




The implementation of the African Continental Free Trade Agreement and its legal effect on Regional Trade Agreements in Africa

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DECLARATION OF AUTHENTICITY

I declare that the mini-dissertation with the title "The implementation of the African Continental Free Trade Agreement and its legal effect on Regional Trade Agreements in Africa", is my own work and all the sources I have used and quoted, have been indicated and acknowledged by means of complete references.

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ABSTRACT

The African Continental Free Trade Agreement (AfCFTA) will play a crucial role in Africa's economic future. Apart from being the largest FTA in the world with 55 Member States, AfCFTA is poised to lead a significant shift in the trade landscape on the African continent. Its primary purpose is to form a single market for goods and services by promoting solidarity among African nations. This solidarity is further evidenced in the establishment of regional economic communities (RECs) and regional trade agreements (RTAs) to enhance Africa's unity, integration, and competitiveness. In simple terms, the AfCFTA Agreement looks to achieve its set goals by boosting intra-African trade.

The current trade landscape in Africa is best defined as one with vast regional trade regimes. There are eight RECs and many RTAs in Africa. This regional trade regime means that African nations are members of multiple bilateral and multilateral agreements. Despite most RECs taking steps to achieve effective regional integration, these agreements have failed to establish adequate levels of intra-regional trade. Member States still trade more with countries outside their respective regions, and even more with countries outside of the continent than they do with other Member States. The eight RECs are building blocks of the AfCFTA Agreement. As such the AfCFTA Agreement does not seek to nullify all pre-existing RTAs. However, regional agreements contain varying terms and conditions, and the policies entrenched therein will vary between regions and parties. This makes conflict between the AfCFTA and pre-existing RTAs and RECs inevitable.

This dissertation analyses how the implementation of the AfCFTA Agreement will affect existing RTAs and RECs. The study begins by explaining the motivation for this study, followed by the history and implementation of the AfCFTA Agreement. It goes on to define Africa's current trade landscape and the importance of RTAs. It then analyses the possible conflicts and challenges, such as overlapping memberships and legal harmonisation. The dissertation concludes by providing recommendations to address the possible challenges.

Key words: Intra-African Trade, African Continental Free Trade Area Agreement, Regional Trade Agreements, Regional Economic Communities, Economic Integration, AfCFTA Implementation.

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LIST OF ABBREVIATIONS AND ACRONYMS

AEC: African Economic Community

AfCFTA: African Continental Free Trade Area

AJPAS: African Journal of Politics and Administrative Studies

AU: African Union

COMESA: Common Market for Eastern and Southern Africa

Draft Articles: The international Law Commission Draft Articles on Most Favoured Nation Clause

DSB: Dispute Settlement Body

EAC: East African Community

EALR: Eastern Africa Law Review

ECCAS: Economic Community of Central African States

ECOWAS: Economic Community of West African States

EU: European Union

FTA: Free Trade Area

GATT: The General Agreement on Tariffs and Trade

GDP: Gross Domestic Product

JCLA: Journal of Comparative Law in Africa

MFN: Most Favoured Nation

NTB: Non-Tariff Barriers

OAU: Organisation of African Unity Charter

PRPSD: Protocol on Rules and Procedures on the Settlement of Disputes

PER/PELJ: Potchefstroom Electronic Law Journal

REC: Regional Economic Community

RTA: Regional Trade Agreements

SADC: Southern African Development Community

TFTA: Tripartite Free Trade Area

The Abuja Treaty: Treaty Establishing the African Economic Community (1991)

The AfCFTA Agreement: Agreement Establishing the African Continental Free Trade Area

The LPA: Lagos Plan of Action

The COMESA Treaty: The Treaty Establishing the Common Market of Eastern and Southern Africa

The ECCAS Treaty: Treaty Establishing the Economic Community of Central African States

The ECOWAS Treaty 1975: Treaty of The Economic Community of West African States

The Revised Treaty: Revised Treaty of the Economic Community of West African States

The SADC Treaty: SADC Consolidated Treaty Text

WTO: World Trade Organization

CHAPTER 1: Introduction

1.1 Background

The African Continental Free Trade Area Agreement (AfCFTA) is the world's largest free trade area (FTA), bringing together the 55 countries of the African Union (AU) and eight regional economic communities (RECs).¹ The Tripartite Free Trade Area (TFTA), which is a three-way agreement between the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community, and the East African Community (EAC), sets the tone for the AfCFTA. The TFTA is formally known as the COMESA-EAC-SADC Tripartite Agreement. It was negotiated between three RECs with the objective of merging the RECs to create a single FTA to speed up the process of attaining an African Economic Community (AEC).² There are currently 54 member states of the AfCFTA Agreement, of which 44 countries signed The AfCFTA Agreement in March 2018, in Kigali, Rwanda, and since then 48 state parties have deposited their ratification instruments.³ As there are 55 African countries, Eritrea is currently the only exception. Primarily, the objectives of AfCFTA are to establish a single market for goods and services, established by promoting solidarity among African nations, further evidenced by the establishment of RECs and RTAs to enhance Africa's unity, integration, and competitiveness.⁴ The aim of AfCFTA is to strengthen the economic integration of the African continent, which follows the Pan-African vision of "an integrated, prosperous and peaceful Africa" enshrined in Agenda 2063.⁵

At the core of this project is a commitment by the Member States of the AU, all signatories to the AfCFTA, to liberalise their trade by reducing and ultimately dismantling trade barriers such as tariffs and non-tariff barriers (NTBs) to facilitate intra-African trade.⁶ The successful integration of the AfCFTA mandate, which is to create a single continental market of a combined 1,2 billion people, expected to reach 2,5 billion by 2050, is predicted to result in US\$2,5 trillion in gross domestic product

¹ AfCFTA 2023 <https://au-afcfta.org/about/>.

² Vhumbunu 2020 *AFRICA INSIGHT* 122.

³ Vhumbunu 2020 *AFRICA INSIGHT* 122.

⁴ Odeku and Rikhotso 2023 *Journal of African Foreign Affairs* 111.

⁵ Moyo 2020 *AFRICA INSIGHT* 1.

⁶ Moyo 2020 *AFRICA INSIGHT* 1.

(GDP), with “empirical studies done by the Economic Commission for Africa having predicted that the AfCFTA will increase the value of intra-African trade by 15 percent to 25 percent”.⁷

However, the implementation of the AfCFTA could potentially lead to conflicts with existing regional trade agreements (RTAs) in Africa. This could hinder the realisation of the AfCFTA's objectives. For nearly a century, regionalism has played a crucial role in Africa's socio-economic development, evolving from a colonial initiative into a post-colonial developmental tool.⁸ As of the 1st of August 2023, there are 360 active RTAs among World Trade Organization (WTO) members, of which 47 are active in Africa, with almost every African country being a signatory to at least one bilateral or plurilateral agreement.⁹ The coexistence of these agreements within the AfCFTA framework has the potential to create complexities and divergences. These RTAs, developed over the years, include varying trade provisions, rules of origin, tariff schedules, and dispute resolution mechanisms. Aligning these pre-existing agreements with the uniform and overarching principles of the AfCFTA may be challenging. This study explores the conflicts that may arise between RTAs and the AfCFTA implementation to identify the associated implementation challenges.

