annex 8 is distinct from the TFA, and the two are not interchangeable. Annex 4 also highlights the principle of freedom of transit but Annex 8 becomes an independent entity in all respects with details of how goods in transit must be processed. The extent of detail in Annex 8 makes it an operational document designed for an FTA. It focuses more on other regulations of commerce with requirements that must be complied with for transit goods to be facilitated in the AfCFTA. Annex 8 specifies some details required to facilitate transit, such as exchange of specimen date stamps or seals used in processing traffic in transit.[1292] Through Annex 8, the AfCFTA has come up with operational procedures for goods in transit, and it has gone beyond merely stating principles as is found in the TFA.

7.3.14 Customs cooperation (TFA, Article 12; Annex 3)

Description

Chapter Five demonstrated that the hallmark of trade facilitation for both the WTO and the AfCFTA is the "simplification, modernisation and harmonisation"[1293] of import and export procedures. This places Customs at centre stage because it is the primary government agency enforcing and facilitating the cross-border movement of goods. While border controls and the gatekeeping controls are necessary to protect society, there is an expectation to reduce red tape and ease the flow of goods, given that border management agencies, such as Customs, are now operating in an environment of increased accountability and expectations from the private sector.[1294] The gatekeeper

1291 TFA Art 11:16.
1292 Annex 8, Arts 11:5, 11:6 and 11:7.
1293 WTO, 'Trade Facilitation'; Annex 4, definitions;
1294 Tom Doyle, 'Collaborative Border Management' (2010) 4(1) WCJ 15.

approach reflects an outdated and traditional approach that can be a barrier to international trade, and it must be balanced with a facilitative role in which Customs intervenes by exception, focusing on areas where risks have been identified.[1295]

As discussed in Chapter Five, Customs cooperation has become an important measure in trade facilitation, although this measure had not been adequately covered by both GATT 1947 and 1994, despite the fact that Article VIII recognised the importance of border formalities. RTAs such as the EU recognised the benefits of Customs cooperation, and accordingly formalised it by signing international agreements to support enforcement as well as streamlining procedures in order to eliminate unnecessary costs and procedures.[1296] Peterson acknowledged that, based on ASEAN's experiences, Customs cooperation enables Customs administrations to collaborate in trade facilitation measures, the handling of Customs fraud, and engagement with the private sector on matters of common interest.[1297] The significance of cooperation to simplify procedures and facilitate trade has been illustrated in Chapter Five of this thesis in respect of the two adjoining border posts at Beitbridge between South Africa and Zimbabwe. To facilitate trade within the AfCFTA it will be important for Customs administrations to cooperate and share information pertaining to the movement of goods. Both the TFA and the AfCFTA includes such provisions. It is therefore unavoidable for cooperation among Customs administrations to take the centre stage.

Comparison

The similarities in the two texts at hand are that both provisions recognise the need for cooperation in facilitating trade.[1298] The focus and detail of the two texts are, however, different. All the provisions in Article 12 of the TFA, with the exceptions of its paragraphs

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1295 David Widdowson, 'The Changing Role of Customs: Evolution or Revolution?' (2007) 1(1) WCJ 31, 32.

1296 European Commission, Taxation and Customs Union, 'Customs Co-operation' <https://ec.europa.eu/taxation_customs/customs-co-operation_en> accessed 20 February 2022.

1297 Joann Peterson, 'An Overview of Customs Reforms to Facilitate Trade' [2017] Journal of International Commerce and Economics 1 <www.usitc.gov/publications/332/journals/jice_customsreformstofacilitatetradepeterson_508_compliant.pdf> accessed 20 October 2022, 11.

1298 TFA Art 12; Annex 3.

12(1) and 12(12), deal with the exchange of information, meant to confirm authenticity of information or documents. There is no emphasis on the general principle of working together. Paragraph 12(1) of the said Article 12 of the TFA emphasises the need for Customs to ensure that traders comply with the laws, whereas paragraph 12(12) assures WTO members that the TFA will not prejudice their obligations under their respective RTAs. This is an important acknowledgement in view of the discussions in Chapter 3 in which RTAs are a creation of the WTO under Article XXIV. Table 7.3 below illustrates the general focus of Article 12 of the TFA.

Table 7.3: Headings under Customs Cooperation of the TFA

Paragraph Number in Article 12 of TFA	Subject heading as used in the paragraphs of Article 12 of the TFA	Comments by the author
1	Measures Promoting Compliance and Cooperation	Members are encouraged to ensure that their traders are aware of the need to comply, and in that respect, Customs administrations must share information on best practices to manage compliance. The provisions are skewed towards ensuring that the need for Customs administrations seeking verifications from each other are reduced to a minimum.
2	Exchange of Information	This set the requirement for Customs-to-Customs cooperation in exchange of information to verify import and export declarations.
3	Verification	Members must handle their own preliminary investigations before seeking outside assistance for verification.
4	Request	A request for information must be in some basic format and certain details must be provided.
5	Protection and Confidentiality	The highest level of confidentiality must be exercised by both the members providing and receiving the information.
6	Provision of Information	Request for information must be responded to expeditiously.
7	Postponement or Refusal of a Request Postponement or Refusal of a Request	A requested member has a right to delay or refuse supplying part or all of the information, and in such instance, should respond giving reasons for doing so.
8	Reciprocity	Where it would be unable to reciprocate with a similar request, the requesting member must state that fact when requesting information.
9	Administrative Burden	Requesting member must limit requests for information because unlimited requests can cause an administrative burden to the other party.
10	Limitations	There are listed limitations relating to the supply of information by the requested member eg the requested member is not obliged to translate documents.
11	Unauthorised Use or Disclosure	Remedies if the information provided to a requesting member is used in breach of conditions.
12	Bilateral and Regional Agreements	Provisions guaranteeing that the provisions in Article 12 of the TFA do not override any other provisions entered into under any RTA arrangements.

Source: Own, using data from TFA Art 12.

According to the data shown above, the entire purpose of Customs cooperation under the TFA is to 'request' and 'give' information for purposes of verifying import and export declarations amongst WTO members. This is the message conveyed in each of the twelve paragraphs of Article 12. The above paragraphs also prescribe how the request and response for information must be handled under the TFA.

The focus of Annex 3 on "Customs Cooperation and Mutual Administrative Assistance"[1299] of the AfCFTA is different from that of the WTO. The AfCFTA's approach is premised on the fact that Customs cooperation is a critical enabler of trade.[1300] Its motivation is to ensure total cooperation amongst the Customs administrations in Africa. Its distinct approach is for the Customs administrations in the AfCFTA to cooperate, not only in the exchange of information, but also in other areas such as harmonising and modernising procedures, automation, exchange of staff, technical cooperation, and sharing of resources.[1301] The author considers the holistic cooperation as articulated in Annex 3 as the ideal for any FTA. It must however be noted that the TFA, as a global agreement cannot be an advocate for such holistic cooperation as that is tantamount to repeating the work already being done by the WCO at the global level. The mission of the WCO includes fostering cooperation amongst Customs administrations.[1302] It is therefore understandable for the TFA to place focus on confirmations of trade documents.

Table 7.4 below lists the headings of all the articles in Annex 3. What it demonstrates is that the provisions in Annex 3 go beyond what is covered by the TFA.

1299 Heading of the Annex 3.
1300 Annex 3, Art 2: a.
1301 Annex 3, Art 11.
1302 Refer to Chapter 2.

Table 7.4: Provisions under Annex 3

Article Number of Annex 3	Heading as used in Annex 3	Comments by the author
1	Definitions	This includes "trade facilitation" whose definition is also provided for in Annex 4.[1303] The definition has also been discussed in Chapter 5.
2	Objectives and Scope	The objective is for the cooperation to cover all aspects of Customs without any undue hindrances.[1304]
3	Harmonisation of Customs Tariff Nomenclatures and Statistical Nomenclatures	Refer to Chapters 3 and 5.
4	Harmonisation of Valuation Systems and Practices	Part of harmonisation of procedures.
5	Simplification and Harmonisation of Customs Procedures	Cooperation in the use of international standards.
6	Automation of Customs Operations	Cooperation in modernising processes.
7	Advance Exchange of Information	Providing each other with information, in advance, pertaining to eg goods and persons etc.
8	Prevention, Investigation and Suppression of Customs Offences	Collaboration in enforcement matters.
9	Request, Exchange and Provision of Information	The provision is the equivalent of Article 12 of the TFA.
10	Protection and Confidentiality	Provision that State Parties are bound by confidentiality during the interaction.
11	Technical Cooperation	State Parties undertake to share resources and staff to enhance their capacities.
12	Communication of Customs Information	These provisions cover the need for Customs administrations to share general information pertaining to their operations.
13	Sub-Committee on Trade Facilitation, Customs Cooperation and Transit	These are implementing provisions discussed in section 7.3.17 below.
14	Dispute Settlement	This aspect is discussed in section 7.3.16 below.
15	Review and Amendment	Provisions governing amendment of the Annex.

Source: Author[1305]

1303 Annex 3, Art 1; Annex 4, Art 1.
1304 Annex 3, Art 2:a.
1305 The headings in Table 7.4 have all been extracted from Annex 3.

Some of the TFA provisions stipulate that a request for the exchange of information, together with the response, must be in writing.[1306] The AfCFTA is flexible in this regard in that it can be done orally. It states:

> In case of reasonable doubt as to the truthfulness or accuracy of an import or export declaration, State Parties shall, upon request and subject to the provisions of this Article, promptly provide all necessary information orally or in writing or through any other appropriate means including specific information as set out in, but not limited to the import or export declaration, commercial invoice, packing list, certificate of origin and bill of lading. This shall not affect the right of the economic operators to confidentiality and privacy under the relevant national law.[1307]

From the above it can be noted that under the AfCFTA, information can even be exchanged orally. Unlike the TFA, Article 9 of Annex 3 does not prescribe similarly detailed procedures on how the request and response for information must be handled. As part of closer cooperation within the RTA, Customs administrations in the AfCFTA can, amongst themselves, agree on how to handle the exchanges. Annex 3 includes clauses to that effect, and Article 9 itself is one such example.[1308]

Conclusion on Customs cooperation

Article 12 of the TFA and Annex 3 demonstrate that Customs cooperation is an important measure and component of trade facilitation. The TFA focuses on the exchange of information on a global level and the procedures that must be followed when requesting such information and providing it. The TFA depicts Customs administrations as a disintegrated group of strangers who need to share certain information regarding problem consignments moving across borders. To the contrary, the AfCFTA portrays Customs administrations in Africa as a team that needs to work together, communicate and share information on all issues, without boundaries, pertaining to their operations. The cooperation called for under Annex 3 solidifies the unity of Customs in Africa to the extent of making it a club along the lines of the WCO.

1306 TFA Arts 4 and 6.

1307 Annex 3, Art 9.

1308 Annex 3, Art 9:9 reads: 'Modalities for the implementation of this Article shall be subject to arrangements to be made on a case-by-case basis between the requesting and the requested State Parties.'

That demonstrates the unity and purpose of meeting continental needs in economic integration in Africa.

Annex 3 therefore represents a pact in which Customs administrations belonging to an RTA, in this case the AfCFTA, enter into a close cooperative arrangement whose goal is to facilitate trade. As an effective Customs cooperative framework an FTA will improve trade flows, facilitate trade and benefit stakeholders. The AfCFTA provides a framework for Customs administrations to cooperate, assist each other and simplify procedures. This in line with the purpose of any FTA as envisaged in Article XXIV, which is to deepen trade amongst members, as is the case with the AfCFTA.

The AfCFTA therefore goes beyond the sharing of information. It calls upon Customs administrations to strengthen their cooperation and improve their operational systems individually and collectively.

7.3.15 SDT for developing countries and LDC (TFA, Articles 13-22; Protocol on TiG, Article 6; Annex 4, Article 29; Annex 8, Article 13)

Description

It was noted in Chapter Two of this study that the ability of a country to implement some of the provisions in international agreements is determined by its level of development.[1309] Some of the trade facilitation measures provided for under the TFA and the AfCFTA, such as single window and OSBP, can be costly and require a significant investment in resources by members. As an example, the ability of Comoros, a LDC and AfCFTA State Party, to implement electronic payment systems for its trade processes would differ from that of the United States, a developed country.[1310] The ability of countries to implement certain international obligations therefore differs. SDT facilities provide some support in the implementation of measures to facilitate trade.

1309 Oyejide, 'Costs and Benefits of "Special and Differential" Treatment' 178-179.

1310 Both Comoros and the US are members of the WTO. Comoros is also a State Party to the AfCFTA. WTO, 'Least-Developed Countries' <www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed 10 March 2022.

Both the WTO and the AfCFTA have SDT provisions in their texts on trade facilitation.[1311] These provisions are intended to accommodate the participation of LDCs in world trade.

Comparison

The TFA contains extensive provisions on SDT issues designed to mainly assist the non developed countries implement the Agreement.[1312] As a result, the TFA contains explicit provisions that take into account a country's level of development as well as its capacity to implement trade facilitation measures. As shown in Table 7.5 below, the provisions are divided into three categories which apply to developing and the least developed member countries.

Table 7.5: Implementation categories of the TFA

Category	Implementation time line for trade facilitation measures
A	The measures identified by a developing country member and which it committed to implement when the TFA entered into effect, while in the case of LDCs, they had up to an additional year to implement the measures so identified.[1313]
B	These are the measures identified by a developing country member or LDC country member for implementation after a specified transitional period from entry into force of the TFA.[1314]
C	The measures that a developing or LDC member country designates for implementation following a transitional period after the entry into force of the TFA, necessitating the acquisition of implementation capacity through the provision of technical assistance.[1315]

Source: Own, using data from TFA, Arts 13-22.

The above table demonstrates the flexibilities provided by the TFA in terms of the SDT provisions. This required members to identify the technical assistance or capacity-building measures that they needed.[1316] Donor members also agreed to arrange

1311 TFA Art 13-22; Protocol on TiG Art 6; Annex 4, Art 29:2; Annex 8, Art 13:2.
1312 TFA Art 13-22.
1313 TFA Art 14:1(a).
1314 TFA Art 14:1(b).
1315 TFA Art 14:1(c).
1316 TFA Art 16.

support for the implementation of the TFA through the appropriate international organisations.[1317] Among these organisations are the WB, WCO and UNCTAD.[1318]

The AfCFTA's SDT provisions for trade facilitation are open-ended and different from those found in the TFA. They do not offer as much comprehensive and detailed information as is found in the TFA. The levels of development of the African countries are not the same, and as such, the provisions regarding SDT are important since they govern trading relations between the rich and the poor countries in the continent. The main provisions on SDT as given in the Protocol on TiG state:

> In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis.[1319]

When compared to the clear provisions found in the TFA, the provisions in the Protocol on TiG are sketchy and lack detail to enable certainty and clear direction on implementation. As regards the implementation of Annex 4, it states:

> The extent and the timing of implementation of the provisions of this Annex shall be related to the implementation capacities of State Parties, the Sub-Committee for Trade Facilitation, Customs Cooperation and Transit or as notified under the WTO Agreement on Trade Facilitation.[1320]

The above statement is allowing implementation to be in accordance with the capacity of State Parties or the SCTFCCT. The SCTFCCT is an AfCFTA organ comprised of representatives from State Parties with a specific mandate under the AfCFTA Agreement.[1321] The other option is equally ambiguous and it refers implementation to State Parties' commitments as notified to the WTO. This option is unclear in that what is notified to the WTO under the TFA is based on the measures found in the TFA, and

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1317 TFA Art 21(1).
1318 WTO, 'Trade Facilitation'.
1319 Protocol on TiG Art 6.
1320 Annex 4, Art 29:2; Annex 8, Art 13:2.
1321 SCTFCCT is an organ of the AfCFTA, established by its Committee on Trade in Goods in terms of Annex 3:13, Annex 4:27 and Annex 8:12. Amongst others, it is responsible for the implementation of trade facilitation issues.

as has already been shown in this study, some of the measures under the TFA and AfCFTA are not uniform. The effect of the clause is that an AU member which is not party to the WTO is directly bound to some explicitly stated WTO rules. The clauses in the AfCFTA Agreement and its instruments should not explicitly bind State Parties to another treaty which they are not party to. A State Party can therefore not be bound using different measures which have been notified to the WTO. As of 1 July 2022, five State Parties were not members of the WTO.[1322] The capacity to implement the provisions in the AfCFTA must be assessed against what a State Party declares. The provisions found in Annex 4 are identical to those in Annex 8.[1323]

Conclusion on SDT for developing members and LDC country members

Overall, the TFA provisions are detailed and provide adequate guidance on how to implement SDT measures. It is however too simplistic to benchmark the SDT provisions of the continent against those of the WTO. The measures found in the TFA relate to implementation of measures and taking into account the levels of development among the 164 member world body. The SDT measures in the legal texts of the AfCFTA are therefore ambiguous and would be difficult to implement. Ambiguity in statutes makes interpretation of the law uncertain. In the event of a dispute under the AfCFTA, such ambiguous texts would make it difficult for the panels or AB to issue a ruling. There is a need to review the SDT provisions under the AfCFTA Agreement in order to come up with effective measures that accommodate the practical needs of African countries.

[1322] The five State Parties who were nonmembers of the WTO as of 1 July 2022 were Algeria, Equatorial Guinea, Ethiopia, Sahrawi Arab Democratic Republic, and São Tomé and Principé. Refer to: WTO, 'Doha Development Agenda'.

[1323] Annex 4, Art 29:2; Annex 8, Art 13:2.

7.3.16 Dispute settlement (DSU; TFA Article 24(8); Annex 3, Article, 14; Annex 4, Article 30; Annex 8, Article 16)

Description

Disputes arising from the TFA, as with any dispute involving WTO agreements, are resolved in accordance with the DSU.[1324] Disputes involving the AfCFTA are resolved under its own PSD.[1325]

Comparison

The TFA and AfCFTA each have their own legal instrument dealing with dispute resolution, being the DSU and PSD respectively. The structures involved are also similar in that each of the Agreements establishes a DSB made up of WTO members in the case of the WTO, and State Parties in the case of the AfCFTA. The similarities between the DSU and the PSD are summarised in Table 7.6 below.

Table 7.6 Selected similarities between DSU and PSD

Similarities between DSU and PSD	**Legal provisions from the legal texts of the WTO and the AfCFTA**	
	WTO	**AfCFTA**
Both are standalone legal instruments for resolving disputes.	DSU is derived from WTO Agreement, Article III:3	PSD is derived from AfCFTA Agreement, Article 21 f
It is a requirement that a DSB is established to deal with disputes.	DSU, Article 2:1	PSD, Article 6:5
DSB memberships: Members for WTO; State Parties for AfCFTA.	WTO Agreement, Article IV:3	PSD, Article 5:2
The first stage is an attempt to resolve the dispute through consultations.	DSU, Article 4	PSD, Article 7
Initial informal processes.	DSU, Article 5	PSD, Article 8
Similar structures in the form of panels and AB to deal with disputes.	DSU, Article 6 for panels; DSU, Article 17 for the Appellate Body	PSD, Article 9 for panels; PSD, Article 20 for the Appellate Body
Adoption of panel and AB Reports	Reports for both panel and AB are considered for adoption by the DSB; DSU, Articles 16 and 14	Reports for both Panel and AB are considered for adoption by the DSB; PSD, Articles 19 and 22:9

1324 TFA Arts 23-24.
1325 AfCFTA Agreement Art 20.

Source: Author; using data from the legal texts

The selected aspects in Table 7.6 show that, in broad terms, there are similarities in the way that the TFA and the AfCFTA deal with disputes. There are, however, significant differences, and some of these divergences are summarised in Table 7.7 below.