1.2 Motivation

The AfCFTA represents a transformative vision for Africa's future, with the potential to create the world's largest single market by removing tariffs and non-tariff barriers, the AfCFTA seeks to facilitate the movement of goods, services, and investments across African borders. The successful implementation of the AfCFTA promises to boost industrialisation, spur economic diversification, and create job opportunities, thereby contributing to sustainable development and poverty reduction on the continent.¹⁰

The AfCFTA has 54 members and is led by a hierarchical system consisting of the Assembly of Heads of State and Governments, the highest decision-makers of the AU,

⁷ Vhumbunu 2020 *AFRICA INSIGHT* 122.

⁸ Fagbayibo 2019 *Comparative and International Law Journal of Southern Africa* 143.

⁹ World Trade Organization 2023 <https://shorturl.at/hlqF5>.

¹⁰ World Bank Group 2020 <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area>

the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat.¹¹ Decisions of AfCFTA institutions on substantive issues are taken on consensus¹², and decisions on procedural issues are taken on a simple majority of state parties eligible to vote.¹³ This indicates that the policies and interests of AfCFTA are shared interests of AU members, and all countries have equal voting power when they are eligible to vote. However, ensuring effective policy coordination among such a diverse group of participating countries can be challenging. Differences in economic development, industrial capabilities, and policy priorities among AU members may result in varying expectations and interests, making it difficult to effect key policies that meet the needs of most members.¹⁴

The AfCFTA represents a significant milestone in regional integration efforts in Africa, aiming to foster intra-African trade and economic growth. Intra-African and intra-regional trade in Africa has been and is relatively low, despite Africa currently experiencing an expansion in intra-regional trade, which has been supported by an increase in commodity exports, stronger macro-economic conditions and institutions, and the establishment of regional economic arrangements.¹⁵ Most of the intra-regional trade on the African continent has been facilitated by the Southern African Development Community (SADC) and the East African Community (EAC),¹⁶ which have the highest levels of intra-union trade compared to other groupings on the continent.¹⁷

In the last 30 years, there has been a significant increase in the number of RTAs, which reflects developing economies, including those in Africa, becoming more actively engaged in international trade. In sub-Saharan Africa, the initial RTAs were set up to foster unity on the continent after the colonial era. As a result, “regional integration in the form of free trade agreements became the key strategy”.¹⁸ Furthermore, “they

¹¹ Article 9 of the Agreement Establishing the African Continental Free Trade Area (2019).

¹² Article 5, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

¹³ Article 5, para 3 of the Agreement Establishing the African Continental Free Trade Area (2019).

¹⁴ UNCTAD 2024 <https://shorturl.at/30C5w>

¹⁵ Albert 2018 *CUTS INTERNATIONAL* 6.

¹⁶ Chipanda and Cilliers 2024 <https://futures.issafrica.org/thematic/08-afcfta/>.

¹⁷ Albert 2018 *CUTS INTERNATIONAL* 6.

¹⁸ Darku and Appau 2015 *The African Finance Journal* 42.

have played a crucial role in enhancing economic cooperation, conflict resolution and good governance on the continent”.¹⁹

Even today, the majority of African RTAs have objectives that extend beyond mere economic goals like promoting industrialisation and trade. SADC is a good example of this, as it has significant regional sectoral projects in areas like energy and infrastructure.²⁰ RECs and RTAs, like the AEC, were created to serve as a framework from which African countries could gather to talk and engage with each other, to “strategise, unite the people and execute plans to free the continent from the yoke of colonialism and economic exploitation”.²¹ However, “these trade blocs have had poor success in achieving their strategic goals, particularly in terms of their stated capacity to increase intra-African regional trade”.²² Also, African countries have struggled at the REC level to integrate because they consume more than they can produce.²³ However, aside from breaking down trade barriers, if combined with political advantages, RTAs in Africa, like SADC, have the potential to boost the integration of these economies into the global value chains.²⁴

Despite the poor performances in intra-African trade, the introduction of RTAs in Africa has increased trade. A study conducted between 1988 to 2005 found that: “Sub-Saharan Africa recorded a reduction in trade levels only in the years 1998/1999 and 2003. This confirms that trade within Africa increased over the study period.”²⁵ The same study recorded that

the creation of the Common Market for Eastern and Southern Africa (COMESA), SADC and the Economic Community of West African States (ECOWAS) has increased trade between its members by 5.42, 2.56 and 1.89 percent annually, respectively. The Economic Community of Central African States (ECCAS) however has reduced trade among its members. Also, the formation of COMESA and SADC has increased trade between members and non-members, whereas ECOWAS and ECCAS have had a negative effect on trade flows between members and non-members.²⁶

¹⁹ Mude 2020 *AFRICA INSIGHT* 42.

²⁰ SADC 2015 <https://shorturl.at/CD1Za>

²¹ Zaire and Warikandwa 2021 *Journal of Corporate and Commercial Law & Practice* 17.

²² Uwakata and Aregbeshola 2022 *Journal of African Union Studies* 92.

²³ Vhumbunu 2020 *AFRICA INSIGHT* 128.

²⁴ Vhumbunu 2020 *AFRICA INSIGHT* 132.

²⁵ Darku and Appau 2015 *The African Finance Journal* 43.

²⁶ Darku and Appau 2015 *The African Finance Journal* 44.

These results indicate the complex trade regimes and relevance of RTAs in the different regions of Africa, with varying political and economic interests that will make implementing the most-favoured nation policy a difficult task for AfCFTA, which is discussed in depth in Chapter 4 below.

The potential AfCFTA holds for boosting intra-African trade and economic integration cannot be understated. However, its structure may present challenges with existing RTAs in Africa. This study analyses the potential conflicts and challenges that may arise. These may include overlapping memberships. Many African countries are members of multiple RECs, such as the ECOWAS or the EAC, and multiple smaller trade agreements. The Democratic Republic of Congo is a prime example, as it is party to 4 out of the 8 RECs.²⁷ Due to a lack of coherent and systematic implementation of decisions, “policies and programmes at the regional level are linked to overlapping mandates by many RECs”.²⁸ This then leads to the duplication of functions and conflicts over mandates, which creates tension among governments, hinders the smooth implementation of preferential integration and raises trade transaction costs. Having multiple rules of origin can have a negative effect on the trade-boosting aspect of the AfCFTA.²⁹

A second challenge will be the harmonisation of trade rules and standards. With most African countries being members of multiple and varying trade agreements, conflicting and overlapping trade terms may be unavoidable.³⁰ Differing standards and policies, depending on the region, remain a barrier to cross-border trade. It is crucial to implement trade facilitation policies to reduce border regulations and corruption. Each RTA in Africa has its set of trade rules, regulations, and standards. With the existing RECs meant to be building blocks of AfCFTA, as stipulated in Art 5(b),³¹ the AU Assembly has urged RECS to harmonise and coordinate their policies among

²⁷ Karkare 2025 [https://ecdpm.org/work/m23-eastern-drc-whose-peace-it-anyway#:~:text=The%20recent%20flare%20in%20violence,and%20Southern%20African%20\(COMESA\)](https://ecdpm.org/work/m23-eastern-drc-whose-peace-it-anyway#:~:text=The%20recent%20flare%20in%20violence,and%20Southern%20African%20(COMESA).).

²⁸ Zaire and Warikandwa 2021 *Journal of Corporate and Commercial Law & Practice* 39.

²⁹ Zaire and Warikandwa 2021 *Journal of Corporate and Commercial Law & Practice* 39.

³⁰ Uwakata & Aregbeshola 2022 *Journal of African Union Studies* 93.