Table 7.7 Selected major differences between DSU and PSD

Differences between DSU and PSD	**Legal provisions from the texts**	
	WTO	**AfCFTA**
Under the WTO, the DSB shall make appointments to fill vacancies in the Appellate Body. The AfCFTA has further provisions in which the Chairperson of the DSB and the Secretariat would make appointments to fill such vacancies if its DSB fails to meet the deadline.	DSU, Article 17:2	PSD, Article 20:6
Constitution of a panel within ten days of its establishment by the DSB.	WTO does not have corresponding provisions	PSD, Article 9:5
Qualifications for panellists are different, eg WTO requires periodic submission of names whereas AfCFTA is more specific and refers to annual submissions; WTO acknowledges the importance of teaching experience or publications whereas AfCFTA does not; and mentions that the panellist must comply with a code of conduct, while the WTO makes no reference to this.	DSU, Article 8.	PSD, Article 10
Whereas parties to a dispute under the AfCFTA meets their own expenses, the WTO has provisions to bear the expenses of LDCs.	DSU, Article 5	PSD, Article 26:3
Third parties with a significant interest in a case have an unrestricted right to be heard under the WTO. The AfCFTA requires the disputing parties to first concur that a claim for significant interest is properly established.	DSU, Article 13	PSD, Article 13

Source: Own using data from DSU and PSD

As discussed in Chapter Two, the DSB is made up of members of the GC, which is comprised of ambassadors based in Geneva, with a mandate to represent members in

the MC.[1326] When the GC meets as the DSB, it elects its own Chair, and through practice, the DSB Chair becomes the GC Chair for the following year.[1327] This means that the WTO's DSB is made up of politicians, career diplomats, or representatives with strong political clout compared to the AfCFTA's DSB, which is comprised of professional experts representing State Parties.[1328] As a result, reports from panels and the AB are driven by technical experts in the AfCFTA, unlike in the WTO where the DSB has a political inclination.

The WTO's AB consists of seven members, including the Chair, all of whom are appointed by the DSB through consensus.[1329] In December 2019, the terms of two out of the three remaining AB members expired and this prompted the US to block the appointments of their replacements because it considered that its rulings had been unfair, and as of May 2022, the AB was rendered dysfunctional.[1330] One such case was *Argentina – Financial Services*, in which a panel decision was overturned. It was alleged that the analysis by the AB was based on *obiter dicta* and that the AB exceeded its own mandate by making law instead of resolving a dispute.[1331] The AfCFTA has different provisions which mandates the Chair of the DSB, together with the AfCFTA Secretariat, to make appointments to fill such vacancies if its DSB fails to meet the deadline.

Whereas the timeframes for the functions of the WTO's DSU in respect of its meetings are reasonable (for example, a DSB shall be convened within fifteen days of the complainant's request), the same stipulated timeframe in respect of the AfCFTA's DSB would cause practical difficulties.[1332] The WTO's DSB is essentially the GC, whose members are all based in Geneva and it will be relatively easy to convene a meeting

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1326 WTO, 'The WTO General Council'.
1327 VanGrasstek, *History and Future of the WTO* 516.
1328 PSD Art 5:2.
1329 DSU Art 17:2.
1330 Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?' (*Jurist*, 14 April 2020) <www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/> accessed 21 October 2022.
1331 *Argentina – Financial Services*: Report of the Appellate Body AB/2015/8 (circulated 14 April 2016, adopted 9 May 2016) WT/DS453/AB/R.
1332 DSU Art 6:1 and its footnote.

for participants who are all based in the same town. The same fifteen-day timeframe in respect of the DSB has been used in the PSD.[1333] It will, however, cause practical problems to invite DSB members from State Parties, arrange the logistics and have them meet in Accra, Ghana or any other venue, in fifteen days.[1334]

Conclusion on dispute settlement

Both the WTO and the AfCFTA have separate agreements that deal with disputes under their respective regimes. Trade facilitation disputes arising under the TFA and the AfCFTA Agreement are resolved under the DSU and the PSD respectively. Unlike the WTO, the AfCFTA is based on a political vision of solidarity and unity towards an AEC.[1335] Studies have shown that friendly African countries do not usually litigate against each other on trade issues.[1336] Akinkugbe also noted that intra-African adjudication is low because African States have preferred political solutions to litigation.[1337] While the AfCFTA Agreement adopted some practices under the WTO, time will tell if African countries will utilise their own mechanism to resolve their trade conflicts under the AfCFTA. Brexit and the EU have shown that, while countries can be political partners, they must still hold one another accountable when it comes to implementing agreed-upon treaties. The reluctance of African States to litigate against one another at international forums may change, considering that the AfCFTA was negotiated by taking into account experiences from the RECs and globally. As of 1 September 2022, no dispute has been heard under PSD due to the fact that the AfCFTA trade regime is still in its infant operational stage.

The analysis of the DSU and PSD revealed that there are variances in the manner in which disputes involving trade facilitation matters are resolved under the two regimes.

1333 PSD Art 9:4.

1334 The processing of invitation letters, nomination of delegates and handling of travel logistics would usually take more than fifteen days.

1335 Abuja Treaty preamble; AfCFTA Agreement preamble.

1336 Obert Bore, 'Dispute Settlement Mechanisms in African Regional Economic Communities: Lessons and New Developments' (2020) 12(3-4) African Journal of Legal Studies 242.

1337 Olabisi D Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area' (*Dalhousie University Schulich Law Scholars*, 23 April 2021) <https://digitalcommons.schulichlaw.dal.ca/scholarly_works/605/> accessed 7 March 2022.

The comparative analysis of the two dispute resolutions systems would, however, warrant a more detailed and separate study.

7.3.17 Implementation structures for trade facilitation (TFA, Article 23; Annex 3, Article 13; Annex 4, Articles 27-29; Annex 8, Articles 12 and 13)

Description

Both the WTO and the AfCFTA legal texts contain undertakings to implement the provisions of their respective agreements. As discussed in Chapter One, ratifying or acceding is a commitment to take all necessary legislative, administrative and policy actions to effectively implement an international treaty within domestic legislation.[1338] Ratification or accession is thus a prerequisite for domestication of an international agreement in order for it to be implemented. National or international structures represent a strategy for converting the written treaty into action and compliance with the stipulated obligations. Such provisions are included in the legal texts of both the TFA and the AfCFTA.

Comparison

The TFA has two committees to facilitate implementation of the TFA. At national level, members are required to establish a National Committee on Trade Facilitation (NCTF). The TFA states:

> Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement.[1339]

The important role of this committee, in whatever form it takes, is to coordinate implementation at national level. The TFA is cross-cutting, involving, for example, Customs authorities, government agencies responsible for foreign trade, agencies who

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1338 Sonja Neudorfer and Claudia Wernig, 'Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System' (*Max Planck Yearbook of United Nations Law Online*, 1 January 2010) <https://brill.com/view/journals/mpyo/14/1/article-p409_11.xml?language=en> accessed 2 March 2022.

1339 TFA Art 23:2.

charge service fees connected with imports and exports, border agencies and many others. As a result, the NCTF is tasked with coordinating implementation amongst these stakeholders. The national committee reports to national structures. In addition to the national committee, the WTO has the Committee on Trade Facilitation whose function, in implementing the TFA, would include collaboration with organisations such as the WCO.[1340] It is interesting to note that the WCO is the only organisation identified by name, showing the special relationship between the WTO and the WCO on issues of trade facilitation, an observation which was discussed in Chapter Five of this study.

The AfCFTA has a similar structure, and at national level there is a NCTF, using the same language as the WTO:

> Each State Party shall establish and/or maintain a National Committee on Trade Facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Annex.[1341]

The above shows that both the WTO and the AfCFTA can use each other's national structures on trade facilitation. Both the WTO and the AfCFTA recognise that their respective members can avoid duplication by ensuring that one committee handles trade facilitation issues for both the TFA and AfCFTA Agreement. Ghana is an example of a country where a single NCTF has been established to coordinate the implementation of TFA and AfCFTA trade facilitation provisions, involving stakeholders such as government departments, transporters, shipping agents and others.[1342] The distinct function of the NCTF is to coordinate implementation of trade facilitation issues at domestic level. As noted in section 7.3.14 above, the SCTFCCT is in charge of overseeing the implementation of trade facilitation issues in the AfCFTA Agreement.[1343] Whereas State Parties must establish NCTFs to deal with the coordination of trade facilitation at national level, some State Parties, such as Côte d'Ivoire, have established

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1340 TFA Art 23:1.5.

1341 Annex 4, Art 28; TFA Art 23:2.

1342 Kyeremeh Yeboah, 'Operations of a National Trade Facilitation Committee, the Case of Ghana' (Presentation on Capacity Building on the AfCFTA for Stakeholders from the Economic Community of West African States (ECOWAS) and Central African Economic and Monetary Community (CEMAC) Member States, Accra, Ghana 2 March 2022).

1343 Annex 3, Art 13. Also refer to Annex 4, Art 27and Annex 8, Art 12.

National Implementation Committees whose functions go beyond dealing with trade facilitation issues and includes superintending over holistic issues of the AfCFTA such as trade in services, competition policy and investment.[1344]

Conclusion on implementation structures

The TFA and the AfCFTA both have similar implementation structures. To avoid having too many committees handling nearly identical tasks, the functions can be assigned to one committee to attend to both TFA and AfCFTA issues.

7.3.18 Other measures to facilitate trade (Annex 4, Article 26; No similar provisions in TFA)

Annex 4 has an additional Article, which recognises the need for cooperation with other international organisations. The measure of relating with other international organisations is captured under the heading "Other Measures to Facilitate Trade".[1345] From the heading one would be prompted to consider that there is a list of remaining measures listed, but the provisions only deal with cooperation with other organisations. This indicates a recognition that trade facilitation is cross-cutting and is not the exclusive domain of the WTO and its RTAs or the AfCFTA. The provisions also highlight another element of trade facilitation involving the requirement to reduce costs and paperwork. It states:

> The State Parties recognise the importance of cooperation in order to expedite the movement of goods and reduce the cost of doing business and the volume of paper work in respect of trade within the continental free trade area.[1346]

1344 Fatoumata Fofana Boundy, 'Operations of a National Trade Facilitation Committee, the Case of Côte d'Ivoire' (Presentation on Capacity Building on the AfCFTA for Stakeholders from the Economic Community of West African States (ECOWAS) and Central African Economic and Monetary Community (CEMAC) Member States, Accra, Ghana 2 March 2022); National Committee of the AfCFTA - Ivory Coast, 'AfCFTA: The Awareness Tour Continues' (23 February 2022) <www.cnzlecaf.gouv.ci/actualite/actudetail/zlecaf-la-tourne-de-sensibilisation-continue376> accessed 4 March 2022.

1345 Annex 4, Art 26.

1346 Annex 4, Art 26:1.

The AfCFTA Secretariat has been mandated to collaborate with other international organisations on trade facilitation. including UNECA, the WCO; the International Maritime Organisation (IMO); the International Civil Aviation Organisation (ICAO); and the WTO.[1347] Some of these organisations were identified and discussed in Chapter Two of this study.

This measure has not been accorded the prominence of a separate Article in the TFA, as has been done under the AfCFTA.

7.4 Conclusion

The focuses of the two sets of legal texts anaylsed in this chapter are different. While the WTO's legal texts on trade facilitation are designed to address global trade, those of the AfCFTA are meant to foster closer cooperation among African nations so that they can facilitate trade amongst themselves, expand intra-African trade, accelerate socio-economic development, and realise the dreams envisaged under the Abuja Treaty. This chapter identified eighteen themes from the legal texts of the TFA and the AfCFTA Agreement for a comparative analysis. To the extent possible, and in order to deal with the statement problem and answer the research questions, all the eighteen themes were analysed. These themes comprised the major ingredients of the legal texts on trade facilitation in respect of both regimes. While there are some similarities in certain cases, the study found that there are several divergences. The extent of the divergences differs. Overall, the study came up with the following five categories of findings, each of them with implications: a) In some cases, the AfCFTA has no correlating provisions to those of the WTO, and in like manner, there are instances where the WTO does not have corresponding provisions in the AfCFTA; b) In other instances, the AfCFTA is found to provide better stipulations than the WTO; c) Yet in another category, the WTO is found to be better than AfCFTA; d) Both the TFA and AfCFTA have certain provisions that are similar; and lastly e) Both texts have evidences of significant differences.

[1347] Annex 4, Art 26:2.

The study found that there are instances where the provisions in the legal texts of the AfCFTA do not have corresponding provisions in the TFA, and vice versa. As examples, it will be noted that the emphasis in Annex 3 on Customs cooperation differs from that stipulated in the TFA. The TFA has a narrow approach to Customs cooperation and restricts this to mutual assistance. The TFA requires Customs administrations to cooperate solely to enable authentication of trade documents amongst the 164 members of the WTO whereas the AfCFTA has a wider and deeper perspective.[1348] The AfCFTA does not restrict engagement of Customs administrations to the verification of documents only. It provides for a comprehensive and multilateral collaboration amongst Customs administrations in Africa, that goes beyond verifying documents and includes harmonisation of Customs laws and sharing of resources. This demonstrates cooperation and collaboration toward a common objective of African integration, which is a vision shared by both the Abuja Treaty and the AU.[1349] Further, the TFA requires its members to consult with stakeholders before implementing any new measures, and this is an example of a measure not covered in Annex 4.[1350] The involvement of business in the making of laws or policies is important, more so when considered that international trade is driven by business, while governments provide a conducive regulatory environment. African policy makers and governments will need to engage with business in order to have the trade agenda succeed. The fact that some of the provisions of the two texts do not correlate shows that laws are proclaimed to address peculiar settings and will not read the same even on a common subject. Although both the AfCFTA and WTO desire trade facilitations, the preambles of their respective legal texts show that the two are guided by and responding to different situations.[1351]

At the risk of delving into a debate of what constitutes good or bad law and the value judgements thereof, suffice to state that there are instances in which the AfCFTA is found to provide improved stipulations than the WTO while the latter also has certain

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1348 Refer to section 7.3.14 of the study.
1349 Refer discussions in Sections 4.2 and 4.4.
1350 Refer to the discussion in Section 7.3.3.
1351 Refer to the discussion in Section 7.3.1 on preambles.

provisions that are better than those of the former. The study has identified such features in each set of the legal texts. This is evident in the TFA, which has borrowed a number of aspects from the international best practices prescribed in the RKC, such as appeal procedures and the disciplines involving service fees.[1352] While both the AfCFTA and TFA articulate the principle of freedom of transit, the former extends beyond that. The AfCFTA goes deeper through Annex 8 which provides some detailed transit procedures, all of which have been designed to confront an existing situation on the continent. The AfCFTA has therefore built upon the universal principle of freedom of transit to develop a solution for an existing problem. In addition to the technical content of the texts, the author noted that there are instances where the textual language used by the AfCFTA is simpler and more user-friendly compared to that used by the TFA. These variations, with their improvements, further prove that contrary to some common belief, those who negotiated the AfCFTA did not just borrow everything from the TFA.[1353]

The comparative analysis has shown that both the TFA and the AfCFTA have similarities. The texts are almost identical on provisions requiring border officials to cooperate in the performance of their duties in order to harmonise processes and ease trade. Such collaboration is essential amongst border agencies operating from the same country and between authorities stationed on either side of a border. The two sets of legal texts are so similar on border agency cooperation to the extent that in certain instances they use common terms. The second example of similarities involves the general framework dealing with penalties and the need for such fines to be transparent and consider mitigatory factors. These similarities show that trade facilitation measures are all designed to facilitate trade and certain measures are bound to be universal.

This chapter has also found some significant differences in the legal texts. Some measures deemed mandatory under the WTO, are in fact not obligatory, under the AfCFTA, and the reverse applies. Each text has its own set of mandatory

1352 Refer to Sections 7.5 and 7.3.7.
1353 Also refer to the objectives of the study in section 1.3.

responsibilities or clauses requiring best efforts and the two sets are not necessarily aligned to each other. As an example, the establishment of enquiry points is obligatory under the AfCFTA whereas under the TFA, the members of the WTO would consider their available resources.[1354] The study has also found such differences in cases such as: the administration and implementation of advance rulings; the scope of coverage of PSI; and approaches to the administration of dispute resolution mechanisms between the WTO and the AfCFTA. Furthermore, the study found that, while the provisions in the TFA on SDT are clear, those in the AfCFTA are vague and will need to be reviewed to ensure that they are unambiguous and respond to the collective requirements of the continent as its members engages in trade among themselves. These differences can be viewed as showing the importance that Africa put when negotiating its own texts on trade facilitation. Although the TFA had been concluded in 2013, the continent did not necessarily adopt what had been agreed upon at global level, but it meticulously invented its own instruments, supposedly making reference to the international texts of the TFA. The research provides enough evidence showing that there was some effort to ensure that the legal texts of the AfCFTA on trade facilitation represented the desires of Africa and did not just replicate the TFA which had been earlier concluded at the global level.

This chapter integrated several issues discussed in the preceding six chapters in order to address some of the research questions pertinent to the study. It identified the major features of the legal texts on trade facilitation of both the TFA and the AfCFTA Agreement, while the analysis brings out the similarities and the differences of the texts. Chapter Eight of the study arrives at some conclusions for the thesis.

[1354] Refer to discussion under Section 7.3.2.

CHAPTER EIGHT

SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

8.1 Introduction

Trade facilitation has grown in importance since it is directly related to the expansion of trade at the national, continental and global levels. The aims of this study were to conduct a comparative analysis of the texts on trade facilitation of the WTO and the AfCFTA in order to identify any similarities and differences, and to establish if the AfCFTA complies with the rules of the WTO. To accomplish this, the study explored the importance of the WTO and AfCFTA in trade and interrogated the respective legal texts on trade facilitation. It also examined if the AfCFTA instruments provided viable measures for trade facilitation to advance continental economic integration. Given the impact of trade on socio-economic growth and political stability, the implementation of measures to facilitate trade should therefore be attractive to most countries as this boosts trade at regional and global levels. The study has shown the significance of trade facilitation at the WTO and in RTAs such as the AfCFTA.

The central research question for the study concerned the differences and similarities between the legal texts on trade facilitation of the WTO and the AfCFTA. The thesis was divided into eight chapters that addressed the following secondary questions in order to accomplish its objectives and solve the problem statement and research questions:

(a) How do the objectives of the legal texts on trade facilitation for the WTO and the AfCFTA compare?

(b) What are the major features of the legal texts on trade facilitation under the WTO?

(c) What are the major features of the legal texts on trade facilitation under the AfCFTA?

(d) What similarities and differences exist between the legal texts on trade facilitation under the WTO and the AfCFTA and why?

(e) To what extent do the AfCFTA legal texts comply with the WTO legal texts?

(f) What recommendations can be drawn from the study?

This chapter concludes the research. It summarises the findings, then formulates some recommendations, and finally, offers suggestions regarding areas for further research.

8.2 Summary

Chapter One set out the context of the study. It identified the three essential concepts that were core to the research, these being: the WTO, the AfCFTA, and trade facilitation. It further explored the nature of international treaties, given the fact that the legal texts under scrutiny are all international treaties as defined under VCLT.[1355] Both sets of international treaties under consideration, that is, the TFA with its GATT 1994, and the AfCFTA Agreement, have the word 'agreement' in their titles. The first chapter is therefore an introduction of the study and the methodology used to approach the research.

The second chapter traced the historical evolution of global trade law from GATT 1947 to the WTO Agreement in 1994 as the supreme global law governing trade relations among WTO members. The study found that there was an increase in global trade after the Second World War. Such a scenario, accompanied with the resultant opportunities and competition in world trade, led to the possibility of heightened political conflicts and wars. The absence of basic ground rules on trade would have created a void that could have resulted in disorganised global trade dictated by what would have been comparable to the ‘laws of the jungle’. Despite any flaws which may exist in the world trade system, the study argued that global trade progressed better with rules than it would have done without them. It must therefore be acknowledged that the WTO and its rules and legal instruments on global trade have contributed to peace, increased trade, and development.

[1355] VCLT Art 2:1.

A historic outcome from the WTO Agreement and the DDA is the TFA, which was adopted in November 2014 and entered into force in February 2017. These dates are close to March 2018 when the AfCFTA Agreement with its component texts on trade facilitation, was adopted.[1356] This historical narrative demonstrates that the two sets of legal texts under consideration are contemporary, both having entered into force within the last six years.