³¹ Article 5 (b), of the Agreement Establishing the African Continental Free Trade Area (2019).

themselves by having regular meetings to accelerate Africa's integration process.³² Achieving this harmonisation can be a complex and time-consuming process, as it requires negotiations, consensus-building, and legal adjustments among the participating countries. Harmonising trade policies is essential to mitigate the risk of trade diversion and ensure the smooth functioning of AfCFTA.

Addressing these challenges will require close collaboration, negotiation, and flexibility among participating countries. It will be crucial to ensure effective coordination between the AfCFTA and existing RTAs in Africa to minimise conflicts and maximise the benefits of both frameworks for the continent's economic integration and development.

1.3 Research question

The research was guided by the following question: What are the legal consequences of the implementation of the AfCFTA and its effect on RTAs in Africa?

1.4 Research aims and objectives

This research's main objective is to thoroughly analyse the potential legal conflicts and implementation hurdles before the AfCFTA framework given the regional trade regime in Africa. This study identifies potential conflicts between existing RTAs and the AfCFTA in terms of trade provisions, rules of origin, and dispute settlement mechanisms that may arise from overlapping memberships. Despite the AfCFTA being built off Africa's RECs, it is still apparent that there will be confusion among these groupings in cases where there are already many overlapping memberships.³³ This study also assesses the impact of these conflicts on trade liberalisation and economic integration in Africa. A further complexity is the risk of trade diversion. Therefore, this study also examines the challenges encountered during the harmonisation and alignment of trade policies and rules of existing RTAs with the AfCFTA. The study then proposes strategies and mechanisms to address conflicts and enhance their coherence by investigating these conflicts and obstacles. This research aims to shed light on the intricacies of trade dynamics in the African region and to contribute to a better understanding of how the

³² Zaire and Warikandwa 2021 *Journal of Corporate and Commercial Law & Practice* 39.

³³ Vhumbunu 2020 *AFRICA INSIGHT* 128.

AfCFTA can be effectively implemented to foster economic growth and cooperation among African nations.

1.5 Research methods

The research question is answered by referring to various primary sources, including the AfCFTA provisions, accessible on the AfCFTA website, and various RTAs and RECs in Africa. This study also used secondary sources, including law journal articles, books, and, to a limited extent, internet sources. Primary and secondary sources were searched using an accredited search engine such as Juta, LexisNexis and the University library to ensure that accurate information and arguments are discussed. The above literature includes journal articles that examine the structure of the AfCFTA, the complexities of RTAs in Africa, and the conflicts that will arise from implementing the AfCFTA. This study further suggests mechanisms to address these conflicts and challenges. These suggestions are formulated by reviewing literature such as journals and legal articles.

1.6 Framework

Chapter 1: "Introduction" – This chapter discusses various key aspects of the study. These include the title of the study, research question, background to the study, research method and importance of the study.

Chapter 2: "Significance of AfCFTA"—This chapter discusses the objectives and structure of the AfCFTA. It includes an overview of its implementation process and phases and the potential for achieving intra-African trade.

Chapter 3: "Complexities of RTAs in Africa" – The chapter examines the current African trade landscape, which includes various RTAs with unique trade rules and dispute resolution mechanisms. It assesses the role of RTAs in fostering intra-African trade and analyses the potential consequences of their success or failure. The chapter also compares the policies and outcomes of four RECs in Africa: SADC, ECOWAS, COMESA, and ECCAS.

Chapter 4: "Conflicts and Implementation Challenges" – This chapter examines conflicts and challenges that arise from the interaction between the AfCFTA and pre-

existing RTAs. It identifies conflicts in trade provisions, rules of origin, and dispute resolution mechanisms between AfCFTA and various RTAs, assessing their impact on intra-African trade and economic integration. This analysis reveals potential complexities and obstacles to the effective implementation of AfCFTA.

Chapter 5: "Recommendations to Address Implementation Conflicts and Challenges and Conclusion"—This chapter presents recommendations to resolve the conflicts and challenges that may arise between the AfCFTA and existing RTAs. The research conclusion provides a summary of the study's exploration.

1.7 Relevance to the study unit

This research is relevant to the work of the Law, Justice, and Sustainability research unit of the Faculty of Law at North-West University as it concerns the subunit of Trade & Innovation. AfCFTA is vital to boosting intra-African trade, and therefore, its successful implementation is important to African trade and economy. Also, the AfCFTA is guided by the 2030 Agenda for Sustainable Development and the African Union's Agenda 2063.

1.8 Statement regarding ethics

No interviews or questionnaires were used for this study. The study is based on the Agreement Establishing the African Continental Free Trade Area (AfCFTA agreement), accredited journal articles, RTAs, and reports about the success or failure of RTAs in Africa. The completed prescribed ethics form, as the Faculty of Law provided, is attached.

Chapter 2: Significance of the African Continental Free Trade Area

2.1 Introduction

As established above, the main objective of AfCFTA is to facilitate economic integration in Africa by boosting intra-African trade. Article 3(a) of the AfCFTA agreement states that the objective of AfCFTA is to “create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent”.³⁴ Article 3 continues by stating general objectives such as enhancing the competitiveness of Member States in the global market and fulfilling the AU Agenda 2063.³⁵ Intra-African trade is essentially the cornerstone of fulfilling the objectives of AfCFTA. This chapter delves into the profound significance of the AfCFTA in advancing economic integration across Africa. The chapter provides an overview of the AfCFTA's structure and its phased implementation process. Additionally, the chapter analyses the potential of AfCFTA in achieving intra-African trade.

2.2 History of economic integration in Africa

As more and more African states gained independence in the 1950s, cooperation among independent African states became a prominent feature. Due to historical and external developments such as World War II and the African recession of the 1960s, integration for economic development became a priority for Africa.³⁶ In 1963, during a summit in Addis Ababa, Egypt, 32 African heads of state and governments adopted the Organization of African Unity Charter (OAU), which formally established the organisation.³⁷ The objectives of the OAU were to facilitate cooperation, unity and integration among independent African states. The OAU Charter was “the first legal instrument towards the AEC” to harmonise trade policies and promote economic integration.³⁸ The OAU laid the groundwork for the future of economic integration in

³⁴ Article 3 (a) of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁵ Article 3 of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁶ Mude 2020 *AFRICA INSIGHT* 42.

³⁷ Shumba 2023 *PER / PELJ* 3.

³⁸ Shumba 2023 *PER / PELJ* 3.

Africa. With the political independence of all African nations, the OAU provided a deep foundation for economic integration.³⁹

As part of the effort to create an AEC, the Monrovia Declaration of 1979 and the Lagos Plan of Action (the LPA) of 1980 laid the foundation for creating regional and sub-regional economic arrangements.⁴⁰ The LPA was a strategic legal instrument committed to implementing economic integration in two phases.⁴¹ In Phase 1, the LPA committed the 1980s to establishing RECs in each region of the continent,⁴² while the 1990s were set aside for the “creation of a common market as a step towards the AEC by 2000”.⁴³ However, the LPA was never implemented due to a lack of desire among members. One of the main reasons is that the LPA did not enact legally binding provisions to enforce implementation, and as such, was an example of ‘soft law’.⁴⁴ Despite not being implemented, the LPA laid the foundation for the adoption of the Treaty Establishing the African Economic Community (the Abuja Treaty).