Chapter Two examined the four stipulated functions of the WTO, identified as trade negotiations, settlement of trade disputes, monitoring trade policy and collaboration with relevant stakeholders. Although not listed in the WTO Agreement, this thesis identified capacity building as a fifth important function of the WTO. Trade, as a subject, has become broader, deeper and more complex. Not all the WTO members would keep pace with these changes and some of the WTO members would need the capacity to understand or implement the trade laws. This thesis states that WTO members and stakeholders must be equipped with the required capacity to enable proper implementation of global trade laws. It is therefore important that the WTO formalises capacity building as one of its key roles in order to build common purpose and understanding amongst its members, stakeholders and within its own institutions. These stakeholders, amongst others, include other international organisations, the private sector, civic society, and governmental agencies. The study noted that in practice the WTO indeed conducts some limited ancillary capacity building activities. This study argues that capacity building must be one of the strategic functions of the WTO, since this is necessary to support its other roles. Capacity building must be upgraded from being viewed only as an ancillary activity.

Chapter Three discussed the provisions of Article XXIV. It examined the creation of RTAs, and in particular, FTAs such as the AfCFTA, and their operations outside of the MFN principle, yet with the strategic goal of achieving the objectives of GATT 1994. The thesis contends that multilateralism is slower than regionalism and therefore considers that RTAs are building blocks for global trade. Of interest are the RECs in Africa that have made considerable progress in removing tariff barriers among

[1356] AfCFTA Agreement; Also refer to Chapter 4.

themselves when compared to the slower progress at the global front, as evidenced by the impasse over DDA. RTAs, such as the AfCFTA, therefore allow members to liberalise trade among themselves faster rather than being slowed down by the complexities associated with negotiations at the global level. The fact that duty-free movement of goods and substantial trade are prerequisites for the existence of an FTA demonstrates that the significant role of free movement of goods within the AfCFTA, albeit at continental level, contributes towards trade liberalisation globally. The AfCFTA therefore serves as a building block towards multilateralism. In addition, the effectiveness of these FTAs, such as the AfCFTA, stems from the fact they are a product of international treaties. These international treaties justify their existence from clearly defined objectives and most of the FTAs are guided from the highest political level. The thesis noted the high political attention given to FTAs or RTAs, most of which have the Heads of State and Government as their highest organ in comparison to the WTO, which has the MC as its highest level of political governance. Although this arrangement has seemingly operated well so far, it is paradoxical that the MC, the WTO's highest authority, makes rules that govern the operations of RTAs and RECs, and yet the latter's highest decision-making is comprised of Heads of State and Government.

The thesis identified the key elements which can be used to determine if a configuration meets the definition of an FTA.[1357] Chapter Three noted an unequivocal assertion in Article XXIV that the whole purpose of establishing FTAs is to facilitate and liberalise trade among its members. In addition to the five other elements identified in the chapter, the author considers these to be the litmus test which can be used to ascertain whether or not an FTA exists. So much has been written and said about FTAs but if they do not meet the criteria as set by WTO law, they must be referred to by another name. The fact that trade facilitation is one of the constituent elements of an FTA justifies the AfCFTA or any other FTA to create its own instruments on trade facilitation, and not necessarily depend on the global TFA. As a result, the AfCFTA can be viewed as a mechanism for facilitating intra-African trade within a global trade facilitation framework.

[1357] Refer to section 3.8.

From this, it can be drawn that both the WTO and AfCFTA legal texts on trade facilitation have the same goal of facilitating trade. The difference is that the WTO conducts oversight at a global level while the AfCFTA is custom-made for Africa.

In the context of Article XXIV, the AfCFTA creates a favourable trading regime and trade facilitation instruments for its members as long as it does not raise trade barriers to third parties belonging to the WTO. In crafting the AfCFTA Agreement, the WTO members had to adhere to global laws, which bound and obligated them as individual members. At the same time, the AfCFTA Agreement was bound by the principles of the WTO Agreement.[1358] The AfCFTA Agreement is unique in that forty-four of the negotiating countries, who were WTO members, had to comply with the requirements of the WTO, while the remaining eleven who were non-members of the WTO ensured that they were not being coerced into accepting some WTO conditions. As a result, the two groups negotiated an agreement that suited Africa's wishes while also complying with WTO regulations in favour of those bound by global rules, but also accommodating those who were not WTO members and were not bound by the WTO Agreement. For the sake of African WTO members, there was no other option but to have the AfCFTA comply with the WTO. In a way, it can be argued that the AfCFTA Agreement coerced pressure for non-WTO members comply with some WTO provisions. The WTO members could only deviate from WTO rules to the extent permitted by the WTO. The AfCFTA Agreement therefore demonstrates how African countries accommodated one another in reaching a mutually beneficial trade agreement, which had to comply with the WTO Agreement.

The study found that the AfCFTA is indeed a building block towards liberalising global trade and is therefore complementary to the WTO. The complementarity between the AfCFTA and the WTO would, to a great extent, be comparable to that between the AfCFTA and its own building blocks of eight RECs. One of the key principles provided for under Article XXIV governing FTAs, and the AfCFTA, is that they must not prejudice those WTO members not participating in that particular RTA. The legal texts of the AfCFTA strike a delicate balance between facilitating trade amongst its members while

[1358] AfCFTA Agreement preamble.

not prejudicing third parties. As noted, the AfCFTA demands deeper and broader cooperation amongst its Customs administrations in order to facilitate trade.[1359]

Chapter Four chronicled, amongst others, the political, economic and legal aspects of the African integration agenda from the OAU up to the current status of the AfCFTA. The vision for Africa's integration is derived from the Abuja Treaty, whose goal is to establish a continental economic community by 2034. The agenda towards that goal include trade liberalisation and trade facilitation, and it illustrates some common interests between the WTO and the AfCFTA. Unlike GATT 1947, where only two African countries out of twenty-three parties negotiated that agreement, and the current scenario at the WTO where African makes up less than 30% of the membership, the AfCFTA Agreement is unique in that it represents a mutually beneficial pact negotiated and owned by all fifty-five AU member states.[1360] It is thus an international treaty for Africans that fulfils all the requirements of the VCLT, concluded within the global rules of the WTO. The AfCFTA Agreement is a treaty negotiated by Africans, in Africa and by all the members of the AU. Just as RTAs, such as the AfCFTA, are building blocks for the global economy, the AU constructed the AfCFTA using the eight RECs as its building blocks. The study noted that the eight RECs use different approaches to economic integration and that they are at different stages of economic integration. As examples, COMESA has a focus on the trade agenda while IGAD concentrates on promoting joint developmental projects within a peaceful and stable environment. The SADC, on the other hand, is a holistic organisation and runs programs which attempt to integrate its region in areas affecting the socio-economic development of its members, be it in politics, trade, social services or agriculture. Despite these different focuses, and the success or failure of the RECs to achieve their goals, their mandate has a link to trade and have strong linkages to Article XXIV, whose objective it is to facilitate trade for its members.

Although the AfCFTA was established to also address the aspect of multiple memberships in RECs, the author argued that the issue of multiple memberships

1359 Refer to the discussion in section 7.3.14.
1360 AfCFTA Agreement preamble and Art 3.

cannot be resolved while continental integration is at the FTA stage, given that the basic agenda of that phase is to facilitate trade amongst African countries. The agenda of the AfCFTA is trade-related whereas that of the RECs extends, to other aspects such as socio-political forms of integration. The AfCFTA, per se, does not address drought and food security challenges experienced in IGAD. Similarly, the AfCFTA does not deal with issues such as peace and security, which the SADC would deal with under its own configuration. Further, the EAC is currently on its way to become a political federation, something the AfCFTA does not provide for. The RECs are therefore an effective forum of dealing with issues not covered by the AfCFTA such as conflicts between neighbouring countries. It would be easier to merge and harmonise the trade agenda of the RECs and the AfCFTA in order to minimise duplication of activities involving free movement of goods. The selected examples of the IGAD, SADC and EAC justifies the continued operation of RECs since their mandate include issues not covered by the AfCFTA., The need to merge RECs into a continental body to resolve multiple memberships will be gradual and only attained as integration becomes deeper.

Chapter Five examined the concept of trade facilitation from various perspectives, and in particular, that of the WTO and AfCFTA. The importance of trade facilitation can be deduced from the fact that the subject was at the centre of DDA and is a contemporary issue in trade. The WTO adopted a soft infrastructure approach, which focuses on processes involving the modernisation and streamlining of trade procedures This study identified thirty-nine measures from the TFA, all of which evidence the soft infrastructure approach of the WTO in addressing issues of processes. Both GATT 1994 and the TFA do not have a legal definition of the concept “trade facilitation”. The current definitions of trade facilitation by the WTO are either derived from WTO literature or its website. In contrast to the WTO, many RTAs and RECs are ahead of the global organisation and have defined trade facilitation in their treaties or legal instruments. The author viewed this as a significant omission in WTO law. Trade facilitation has been at the heart of RTAs since GATT 1947, and for nearly eight decades, has not yet been given a legal definition by the only global body that set global rules. The TFA does, however, state the expected outcome of trade facilitation, and this indicates what it involves but not a substitute for a legal definition.

The study noted that the WCO defines trade facilitation along the same lines as the WTO website and that both approaches have been derived from the RKC. It was therefore clear that the WTO and the WCO complement each other on trade facilitation issues. It was also evident that the WCO, representing the voice of Customs, contributed major inputs into the TFA. The study found that Customs issues dominate most of the processes and procedures stipulated in the TFA. The author, however, consider that trade facilitation, in its holistic approach, goes beyond Customs procedures. The WB, which addresses hard infrastructure, supports this strategy. Despite the differences of focus in defining trade facilitation, the WB also collaborates with the WTO, WCO, and some RECs and RTAs in supporting activities to facilitate trade.

Although not identical, the definitions of trade facilitation by the WTO and the AfCFTA share similar focuses in that they both deal with soft issues rather than hard infrastructural matters. It should be noted that the AfCFTA did not replicate the WTO definition and that the two are different and not duplicates. In line with the various measures covered by the WTO and the AfCFTA, the author reasoned that unethical behaviour by Customs and other governmental agencies involved in trade facilitation can impede trade. The thesis therefore identified an additional trade facilitation measure, being the implementation of an integrity action plan which, if implemented, would be a useful tool in facilitating trade.