In 1991, African states adopted the Abuja Treaty, culminating in the “proliferation of RECs as trading blocs to promote continental integration”.⁴⁵ The Abuja Treaty “sets out a legal framework designed to deepen the integration of African economies”.⁴⁶ The Abuja Treaty aims to promote cooperation and development in Africa⁴⁷ by strengthening RECs and using these structures to achieve the goal of the AEC.⁴⁸ The Abuja Treaty recognises that RECs can be used as building blocks and calls for strengthening the eight RECs in Africa.⁴⁹ With multiple overlapping memberships between them it became apparent to the AU that COMESA, SADC and the EAC shared many interests. Therefore, three communities became tools to fast-track the Abuja Treaty’s ambitions by cooperating with each other to merge into one grand trade

³⁹ Shumba 2023 *PER / PELJ* 3.

⁴⁰ Mude 2020 *AFRICA INSIGHT* 42.

⁴¹ Shumba 2023 *PER / PELJ* 5.

⁴² Shumba 2023 *PER / PELJ* 5.

⁴³ Shumba 2023 *PER / PELJ* 5.

⁴⁴ Shumba 2023 *PER / PELJ* 6.

⁴⁵ Mude 2020 *AFRICA INSIGHT* 42.

⁴⁶ Article 4, para 1 Treaty Establishing the African Economic Community (1991).

⁴⁷ Article 4, para 1 Treaty Establishing the African Economic Community (1991).

⁴⁸ Article 4, para 2 Treaty Establishing the African Economic Community (1991).

⁴⁹ Article 4, para 2 Treaty Establishing the African Economic Community (1991).

bloc.⁵⁰ This is how the TFTA was formed in 2015. The TFTA is tasked with addressing multiple membership issues among the RECs. However, it also sets the tone for AfCFTA based on the groundwork laid down by the Abuja Treaty.

The AfCFTA draws its inspiration from the ambitions of the Abuja Treaty to promote economic integration in Africa.⁵¹ The AfCFTA was negotiated to liberalise trade and create a single market by removing tariffs and NTBs and enhancing intra-African trade. The AfCFTA Agreement was adopted on 21 March 2018 in Kigali, Rwanda, which was seen as a leap towards establishing the AEC.⁵² The signing and ratification of the AfCFTA agreement were fast and unprecedented, as negotiations between 55 diverse nations were concluded within two years.⁵³ The AfCFTA agreement is a continuation of the foundations laid by the Abuja Treaty, as the preamble of the AfCFTA holds that the instrument is determined to further the rights and obligations of the AU and the Abuja Treaty.⁵⁴ The AfCFTA agreement also acknowledges RECs as the building blocks of the AfCFTA.⁵⁵ The AfCFTA is not a creation in isolation but a reflection of the years of commitment and multiple attempts to develop the African market through economic integration and facilitate intra-African trade.

2.3 Structure and implementation process

The AfCFTA Agreement consists of three layers, and the negotiations regarding the implementation of the Agreement is broken into three phases, Phase I; Phase II; and Phase III. The first layer is the agreement's framework, which consists of definitions of the purposes and objectives of the AfCFTA Agreement, as well as primary definitions and outlines.⁵⁶ This layer sets the intentions and foundation of the AfCFTA Agreement. The objectives and purposes of the AfCFTA Agreement are set out to reflect a commitment to intra-African trade. The second layer, which is vital to Phase I of the AfCFTA agreement's implementation, is a set of "protocols regarding trade in goods and services and the rules and procedures for the settlement of disputes, competition

⁵⁰ Shumba 2023 *PER / PELJ* 8.

⁵¹ Shumba 2023 *PER / PELJ* 20.

⁵² Shumba 2023 *PER / PELJ* 20.

⁵³ Shumba 2023 *PER / PELJ* 21.

⁵⁴ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

⁵⁵ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

⁵⁶ Albert 2018 *CUTS INTERNATIONAL* 7.

policy and intellectual property rights”.⁵⁷ The final layer contains “the annexes, guidelines, and step-by-step instructions of the protocols”.⁵⁸

The institutional framework of the AfCFTA Agreement is divided into four organs: the Assembly, the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat. This section breaks down the institutional framework of the AfCFTA Agreement and the implementation phases of the Agreement.

2.3.1 Institutional framework

2.3.1.1 The Assembly

According to Article 10 of the AfCFTA Agreement, the Assembly is the highest decision-making body of the AU and is tasked with providing oversight and strategic guidance to AfCFTA.⁵⁹ Article 10(2) grants the Assembly exclusive authority to “adopt interpretations of the Agreement on recommendations of the Council of Ministers”.⁶⁰ Decisions on whether to adopt an interpretation are made by consensus.⁶¹ This means that the Assembly is the highest decision-making body of AfCFTA, which makes decisions on recommendations of the Council of Ministers. The only matters referred to the Assembly are those that fall outside the mandate of the Council of Ministers.

2.3.1.2 Council of Ministers

The Council of Ministers is the general decision-making body of the AfCFTA. The Council of Ministers comprises of Ministers of Trade or other nominees from participating countries.⁶² The Council of Ministers is mandated to make decisions per the AfCFTA Agreement, to ensure effective implementation and enforcement of the AfCFTA Agreement, to work in collaboration with the AU, to consider reports from the Secretariat and take appropriate actions, and more.⁶³ The Council of Ministers reports

⁵⁷ Albert 2018 *CUTS INTERNATIONAL* 7.

⁵⁸ Albert 2018 *CUTS INTERNATIONAL* 7.

⁵⁹ Article 10, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁰ Article 10, para 2 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶¹ Article 10, para 2 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶² Article 11, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶³ Article 11, para 3 (a)-(p) of the Agreement Establishing the African Continental Free Trade Area (2019).

to the Assembly through the Executive Council.⁶⁴ They meet twice a year in ordinary sessions, but they may meet in extraordinary sessions if needed.⁶⁵

2.3.1.3 Committee of Senior Trade Officials

The Committee of Senior Trade Officials comprises each state party's Permanent or Principal Secretaries or other designated officials.⁶⁶ The main focus of the Committee is on evaluation, monitoring and reporting to the Council of Ministers.⁶⁷ The Committee shall, subject to directions from the Council of Ministers, meet at least twice a year,⁶⁸ and submit its reports and recommendations to the Council of Ministers after its meeting.⁶⁹ The RECs have an advisory role in the Committee.⁷⁰

2.3.1.4 Secretariat

The AfCFTA Secretariat is the administrative organ of the AfCFTA, located in Accra, Ghana.⁷¹ The main purpose of the Secretariat is to coordinate the implementation of the vast agenda of the free trade area.⁷² The Secretariat, which was established by the Assembly,⁷³ is a functionally autonomous institutional body within the AU with an independent legal personality.⁷⁴ The role and responsibilities of the Secretariat are determined by the Council of Ministers.⁷⁵ The budget of the Secretariat is funded by the AU, and the Secretariat is autonomous from the AU Commission.⁷⁶

2.4 Negotiation phases

⁶⁴ Article 11, para 2 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁵ Article 11, para 4 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁶ Article 12, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁷ Article 12, para 2 (a)-(g) of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁸ Article 12, para 3 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁶⁹ Article 12, para 4 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷⁰ Article 12, para 5 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷¹ Trade Unions in Africa 2023 <https://tradeunionsinafcfta.org/unpacking-the-afcfta-who-will-implement-the-afcfta-and-who-will-have-decision-making-power/>.

⁷² Trade Unions in Africa 2023 <https://tradeunionsinafcfta.org/unpacking-the-afcfta-who-will-implement-the-afcfta-and-who-will-have-decision-making-power/>.

⁷³ Article 13, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷⁴ Article 13, para 3 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷⁵ Article 13, para 6 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷⁶ Article 13, para 4 & para 5 of the Agreement Establishing the African Continental Free Trade Area (2019).

As mentioned above, the implementation of the AfCFTA Agreement will be negotiated in three phases. Phase I and II have been completed, while Phase III is currently underway. The purpose of these three phase negotiations is the creation of legal instruments for the implementation of the AfCFTA.⁷⁷ Article 8 of the AfCFTA Agreement states that the protocols and their annexes and appendices that are created from these negotiations shall, upon adoption, form an integral part of the AfCFTA Agreement.⁷⁸ Article 8 proceeds to prescribe that the enacted protocols and “their associated annexes and appendices shall form part of a single undertaking, subject to entry into force”.⁷⁹

In June 2015, Phase I of negotiations of the AfCFTA commenced. Phase I covered negotiations on trade in goods and trade in services, as well as dispute settlement.⁸⁰ The Protocol on Goods and Services, along with the rules and procedures for dispute resolution settlement, were integral parts of Phase I.⁸¹ Phase I provided for in-depth negotiations on the direction to be taken regarding the elimination of tariffs and NTBs, dispute resolution, and Rules of Origin. However, despite these negotiations, there is still much to resolve in this regard.⁸²

Phase II of AfCFTA negotiations focused on protocols on intellectual property rights, competition policy and investment.⁸³ The negotiations, which took place in February 2023, “led to the adoption of draft protocols on intellectual property rights, investment and competition policy”.⁸⁴ In November 2024, the AfCFTA Phase II protocols were legally published, of which include provisions on Investment, Intellectual Property

⁷⁷ Chibede 2023 <https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html>.

⁷⁸ Article 8, para 1 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁷⁹ Article 8, para 2 of the Agreement Establishing the African Continental Free Trade Area (2019).

⁸⁰ Market Access Map 2022 <https://shorturl.at/flB0S>.

⁸¹ Albert 2018 *CUTS INTERNATIONAL* 7.

⁸² Dietz 2023 <https://african.business/2023/11/resources/afcfta-opens-new-era-of-possibilities-for-african-trade#:~:text=AfCFTA%20negotiations%20have%20taken%20place,have%20yet%20to%20be%20resolved>.

⁸³ Albert 2018 *CUTS INTERNATIONAL* 7.

⁸⁴ Dietz 2023 <https://african.business/2023/11/resources/afcfta-opens-new-era-of-possibilities-for-african-trade#:~:text=AfCFTA%20negotiations%20have%20taken%20place,have%20yet%20to%20be%20resolved>.

Rights, Competition Policy, also with the addition of provisions on Digital Trade and Women and Youth.⁸⁵ Upon the creation of the AfCFTA Competition Authority, member states are now required to enact legislation to promote healthy competition.⁸⁶

Initially, AfCFTA was set to be negotiated in two phases, but in February 2020, the AU Assembly and heads of state and governments decided to commence Phase III on e-commerce immediately after the Phase II negotiations.⁸⁷ Phase III negotiations are focused on creating and adopting the protocol on digital trade and Women and Youth,⁸⁸ which were both adopted into the AfCFTA Phase II Protocol, published in November 2024.⁸⁹

2.5 The potential of the AfCFTA

As established in Article 3 of the AfCFTA Agreement, the main objectives of the AfCFTA are to reduce trade barriers, tariffs and NTBs to enable economic integration on the continent. These objectives essentially mean that the AfCFTA has the potential to “expand the African market, induce industrial development and transform Africa into a globally competitive continent”.⁹⁰ The approach the AfCFTA seeks is regional integration on a continental scale. Therefore, thorough consideration of the existing RTAs, especially the eight RECs in Africa, is foundational to fulfilling the potential of AfCFTA. Overlapping memberships, legal harmonisation, unequal economic standings, and varying interests may seriously threaten the fulfilment of AfCFTA’s objectives.

However, initial projections predicted an increase in intra-African trade by 52.3% by 2022, which “would be possible by cutting tariffs by 90% and harmonising trading

⁸⁵ International Trade Administration 2024 https://www.trade.gov/market-intelligence/afcfta-update-november-2024?utm_

⁸⁶ Dietz 2023 <https://african.business/2023/11/resources/afcfta-opens-new-era-of-possibilities-for-african-trade#:~:text=AfCFTA%20negotiations%20have%20taken%20place,have%20yet%20to%20be%20resolved.>

⁸⁷ Chibede 2021 <https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html>.

⁸⁸ Dietz 2023 <https://african.business/2023/11/resources/afcfta-opens-new-era-of-possibilities-for-african-trade#:~:text=AfCFTA%20negotiations%20have%20taken%20place,have%20yet%20to%20be%20resolved.>

⁸⁹ International Trade Administration 2024 https://www.trade.gov/market-intelligence/afcfta-update-november-2024?utm_

⁹⁰ Mude 2020 *AFRICA INSIGHT* 51.

rules”.⁹¹ According to research conducted by the World Bank, “AfCFTA could double intra-African trade by 2035, increase foreign direct investment by 111% to 159% and elevate GDP by 1.4% to 2.7%”.⁹² Despite the possibly costly integration, successfully implementing the AfCFTA will benefit the African continent. The PSC Report predicts that “Real income could rise by 7% to 9% by 2035, reducing the number of people living in extreme poverty to 45 million”,⁹³ by reducing trade barriers and promoting intra-African trade. A substantial reduction in tariffs and trade costs would decrease import prices, enhance consumers’ purchasing power, and encourage higher consumption.⁹⁴ AfCFTA, if implemented successfully, will increase the competitiveness of African businesses on a global scale, improve infrastructure, enhance African consumer buying power, employment opportunities, etc. The AfCFTA is a game changer for intra-African trade.

2.6 Conclusion

The potential benefits of the AfCFTA are profound. By reducing tariffs and NTBs, the AfCFTA agreement aims to expand the African market, stimulate industrial development, and enhance the continent's global competitiveness. Despite challenges such as overlapping regional trade agreements, legal harmonisation issues, and varying economic conditions among Member States, the projected outcomes of AfCFTA are promising. Increased intra-African trade, higher foreign direct investment, and significant GDP growth are anticipated advantages. The successful implementation of AfCFTA could transform the economic landscape of Africa, making it a pivotal player in the global economy. Enhanced consumer purchasing power, improved infrastructure, and greater employment opportunities are just a few potential benefits that underscore the transformative power of this agreement. As Africa continues this

⁹¹ Albert 2018 *CUTS INTERNATIONAL* 16.

⁹² PSC Report 2024 <https://issafrica.org/pscreport/psc-insights/afcfta-potentially-costly-at-first-but-promising-great-rewards#:~:text=Previous%20research%20by%20the%20World,extreme%20poverty%20to%2045%20million.>

⁹³ PSC Report 2024 <https://issafrica.org/pscreport/psc-insights/afcfta-potentially-costly-at-first-but-promising-great-rewards#:~:text=Previous%20research%20by%20the%20World,extreme%20poverty%20to%2045%20million.>

⁹⁴ Albert 2018 *CUTS INTERNATIONAL* 17.

path of economic integration, AfCFTA stands as a testament to the continent's commitment to unity and prosperity.