The ordinary meaning of the word ‘trade facilitation’ implies going beyond border procedures to include all interventions which would enable trade to happen better and faster. Although the author advocates for a comprehensive perspective to trade facilitation as used by the WB and which encompasses all interventions to improve the flow of international commerce, the study adopted the soft infrastructure approach as embraced by the WTO, WCO and AfCFTA. Despite different definitions, the objective remains the same in that trade facilitation involves applying efficient processes that results in the speedy delivery of goods from the seller to the buyer. As a result, trade facilitation reduces business delays and costs.

Chapter Six identified the legal texts on trade facilitation of the WTO and the AfCFTA which were the focus of the comparative analysis. The legal texts are concerned with speeding up the movement of goods through borders. In respect of the legal texts of the WTO, the major instrument is the TFA and the DSU. The study established that the TFA is an agreement of the WTO whose purpose was to expound on Articles V, VIII and X.[1361] The TFA was not meant to replace the provisions stipulated in GATT 1994 and the mandate for its negotiations was to "review … clarify and improve relevant aspects of Articles V, VIII and X …"[1362] While not repealing the three Articles, the author opines that the TFA is so comprehensive that it incorporates all elements to the extent that it can be implemented without reference to Articles V, VIII and X. The TFA thus served as the basis for the comparative analysis in Chapter Seven. In respect of the AfCFTA, the legal texts were identified to be the AfCFTA Agreement, PSD and the Protocol on TiG together with its Annexes 3, 4 and 8. These AfCFTA legal texts illustrated the hierarchy of AfCFTA law, which starts with the framework agreement, the protocols to the agreement and the annexes to the protocols.

Chapter Seven synthesised the findings from the previous chapters and built upon that to conduct a comparative analysis of the legal texts on trade facilitation. It integrated all the information gathered during the research. Both sets of texts are comprised of various trade facilitation measures as explained in Chapter Five of the study. It interrogated the issues in order to find answers to the research questions of the thesis and to meet the objectives of the study. The findings were therefore summarised into five categories.

In the first category, the legal texts did not have matching provisions in the other. As an example, the scope of coverage on Customs cooperation in the legal texts of the TFA does not correlate with what is covered in the AfCFTA. The cooperation amongst Customs in the TFA is narrow whereas under the AfCFTA, the scope of collaboration is broader and tailor-made to meet the needs of Africa, as the continent moves towards

1361 TFA preamble.
1362 WTO, 'Ministerial Declaration: Special and Differential Treatment' para 27; TFA, preamble.

one customs territory and a continental CU as envisaged under the Abuja Treaty and the AfCFTA Agreement.[1363] The second category shows that the AfCFTA has some provisions that are better than those under the WTO, whereas in the third, the WTO also has certain provisions that are better than those found in the AfCFTA. The fourth group covers instances of similarities between the legal texts, as is the case with Article 8 of the TFA and Articles 25 of Annex 4, which deal with cooperation amongst border agencies.[1364] The fifth category covers areas of significant differences such as advance rulings,[1365] the scope of coverage on PSI,[1366] and dispute resolution.[1367]

On the whole, the study has shown that the AfCFTA's legal texts on trade facilitation are different from that of the WTO. Even in cases where the legal texts resemble each other, there are instances where the language used in the legal texts of the AfCFTA is comparably simplified and easier to comprehend.[1368] This study has gone some way to disprove a perception that the legal texts of the AfCFTA are an exact reproduction of the TFA.[1369] The findings in this study therefore provide a new understanding on the nexus between the legal texts of the AfCFTA and the TFA regarding trade facilitation.

8.3 Recommendations

From the study, the thesis identified several recommendations which were drawn from the discussions. The key recommendations are as follows:

8.3.1 Amendments to the AfCFTA Agreement

Section 6.3 noted the stipulation that any amendment to the AfCFTA Agreement would only be conducted five years after the AfCFTA Agreement entered into force.[1370] The AfCFTA Agreement provides the procedures which must be followed when proposing

1363 Abuja Treaty Art 6:2 (c); AfCFTA Agreement Art 3 (d).
1364 See discussion in 7.3.10.
1365 See discussion in section 7.3.4.
1366 See discussion in section 7.3.12.
1367 See discussion in section 7.3.16.
1368 See discussion in section 7.3.9.
1369 See discussion in section 1.3.
1370 AfCFTA Agreement Art 28.

any amendments.[1371] It therefore follows that the first such amendments would be due after 30 May 2024. The following legislative amendments to the legal texts of the AfCFTA are recommended:

8.3.1.1 Preambles and objectives

Annex 8 on Transit is styled as a detailed technical manual on how goods in transit must be processed in the AfCFTA. As discussed in section 7.3.1, Annex 8 does not stipulate its objectives as is the case with other Annexes of the Protocol on TiG such as Annexes 2, 3 and 4. It leaves a void between what it has provided for and what the original goal was, making it difficult to determine whether the Annex meets its goals. Annex 8 is a component part of the AfCFTA Agreement and is thus an international agreement on its own.[1372] Annex 8 must therefore define its purpose and focus.

8.3.1.2 Opportunity for stakeholders to make comments on new policy issues

The engagement of stakeholders for their inputs into law or policy that affects them is necessary and it leads to buy-in from the implementers. The TFA has such a provision whereas the AfCFTA does not.[1373] A modern legal instrument taking Africa into the global trading environment must adhere to international best practices and take into account the concerns of the stakeholders. This facility enhances transparency as stakeholders are engaged and provide some inputs into intended changes.

8.3.1.3 Appeal procedure

Appeal procedures are an important tenet of any transparent judicial system. It is therefore important that global or international trade includes provisions for clearly laid down appeal procedures. For accountability in the AfCFTA, it is suggested that the AfCFTA outlines clear procedures for the handling of appeals or review for decisions.

1371 AfCFTA Agreement Art 29.
1372 AfCFTA Agreement Art 1.
1373 Refer to section 7.3.3 of this study.

8.3.1.4 Movement of goods intended for import

To decongest borders, goods can be moved into inland offices for final clearances and duty payments. Although this measure is covered under Article 9 of the TFA, the legal texts of the AfCFTA do not have similar provisions. It is recommended that the AfCFTA adopts such a Customs regime, which is already covered under the RKC.[1374] There are several facilities which can be used to control, monitor and ensure that duties are paid as agreed, for example, the transfer of such goods under a bond or bank guarantee, use of bonded warehouses and dry ports.[1375]

8.3.1.5 Measures to control the importation of substandard goods

The TFA's SPS and TBT measures are designed to prevent the importation of goods that are substandard or pose a risk to public health.[1376] Similar provisions do not exist in the AfCFTA. The provisions in the TFA only apply to imported goods and do not relate to the movement of such goods when they leave the country of export. The author suggests that in a globalised world the supply chain should consider the movement of goods through the lens of 'my imports are your exports'. As a result, trade in contaminated or uncontaminated foodstuffs must concern both the exporting and importing countries and must be controlled from both ends. The AfCFTA must therefore have holistic provisions in order to stop the dumping of substandard goods in Africa

8.3.1.6 SDT provisions relating to trade facilitation

The SDT provisions in the AfCFTA's legal texts on trade facilitation are aligned with the TFA provisions. The modalities for implementing the SDT provisions are related to notifications under the TFA. The wholesale import of the WTO's standards into a purely trading relationships amongst African countries can create implementation problems. While the status of a LDC is well-defined, the question of whether a country is

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1374 RKC General Annex, Standard 3.41.

1375 A dry port is a facility located away from the sea where cargo can be unloaded and stored until all Customs formalities have been completed. The meaning has been extended to also refer to such a facility used to decongest border posts or other entry points.

1376 Refer to section 7.3.6 of this study.

developing or developed under the WTO is self-declared and thus open to debate.[1377] The criteria designating 'developed' or 'developing' status under the AfCFTA has not been clarified. The provisions on SDT in Annex 4 and Annex 8 need to be reviewed to ensure that they address implementation issues appropriately rather than simply state that implementation shall be as designated under the provisions of the TFA.[1378] As an example, when countries such as Egypt, Kenya, Nigeria, and South Africa negotiate a position as part of the Africa group at the WTO, their positions may differ from when they negotiate with other African countries, amongst themselves, and within the AfCFTA configuration. During negotiations at the global level, not only are the countries individual, but they would also be expected to be part of the African voice and identify themselves with the rest of the developing and less developed countries. On the other hand, when negotiating with other African countries on an African agenda, it cannot be ignored that they are perceived as economic giants in the continent.

8.3.2 Definition of trade facilitation

As discussed in Chapter Five, the WTO must come up with a legal definition of what trade facilitation is, instead of depending on the ordinary meaning as given on the WTO website. As it is, several organisations and RTAs have defined the concept of trade facilitation and incorporated it into their own treaties and legal texts. A comprehensive definition must be given in the legal texts of the WTO, that is either in GATT 1994 and the TFA, or both. A rider could then be used to explain that the focus of the WTO and the TFA with regards to trade facilitation is on soft infrastructural issues of trade procedures. It is understandable that within its current role, which is being a custodian of global rules of trade, the WTO cannot stretch its mandate to include hard infrastructural issues. At the same time, there is no justification for the WTO to fail to define one of its most important concepts in modern trade law.

1377 WTO, 'Least-Developed Countries'.

1378 Annex 4 Art 29; Annex 8 Art 13.

8.3.3 Non-tariff barriers

NTBs have featured in negotiations under the Uruguay Round and DDA.[1379] The preambles to both GATT 1994 and the WTO Agreement highlight the importance of eliminating NTBs in global trade.[1380] An FTA, by definition, is an undertaking to implement free trade through the removal of tariffs and NTBs, and this shows that there is a link between removal of barriers and ensuring that trade facilitation takes place. While underscoring that any successful REC must remove NTBs, it has been observed that NTBs constitute one of the greatest impediments to intra-regional trade in the RECs.[1381] With the reduction in tariff barriers, NTBs have increased in importance.[1382] They remain a significant hindrance in world trade in respect of developing countries.[1383] The elimination of NTBs therefore results in the facilitation of trade.