Chapter 3: Complexities of regional trade agreements in Africa

3.1 Introduction

The African continent currently stands at a crucial point in its economic development, with the introduction of the AfCFTA set to play a pivotal role. However, RTAs play the most important role in shaping Africa's trade landscape. This chapter focuses on the intricate web of RTAs in Africa, exploring the diverse trade rules, dispute resolution mechanisms, and their impact on intra-African trade. By examining the policies and outcomes of key RECs, namely SADC, ECOWAS, COMESA, and ECCAS, this chapter sheds light on the complexities of RTAs in Africa and their implications for regional integration and economic growth.

3.2 The African trade landscape

A simple way to describe Africa's trade landscape would be to say that opportunities and challenges characterise it. In a 2016 report, the African Natural Resources Centre recorded that about 30% of the world's global reserves are found in Africa, an addition to proven oil reserves constitute 8% of the world's stock and those of natural gas amount to 7%, and "Minerals account for an average of 70% of total African exports and about 28% of gross domestic product".⁹⁵ This means that the African continent is the richest in natural resources and has a large consumer base. However, intra-African trade remains very low compared to other regions. It was reported during the Intra-African Trade Fair 2023 that intra-African trade only accounted for 16% of Africa's trade.⁹⁶ According to Yaduma and Khan, between 1995-2018, 80% of African trade was done with countries outside the continent.⁹⁷ The continent's intra-continental trade is relatively limited because countries in Africa prefer to contribute to the global import/export market over their continent.⁹⁸ The ECOWAS region, for example, has been extremely worrisome as "it reportedly accounted for 91 per cent of total exports from the REC going to destinations outside West Africa".⁹⁹

⁹⁵ African Natural Resources Center 2016 *African Development Bank* 3.

⁹⁶ The AfCFTA Marketplace 2024 <https://www.intrafricantradefair.com/en>.

⁹⁷ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 292.

⁹⁸ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 292.

⁹⁹ Mude 2020 *AFRICA INSIGHT* 49.

Intra-regional trade is the exchange of goods and services between countries within the same geographic region.¹⁰⁰ These exchanges are usually facilitated by bilateral and multilateral trade agreements, for example the United States-Canada-Mexico agreement. Increased intra-regional trade is important and would benefit Africa immensely by expanding the size of the African market by combining multiple smaller domestic markets. It will increase competitive trade within these markets, which would require producers to lower prices and increase consumer affordability.¹⁰¹ Consumers then have more disposable income to spend on other goods and services, which encourages entrepreneurship and creates more employment opportunities. Lastly, “larger markets spur innovation and enable efficiency gains, thereby achieving economies of scale as firms keep costs down while assuring quality”.¹⁰² There have been a few attempts to secure effective regional integration in Africa, for instance, the United States of Africa, which implied “a single African military force, currency and passport for Africans to move freely around the continent”.¹⁰³

With 15 landlocked countries making up one-third of Africa’s economy and 19 countries with a population of less than five million people, intra-African trade is a matter of urgency for the continent.¹⁰⁴ It would boost these economies by extending access to the economy through trade liberalisation, decreased tariffs and NTBs, and offer more cost effective means to export and import goods. Intra-African trade can play a pivotal role in affording inclusive economic growth of African nations and markets “to diversify economies and accelerate trade to realise more investment in implementing provisions of continental instruments”.¹⁰⁵ With the largest natural resource reserves and a large consumer market, the opportunities for intra-African trade are immense. The African continent would be able to establish leading markets and increase competitiveness on the continent. This can play a crucial role in eradicating poverty on the continent, as

¹⁰⁰ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 279.

¹⁰¹ Fofack 2024 <https://www.brookings.edu/articles/the-future-of-african-trade-in-the-afcfta-era/>

¹⁰² Yaduma and Khan “Intra-regional Trade and African Economic Integration” 279.

¹⁰³ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 279.

¹⁰⁴ Ancharaz and Mbekeani 2011 *African Development Bank 2*.

¹⁰⁵ Edeme 2023 <https://www.un.org/africarenewal/magazine/december-2023/intra-african-trade-provides-opportunity-inclusive-economic-growth#:~:text=AfCFTA%20provides%20an%20opportunity%20for,and%20promoting%20women's%20land%20rights.>

increased market participation would result in more employment opportunities. As such, bilateral and multilateral agreements, such as RTAs, RECs and the AfCFTA, are essential for achieving intra-African trade ambitions.

3.3 Regional trade agreements

The establishment of trade agreements is imperative for regional integration.¹⁰⁶ RTAs are treaties between two or more countries that define trade rules between the signatories.¹⁰⁷ These agreements on trade rules are usually made to facilitate free trade, or at least more favourable trade, between the signatories by decreasing or removing tariffs and other trade barriers. The nature of RTAs is contrary to the WTO Most Favoured Nation principle; however, RTAs are permitted and operate under the rules set in Article XXIV of GATT 1994.¹⁰⁸ There are four types of trade agreements: Preferential trade agreements, FTAs, Customs Unions, and Common Markets.¹⁰⁹ Preferential trade agreements are bilateral or multilateral agreements where members agree to reduce tariffs on goods imported from participating members while imposing higher tariffs on non-member states.¹¹⁰ A FTA is a regional trade bloc where member countries have agreed to eliminate tariffs and NTBs on imports from member countries.¹¹¹ A customs union is essentially a free trade bloc with the addition of Member States charging common tariffs on imports from non-member countries.¹¹² A common market is a customs union that allows for the “free movement of factors of production, such as labour and capital, between member states”.¹¹³

From bilateral agreements to multilateral frameworks, RTAs promote trade liberalisation, facilitate cross-border investment, and enhance cooperation among Member States. Due to far-reaching political and economic differences and interests among nations, RTAs vary significantly in scope, membership, and objectives on the

¹⁰⁶ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

¹⁰⁷ World Bank Group 2018 <https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements>.

¹⁰⁸ Article XXIV of General Agreement on Tariffs and Trade (1994).

¹⁰⁹ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

¹¹⁰ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

¹¹¹ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

¹¹² Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

¹¹³ Yaduma and Khan “Intra-regional Trade and African Economic Integration” 287.

African continent. Therefore, the proliferation of RTAs in Africa has led to a complex web of overlapping agreements, posing challenges for harmonisation and coordination.

The African trade landscape is characterised by multiple RTAs, which exist in varying legal and legislative frameworks, political climates, and economic markets, with varying purposes and objectives. The AU recognises eight RECs in Africa: the Arab Maghreb Union, COMESA, Community of Sahel–Saharan States, EAC, ECCAS, ECOWAS, the Intergovernmental Authority on Development, and SADC.¹¹⁴ RECs were developed to facilitate regional economic integration between members of the individual regions and through the wider AEC.¹¹⁵ The AEC would then be the driving tool for eventual continental integration. However, the vast diversity of African nations means that these RECs and RTAs vary significantly in their trade rules and dispute-resolution mechanisms. Some agreements prioritise tariff reduction and market access, while others focus on NTBs and regulatory harmonisation.

The role of RTAs in Africa has always been to foster unity on the continent after the colonial era. The key strategy for regional integration in Africa became the use of RTAs. RTAs have been essential to “enhancing economic cooperation, conflict resolution and good governance on the continent”.¹¹⁶ However, despite these purposes and objectives, RTAs in Africa have had poor success in facilitating intra-African trade, this is due to “many countries having retained tariffs and non-tariff barriers to protect their domestic industries”.¹¹⁷ The vast differences between African countries have made integration through RECs difficult, as countries consume more than they can produce.¹¹⁸ One of the main issues that prevent effective intra-African trade has been the failure to develop a legal framework that works for all the regions in Africa. According to Ajai, properly implementing intra-African trade to inspire tremendous growth in African economies “will require institutional reform and innovation, particularly legal and legislative”.¹¹⁹ The main hurdle has been struggles to harmonise

¹¹⁴ African Union 2023 <https://au.int/en/organs/recs>.