Although there is no specific agreement on NTBs under the WTO, it can be argued that one of the goals of trade facilitation is to eliminate NTBs. From this, it can further be developed that any trade facilitation regime will need a system in place to manage these barriers to trade. In view of this it is recommended that the WTO develops a framework or an agreement on NTBs so that there is a planned effort to eliminate them.

8.3.4 Integrity issues

Modernised trade systems foster a transparent climate of commerce that does not allow for corruption. Since corruption and unprofessional behaviour are a barrier to trade, the implementation of an integrity action plan by both WTO members and AfCFTA State Parties will foster positive values and ethical behaviour. It is recommended that both the TFA and the AfCFTA Agreement imbeds integrity action plans in their legal texts on trade facilitation. This will be a necessary measure which, if implemented, like the

1379 Refer to Chapter 2 and Table 2.1.
1380 WTO Agreement preamble, and the same meaning is captured in GATT 1994 preamble.
1381 UNECA, AU and AfDB, *Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area* (UNECA 2012) 81.
1382 Céline Carrère and Jaime De Melo, 'Non-Tariff Measures: What Do We Know, What Might Be Done?' (2011) 26(1) Journal of Economic Integration 169.
1383 Lester and others, *World Trade Law* 38.

other thirty-nine measures would curtail unethical practices that hinder trade processes. The author therefore considers integrity as a trade facilitation measure.

8.3.5 Capacity building

As argued in section 8.2 above, the WTO Agreement must formally incorporate capacity building in trade related matters as one of its core functions. The WTO has created a set of rules and regulations that can only be effectively implemented if all stakeholders are equipped with the required capacity. It is obvious that the 164 members of the WTO, some developed countries while others are less developed, do not have the same understanding of WTO law. The WTO has become an important organisation in global trade with a diverse range of stakeholders ranging from small-scale traders to large conglomerates, as well as trade experts and many other organisations. The WTO acknowledges that the building of trade capacity, enables its members participate more gainfully in the multilateral trading system. Although the WTO acknowledges the importance of some capacity building programmes,[1384] as an organisation it must redefine its own goals and capacity building must be one of them. Similarly, the AfCFTA is becoming a 'mini-WTO on trade matters which affect Africa. It is therefore also recommended that the AfCFTA adopt capacity building as one of its strategic objectives and that it must be incorporated into the AfCFTA Agreement.

8.4 Future research

This thesis should incite research in several related areas, which could not be covered during the study, as they were outside the set objectives and research questions. The author identified the following as areas for additional research:

8.4.1 Comparative study of the trade facilitation instruments of the WTO and other RTAs/RECs

Similar comparative studies can be conducted with the WTO and other RTAs/RECs to identify any peculiarities of the trade facilitation instruments either with the WTO or

[1384] WTO, 'What We Do' <www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> accessed 11 September 2022.

amongst themselves. RTAs/RECs have trade facilitation instruments that respond to their needs at a specific time.

8.4.2 Multiple memberships in RECs

It is clear that, contrary to the spirit of the Abuja Treaty, RECs will continue to exist and will be a continental asset in serving purposes other than the trade agenda.[1385] One of the goals of the AfCFTA was to address the issue of African countries having multiple memberships in RECs. Indications are that Africa will, for some time, continue to run its intra-African trade agenda through both the AfCFTA and RECs. The relationship and synergies between the recognised and non-recognised RECs and the AfCFTA is an area with opportunities for further studies.

8.4.3 Correlation between the TFA and the RKC

The TFA and the WCO's RKC have a certain relationship, as shown in Chapter Five of the thesis. The terms and vocabulary used in certain instances are similar, and trade facilitation is in any case an aspect in which there is complementarity between the WTO and the WCO. Since the WTO has an effect on how trade facilitation policies are implemented in RECs and RTAs, it stands to reason that the RKC also has an effect, either directly or indirectly, on the trade facilitation agenda.

Further research would be needed to determine the extent of the RKC's influence on the legal texts on trade facilitation in respect of the WTO, RTAs and RECs.

8.4.4 Technical barriers to trade, and sanitary and phytosanitary measures

The scope of this thesis was defined in Chapter One and alluded to again in Chapter Six. The study did not extend to cover Annexes 5, 6 and 7 of the Protocol on TiG, which deal with NTBs, TBTs, and SPS measures respectively. Whereas NTBs are impediments brought about through means other than tariffs, TBTs and SPS are considered as NTMs or policy measures that can potentially affect international trade

[1385] Refer to the discussion in Chapter 4.

in goods by changing quantities traded, or prices, or both.[1386] NTBs convey a negative connotation because they involve unnecessary government controls whereas NTMs are not necessarily negative and include enforcing technical, food and health related standards as goods move across borders. The Abuja Treaty takes the abolition of NTBs very seriously, and it mentions it several times in its provisions in Articles 4 and 31.[1387] Furthermore, the definition of an FTA explains that it involves an undertaking to implement free trade through the removal of tariffs and NTBs. In addition to the legislative changes proposed in section 8.3.3 above, the author further notes that the link between NTBs and trade facilitation provides abundant space for further studies.

8.4.5 Dispute settlement

The DSU and PSD were compared in their contexts as part of mechanisms to resolve trade facilitation disputes under the WTO and the AfCFTA respectively. Unlike the WTO system, the AfCFTA's dispute resolution system still needs to be put to the test because no dispute has yet arisen. The DSU and PSD have some similarities and differences, as discussed in Chapter Seven, and these could be interrogated through further research.

8.4.6 Future role of WTO

The establishment of continental and mega RTAs such as the AfCFTA brings a new dimension which the global WTO must consider if the framework provided in Article XXIV as far back as 1947 is to remain adequate to meet the realities of the twenty-first century. While stability and predictability are important components of law, Krisch noted that the rule of law is always caught between stasis and dynamism and must respond to changing social and political circumstances in order to remain relevant.[1388] The fact that GATT 1994 is mainly GATT 1947-plus-updates from Ministerial Decisions or Interpretations shows that some positive effort was made to ensure that the law remains current. As an example, the sociocultural and technological environment of

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1386 UNCTAD, 'Classification of NTMs' <https://unctad.org/topic/trade-analysis/non-tariff-measures/NTMs-classification> accessed 24 July 2021.

1387 Eg Abuja Treaty Arts 4:2(a), 6:2(b), 29 and 31.

1388 Nico Krisch, 'The Dynamics of International Law Redux' (2021) 74(1) Am L Rev 269, 269-267.

1947 is entirely different from that of 2022. The world has become a better connected, global village and trade has become a global phenomenon. As of December 2021, UNCTAD established that the world's largest RTAs by economic size were the Regional Comprehensive Economic Partnership (RCEP) which includes fifteen East Asian and Pacific nations (30.5%, the United States-Mexico-Canada agreement (28%), the European Union (17.9%), the AfCFTA (2.9%) and Common Market of the South or MERCOSUR (2.4%).[1389] The terrain has changed from Article XXIV being a provision of an agreement that had contracting parties, operating outside the ambit of a formal organisation. The current situation is that Article XXIV is now part of one of the agreements under the WTO and is implemented within the confines of a well-established organisation made up of members who all have equal standing.

While acknowledging the achievements of GATT and the WTO, there is a need to realise that the world has not been static and that other important fields are being introduced in international trade such as e-commerce, e-trade, interconnectivity and improvement in communication systems as was never before during signing of GATT in 1947 or the coming into effect of GATT 1994 and even the entering into force of the TFA in 2013. There has also been phenomenal growth in the parties to global trade, an increase from twenty-three contracting parties in 1947 to 164 members in 2022. Further research is required to determine whether certain provisions of WTO law do not require revision in light of the prevalence of some mega FTAs and the fast-changing environment of globalised trade.

8.4.7 To what extent is the AfCFTA restrictive to trade with third parties?

While the objective of an FTA or a CU is to facilitate trade between its parties, one of the requirements is that its parties must not impose additional impediments to trade with non-parties who are members of the WTO.[1390] Chapter Three of this thesis established that the AfCFTA meets the essential elements required by the WTO for any

1389 UNCTAD, 'Asia-Pacific Partnership Creates New "Centre of Gravity" for Global Trade' (15 December 2021) <https://unctad.org/news/asia-pacific-partnership-creates-new-centre-gravity-global-trade> accessed 7 June 2022.

1390 GATT 1994 Art XXIV:4.

FTA. As discussed in Chapter Three, one of the WTO's committees, the CRTA, has a mandate to consider if the AfCFTA Agreement complies with WTO rules on multilateralism. This study focused on trade facilitation in the context of the defined legal instruments. It has not investigated if other legal instruments of the AfCFTA have raised trade barriers with third parties. A further study would need to examine this more closely.

8.5 Concluding remarks

Not every AU member state belongs to the WTO, hence they are not all subject to the TFA. The AfCFTA was created through the exception of Article XXIV to facilitate trade amongst African countries, and to contribute towards the enhancement of global trade. The AfCFTA accordingly allows African countries to facilitate trade amongst themselves and to boost continental trade, while at the same time conducting business within the rules governing global trade. This is evidenced by the duty-free movement of goods[1391] amongst the State Parties based on the ROO which are designed to meet the needs of Africa[1392]and supported by measures designed to facilitate trade in Africa.[1393]. It is therefore within the mandate of the AfCFTA to develop its own trade facilitation instruments as long as such measures do not hamper global trade. This shows that the AfCFTA, like any other FTA, must conform with WTO laws. The legal instruments of the AfCFTA on trade facilitation are also guided by the principle that subsidiary laws must operate within the framework provided by the principal laws.

In this thesis the author also argued that although trade facilitation instruments in any FTA are designed to benefit the particular members, these measures have ripple benefits to non-members of the FTA and global trade. From the study it is clear that the AfCFTA meets three strategic characteristic goals: the first is that it is a calculated milestone towards the AEC envisaged under the Abuja Treaty; secondly, it gives Africa a louder and influential voice at international forums dealing with global trade; and

1391 AfCFTA Agreement Art 4; Protocol on TiG Arts 7 and 8.
1392 Annex 2 Art 3.
1393 Annex 4 Art 2.

thirdly, as an RTA, it is a major contribution towards multilateral global trade under the WTO.