¹¹⁵ African Union 2023 <https://au.int/en/organs/recs>.

¹¹⁶ Mude 2020 *AFRICA INSIGHT* 42.

¹¹⁷ Ajewumi and Afolabi 2024 *WJARR* 2785.

¹¹⁸ Vhumbunu 2020 *AFRICA INSIGHT* 128.

¹¹⁹ Ajai 2016 *JCLA* 2.

trade rules in their regions and the implementation of effective dispute resolutions. Ajai argues that the lack of legal and legislative reforms is one of the main reasons why, despite seven of the ten fastest growing economies in Africa, intra-African trade is still “estimated at 5% of total African global trade by some accounts”.¹²⁰

3.4 Comparative analysis of four regional economic communities

Despite the term *regional economic community* being used in the Lagos Plan of Action, the Abuja Treaty and the AU Constitutive Act, the term is not defined by either of these legal instruments.¹²¹ In order to establish the AEC, the Abuja Treaty proposed the formation of RECs where there were none¹²², the Abuja Treaty called for RECs to be the drivers of African integration. The Abuja Treaty recognised that and referenced RECs as the building blocks for deeper continental integration.¹²³ The Protocol on Relations Between the African Union and the RECs established a broad and holistic definition of a REC as a “regional grouping of African states organised into a legal entity by treaty with economic and social integration as the main objective”.¹²⁴

The AU recognises eight RECs as building blocks of the AEC and AfCFTA.¹²⁵ The four RECs—SADC, ECOWAS, COMESA, and ECCAS—stand out as essential for comparing regional integration in Africa due to their respective sizes and economic standing. Each has its unique legal and institutional framework, membership policies, dispute resolution mechanisms, and objectives. This section compares these four RECs in terms of successes, challenges, and policies to determine their viability to facilitate intra-African trade.

3.4.1 SADC

SADC, which was formed in 1992 to replace the Southern African Development Coordination Conference,¹²⁶ focuses on promoting industrial development and

¹²⁰ Ajai 2016 *JCLA* 2.

¹²¹ Shumba 2023 *PER / PELJ* 13.

¹²² Article 28, para 2 Treaty Establishing the African Economic Community (1991)

¹²³ Shumba 2023 *PER / PELJ* 13.

¹²⁴ Article 1 of Protocol on Relations Between the African Union and the Regional Economic Communities (2008).

¹²⁵ African Union 2023 <https://au.int/en/organs/recs>.

¹²⁶ Darku and Appau 2015 *The African Finance Journal* 48.

infrastructure investment in Southern Africa. The objectives of the SADC Consolidated Treaty Text (SADC Treaty) are rooted in fulfilling the Abuja Treaty's objectives.¹²⁷ As outlined in Article 5 of the SADC Treaty, the main objectives of SADC are to achieve economic development, peace and security, and growth; to alleviate poverty; to enhance the standard and quality of life of the peoples of Southern Africa; and to support the socially disadvantaged through regional integration.¹²⁸ This while taking account of the LPA, the Abuja Treaty and the Constitutive Act of the African Union.¹²⁹ In order to achieve these objectives, the SADC Treaty seeks to "harmonise political and socio-economic policies and plans of Member States",¹³⁰ while also promoting involvement of people and institutions in the region to take active initiatives to promote cultural, social and economic ties within the region and enhance technological development and coordination amongst Member States.¹³¹ The success of SADC is heavily dependent of the harmonisation and coordination in the Southern African region among Member States. As such, the SADC Treaty places sanctions on any Member that, without good reason, persistently fails to fulfil the obligations of the SADC Treaty,¹³² or Members States that implement policies that undermine the principles and objectives of the Treaty.¹³³

To promote intra-regional trade, Member States signed the SADC Protocol on trade in 1996. It was amended in 2005, and it "legalized the implementation of a free trade area in 2000 to promote intra-regional trade",¹³⁴ with the FTA being achieved in 2008. The purpose was to create a larger regional market, "releasing the potential for trade, economic growth and employment creation".¹³⁵ As a result of the FTA, intra-regional

¹²⁷ Shumba 2023 *PER / PELJ* 19.

¹²⁸ Article 5 of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹²⁹ Preamble of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹³⁰ Article 5A (a) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹³¹ Article 5A (b) – (j) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹³² Article 33, para 1 (a) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹³³ Article 33, para 1 (b) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

¹³⁴ Darku and Appau 2015 *The African Finance Journal* 48.

¹³⁵ SADC 2015 <https://shorturl.at/CD1Za>.

trade in the SADC region has grown from an estimated \$13.2 Billion in 2000 to an estimated \$34 Billion in 2009.¹³⁶ After abolishing 85% of tariffs on goods traded between members in the region in 2008, the SADC region has seen the highest growth in intra-regional trade of all the RECs.¹³⁷ With SADC's average share of intra-regional trade being 15% between 1995 and 2018, only second to the EAC with 19% in the same period.¹³⁸ SADC has continued to encourage cooperation in various sectors by introducing the SADC Programme of Action and taking on several infrastructural programmes to benefit the Member States.¹³⁹ SADC presents itself as an efficient tool for intra-African trade through the framework of the AfCFTA. However, the region only recorded 3% trade with other African regions.¹⁴⁰

However, with visible growth and immense potential in intra-regional trade in the SADC region, there are still challenges of multiple overlapping memberships, overambitious targets, and the inequality of economic development between Member States. Out of the 16 SADC Member States, nine are also members of COMESA.¹⁴¹ This means that nine members of SADC hold multiple concurrent memberships in regional agreements with varying objectives and provisions, which makes it very difficult to harmonise rules and regulations among members. Overlapping memberships undermine the intra-regional trade efforts of SADC by creating inconsistencies in trade blocs and disrupting effective legal harmonisation of trade rules and rules of origin. As such, SADC's efforts and projections for intra-regional trade and the creation of a customs union and single common regional currency are overambitious when the Member States are also fulfilling provisions and objectives of other RECs.¹⁴² According to Mapuva and Mapuva, this is because the rules of origin in the SADC Agreement contain several products that are more restrictive than those of the COMESA.¹⁴³

¹³⁶ SADC 2015 <https://shorturl.at/CD1Za>.

¹³⁷ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 290.

¹³⁸ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 290.

¹³⁹ Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 31.

¹⁴⁰ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 290.

¹⁴¹ ZDA 2024 <https://www.zda.org.zm/regional-arrangements/>.

¹⁴² Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 28.

¹⁴³ Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 29.

The amount of planning and harmonisation has proven insurmountable in the face of overambitious targets and overlapping membership. Despite enactments to harmonise laws in the SADC region, SADC has failed to effectively implement these provisions. As discussed in paragraph 4 below, the legal harmonisation within SADC has been minimal, and Member States have had to rely on bilateral agreements to harmonise trade policies.¹⁴⁴ It is an issue that effectively limits intra-regional trade and will frustrate the process of effecting intra-African trade in terms of the AfCFTA. Another challenge that SADC faces is the difference in economic development between member states. With a contribution to 60% of intra-SADC trade and about 70% of SADC's GDP, South Africa is the largest SADC economy, making it difficult for the country to receive equal treatment with other members.¹⁴⁵ This presents issues, due to varying interests, for the approach to be taken in relation to rules of origin. The issues faced by SADC make intra-regional trade difficult in the region. Therefore, as a building block to AfCFTA and a member of the TFTA, changes are needed to ensure that SADC can be a viable tool for intra-African trade.