The focus of the thesis has been to compare the legal texts on trade facilitation under the WTO and AfCFTA, both of which are international treaties and consequently bound by the VCLT. Both texts have the same functionality, which is to ease trade by promoting transparency, accountability and predictability. Based on the same measures and themes, the study found that although there are some similarities, the two sets of legal texts are generally different from each other. The WTO and its TFA are global treaties, whose approach is broad and designed to facilitate trade amongst its members. On the other hand, the AfCFTA Agreement and its instruments are continental, and its approach is to facilitate trade amongst the fifty-five partners who are bound together under the umbrella of the political vision of the AU and the Abuja Treaty. The two sets of legal texts emanate from these different points of departure. The study also examined the dispute settlement processes relevant to trade facilitation, and found that, although there are also some similarities, the DSU and the PSD are different.

The study makes contribution to knowledge in respect of better understanding of the WTO and FTAs, the relatively new AfCFTA and trade facilitation. While showing that there are some similarities between the legal texts on trade facilitation of the WTO and the AfCFTA, this thesis has been able to prove, through researched evidence, that the legal texts on trade facilitation of the WTO and the AfCFTA are not duplicates of each other. They have differences and similarities. However, the two sets of legal texts both have a general goal of facilitating and expanding trade for their constituencies, that is, globally and continentally. The WTO has a global agenda whereas the AfCFTA was designed to advance the African agenda within the precincts of global rules on trade. Arising from the results of the study, the thesis developed some recommendations that can be considered for implementation by the WTO, AfCFTA and member countries. The thesis has also identified areas for future studies that can be undertaken by other researchers.

APPENDIX: CONFERENCE CONTRIBUTIONS BY AUTHOR RELATED TO THE PhD (LAW) STUDIES: AUGUST 2020 TO SEPTEMBER 2022

International

Shumba W, 'Linking Eastern and Southern Africa (ESA) via Smart Borders and Trade Single Windows: Border Lessons Learned During COVID-19' (Webinar Conference organised by the World Customs Organisation ESA Region for the Private Sector Regional Group, 6 August 2020)

Shumba W, 'Understanding AfCFTA for Better Business' (Webinar Conference organised by World Economic Congress (WEC) Global Business Chamber in partnership with Africa Reconstruction, 18 August 2020)

Shumba W, 'Trade Facilitation and the AfCFTA' (Conference paper presented on 8 October 2020 at a session on Africa's Trade and Development during the 'Barcelona New Economy Week: Webiner International Conference organised by Barcelona New Economic Zones', 6-9 October 2020)

Shumba W, 'The AfCFTA and Business Opportunities' (Presentation at the 2020 International Conference of the Global Forum of Women Entrepreneurs, 31 October 2020)

Shumba W, 'Implementation of the AfCFTA: Contribution of the Economic Zones, Challenges and Opportunities' (Africa Economic Zones Organisation, 5th Annual Meeting, 3 December 2020)

Shumba W, 'State of Implementation and Perspectives of the AfCFTA' (Presentation of a paper at the Workshop of the 26th Conference of the Directors General of Customs of the WCO West and Central Africa region under the theme 'Customs bolstering Recovery, Renewal and Resilience for a Sustainable Supply Chain', 28-29 April 2021)

Shumba W, 'Overview of the AfCFTA' *(*Presentation of a paper at a workshop of the African Alliance for e-Commerce under the theme *'*How Single Window can play a role in the implementation of the AfCFTA and contribute to the effective Regional Integration', 29 April 2021)

Shumba W, panellist at a Regional e-Conference on the AfCFTA under the theme 'Driving Economic Growth in Africa and Building a Continental Market: Opportunities and Challenges of the AfCFTA' (15 September 2021)

Shumba W, panellist at an international virtual forum of The 7th Annual Tax Summit (2021) organised by the Kenya Revenue Authority, on 14th October under the theme 'Revenue Mobilization Within a Rapidly Evolving Taxation Landscape: Global Trends, Analyses & Resolutions' (13-14 October 2021)

Shumba W, 'Developmental definition of the AfCFTA: Destiny of the African and Africa in a competitive global village' and 'Trade, Cooperation and 'Transformation for Prosperity on the African Continent in the Digital Era' (Papers presented at an international conference organised by the Midlands State University, Gweru, Zimbabwe under the theme, 'The African Continental Free Trade Area (AFCFTA)', 27-29 October 2021)

Shumba W, 'Connection between the AfCFTA and WTO Trade Facilitation Agreement' (Presentation at a workshop on 'WTO, Trade Facilitation Agreement' organised by the World Customs Organisation, Eastern and Southern Region and Western and Central African Region, 1-3 December 2021)

Shumba W, 3 papers on AfCFTA were presented at a workshop on 'Capacity Building on the AfCFTA for Stakeholders from the ECOWAS and Central African Economic and CEMAC Member States' Accra, Ghana (28 February 2022 - 2 March 2022)

Shumba W, participated in the 'First and Second Consultation Meeting for Preparation of the Third Edition of the One Stop Border Post (OSBP) Sourcebook', (27-28 January 2022 and 31 March 2022)

Shumba W, 'Overview from AfCFTA Secretariat on Trade Facilitation, Transit and Trade on 11 May 2022' (Keynote presentation at an international Conference organised by Transport Evolution, Mozambique Chapter, Maputo, Mozambique on 'Improving Trade Corridors to Facilitate Cross-border Trade', 11 May 2022)

Shumba W, 'Harmonization of Customs Tariff Nomenclatures and Statistical Nomenclatures in AfCFTA' (Presented at a workshop on EU-WCO Programme for Harmonized System in Africa, Supporting a Coordinated Implementation and Uniform Application of the HS in Africa', Addis Ababa, Ethiopia, 28 June 2022)

Shumba W, 'Role of Customs Administrations in the Implementation of Rules Origin,' (Presented at a workshop, 'Implementation and Application of Rules of Origin for Enhanced Intra-African Trade, EU-WCO Rules of Origin Africa Programme', Accra, Ghana, 19-20 July 2022)

Shumba W, 'Tariff Revenue Loss from AfCFTA: Real or Perceived? What Measures can Help Bridge the Gap?' (Conference organised by African Tax Administration Forum (ATAF), 6th High-Level Tax Policy Dialogue Boosting Trade and Tax Revenues under the theme 'The Impact of the AfCFTA on Domestic Resource Mobilisation in the Next Five Years', Pretoria, South Africa, 3 August 2022)

Shumba W, chaired and facilitated debate during a session 'The Importance of Regional Inter-Agency Cooperation in Light of the AfCFTA' at the 7th Annual Conference of the African Tax Administrators Forums (ATAF) under an overall theme 'The Tax and Revenue Implications of the AfCFTA', Accra, Ghana, 5-7 September 2022)

National

Shumba W, 'Operationalizing Rules of Origin and Customs Cooperation – Perspective from AfCFTA' (AfCFTA Strategy Workshop Series on Customs Cooperation and Mutual Administrative Assistance, Trade Facilitation and Transit: Secretariat, Webinar Conference organised by the Federal Government of Nigeria,11 August 2020)

Shumba W, 'Overview of the AfCFTA' (Presentation on AfCFTA to the Customs Department of Eswatini Revenue Authority, 15 December 2020)

Shumba W, 'Overview of the AfCFTA' (Presentation to the Executive Management of the Zimbabwe Revenue Authority, 19 January 2021)

Shumba W, 'How to Benefit from the AfCFTA' (Presentation on AfCFTA at a virtual conference on 'How to Benefit from the AfCFTA'. The conference was jointly organised by the Zimbabwe Revenue Authority and ZIMTRADE, 26 January 2021)

Shumba W, 'Impact of the AfCFTA on Revenue Authorities' (Presentation to the Senior Management of the Zimbabwe Revenue Authority, 27 January 2021)

Shumba W, 'The Zimbabwe Private Sector and the AfCFTA' (Presentation on AfCFTA at a virtual conference. The conference was jointly organised by the Zimbabwe Revenue Authority and ZIMTRADE, 28 January 2021)

Shumba W, 'The AfCFTA: Opportunities and Challenges' (Keynote speaker at the monthly meeting of the Zimbabwe Economic Society, 23 February 2021)

Shumba W, 'Multi-stakeholder Sensitisation Meeting on the AfCFTA' (Presentation at a workshop organised by the Zimbabwe Council of Churches under the theme 'Strategically Positioning Zimbabwe to Take Advantage of the Opportunities in Trade and Investment,' 23 March 2021)

Shumba W, 'The Role of the AfCFTA in Promoting Africa's Competitiveness'(Presentation of a paper at a workshop organised by the Kenya School of Revenue Administration, 8 April 2021)

Shumba W, 'The Role of Multilateralism on the Effective Implementation of the AfCFTA' (Presentation of a paper at the 2020 Tana High-Level Forum organised by the Institute for Peace and Security Studies in partnership with the German Cooperation Deutsche Zusammenarbeit (GIZ), 17 June 2021)

Shumba W, 'Understanding the AfCFTA' (Webinar presentation organised by Ernst and Young Chartered Accountants and Tax Consultants, Zimbabwe, 22 June 2021)

Shumba W, 'Assessment of the Impact of the AfCFTA on the Moroccan Economy' (Presentation at a conference organised by the Policy Centre for the New South and the French Development Agency, Rabat Morocco, 17 November 2021)

Shumba W, ‘Implications of AfCFTA to Zambia Revenue Authority Customs Management’ (28 December 2021)

Shumba W, ‘Free Trade and Employment Creation in Sub-Saharan Africa’(Presentation to a Conference organised by The Friedrich-Ebert-Stiftung (FES), The Economic Policy Competence Centre (EPCC), Accra, Ghana, 17 February 2022)

Shumba W, ‘Update on the AfCFTA’ (Presentation to a Colloquium on Regional Trade Agreements and Climate Change in Africa organised by the University of Energy and Natural Resource (UENR), Sunyani, Ghana under the theme ‘Climate, Trade and the Energy-Food Nexus: Facilitating Climate Action through Free Trade Agreements in Africa’, 22 September 2022)

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