3.4.2 ECOWAS

ECOWAS was founded on the 28th of May 1975 and became a trading bloc after the signing of the Treaty of The Economic Community of West African States (the ECOWAS Treaty of 1975).¹⁴⁶ The ECOWAS Treaty of 1975 was later revised in 1993, giving effect to the Revised Treaty of the Economic Community of West African States (the Revised Treaty). The reason for revising the ECOWAS Treaty of 1975 was that the treaty did not include security and peacekeeping provisions.¹⁴⁷ Despite ECOWAS being unique in that it was formed before the LPA and "had an earlier history of cooperation initiated during colonial rule,"¹⁴⁸ the Preamble of the Revised Treaty acknowledges the LPA and the Abuja Treaty, particularly establishing an AEC.¹⁴⁹ The Revised Treaty aligns the objectives of ECOWAS with the Abuja Treaty. According to Shumba, comparing the

¹⁴⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 21.

¹⁴⁵ Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 29.

¹⁴⁶ Darku and Appau 2015 *The African Finance Journal* 47.

¹⁴⁷ Okere 2016 *Ajayi Crowther University Law Journal* 1.

¹⁴⁸ Shumba 2023 *PER / PELJ* 17.

¹⁴⁹ Preamble of the Economic Community of West African States, Revised Treaty (1993).

“objectives of the ECOWAS and the Abuja Treaties reveals that the two are complementary”.¹⁵⁰ As such, with its growth in integration, ECOWAS is an essential pillar of the AfCFTA agenda.¹⁵¹

After the Liberia experience in 1990, the leaders of the West African community agreed to amend the ECOWAS Treaty. Article 4 of the Revised Treaty stipulates ten of the 11 fundamental principles that were adopted and are directly or indirectly related to peace, security, confidence building and peaceful settlement of disputes among Member States.¹⁵² In terms of Article 3 of the Revised Treaty, the aims of the ECOWAS Community are:

The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent.¹⁵³

The objectives of ECOWAS are to promote regional integration and achieve the self-sufficiency of all Member States by creating a large trading bloc through an economic and trading union.¹⁵⁴

ECOWAS later established the West African Economic Community, an FTA that forms an integral part of the ECOWAS as an extension of ECOWAS into a custom unions.¹⁵⁵ The FTA advocated for the introduction of a cooperation tax, a preferential trade import duty on a product-by-product basis, while also reducing tariffs on commodities imported from Member States.¹⁵⁶ ECOWAS’ Trade Liberalization Scheme then extended beyond its initial coverage to industrial products,¹⁵⁷ and had allowed ECOWAS to develop a common and expanded market, which also allows Member States to sell outside their domestic markets. Furthermore, ECOWAS has since replaced the West African Economic Community with the West African Monetary and Economic Union.

¹⁵⁰ Shumba 2023 *PER / PELJ* 17.

¹⁵¹ Shumba 2023 *PER / PELJ* 17.

¹⁵² Okere 2016 *Ajayi Crowther University Law Journal* 1.

¹⁵³ Article 3, para 1 Economic Community of West African States, Revised Treaty (1993).

¹⁵⁴ Darku and Appau 2015 *The African Finance Journal* 47.

¹⁵⁵ Darku and Appau 2015 *The African Finance Journal* 47.

¹⁵⁶ Darku and Appau 2015 *The African Finance Journal* 47.

¹⁵⁷ Darku and Appau 2015 *The African Finance Journal* 48.

ECOWAS introduced the ECOWAS Common External Tariff in 2006.¹⁵⁸ The Common External Tariff imposed:

no duty on essential social goods, a 5 percent duty on goods of primary necessity, raw materials and specific inputs, a 10 percent duty on intermediate goods, a 20 percent duty on final consumption goods and a 35 percent duty on specific goods for economic development.¹⁵⁹

ECOWAS is currently embarking on trade diversification projects to increase intra-regional trade. Between 1995 and 2018, ECOWAS recorded a 9% share in intra-regional trade and only 5% trade with other African regions.¹⁶⁰

Despite making strides in promoting regional integration in West Africa, ECOWAS has struggled with peacekeeping efforts and enforcing punishments and sanctions on infringing members. After a military coup resulted in the President of Niger being overthrown by a military junta, ECOWAS imposed harsh trade and travel sanctions on Niger.¹⁶¹ The effects of these sanctions were mostly felt by Niger civilians, as most of the country's trade partners closed their borders to Niger, and humanitarian aid and basic needs, such as electricity, could not be secured.¹⁶² The sanctions imposed on Niger were extremely harsh compared to Mali in 2021, which had also been subjected to a military coup. As a result, the Niger junta refused to cooperate with ECOWAS demands, which was to restore constitutional rule and release the detained Niger President.¹⁶³ This led to Niger forming a partnership with Mali and Burkina Faso, both of which had been suspended from ECOWAS, and together they announced their permanent withdrawal from ECOWAS in January 2024.¹⁶⁴ ECOWAS then responded by lifting most of the sanctions imposed on these three nations and inviting them to continue as members of ECOWAS. Not only does this situation reflect that ECOWAS

¹⁵⁸ Darku and Appau 2015 *The African Finance Journal* 49.

¹⁵⁹ Darku and Appau 2015 *The African Finance Journal* 49.

¹⁶⁰ Yaduma and Khan "Intra-regional Trade and African Economic Integration" 290.

¹⁶¹ Aljazeera 2024 <https://www.aljazeera.com/news/2024/2/24/ecowas-lifts-sanctions-on-niger-amid-tensions-in-west-africa-bloc#:~:text=Reporting%20from%20the%20summit%20in,financial%20institutions%20in%20the%20region.>

¹⁶² Obasi 2023 *International Crisis Group* 2.

¹⁶³ Obasi 2023 *International Crisis Group* 2.

¹⁶⁴ AjJazeera 2024 <https://www.aljazeera.com/news/2024/1/28/niger-mali-burkina-faso-announce-withdrawal-from-ecowas.>

exaggerated its sanctions on Niger far beyond what was necessary, but there was also a lack of enforcement of its own rules and failure of its dispute resolution mechanisms.

Achieving effective intra-regional trade requires immense collaboration from all members. The constant political coups, resultant sanctions, and the unequal economic standing of ECOWAS members make intra-regional trade within the group difficult, and the REC's contribution to intra-African trade seems bleak. The constant conflicts in the ECOWAS region will eventually force AfCFTA to step in, which will most likely reflect as undermining the dispute resolution mechanisms of ECOWAS.¹⁶⁵ The AfCFTA Dispute Settlement Body (DSB) would have to decide on the conflicts and impose sanctions on offending Member States. These decisions and sanctions would be set on matters ECOWAS has already decided on, a consistent challenge with overlapping membership.

The ECOWAS community is home to the most impoverished nations in the world, according to International Monetary Fund's statistics.¹⁶⁶ The vast differences in economic sizes between countries such as Nigeria and Niger have resulted in a monopolised market system, as there is no competition between these nations.¹⁶⁷ An open market is vital to creating competition and intra-regional trade between Member States. ECOWAS's slow progress makes it difficult to imagine their contribution to intra-African trade being significant.

3.4.3 COMESA

Formed in 1994, COMESA was created as a replacement for the former Preferential Trade Area of 1981.¹⁶⁸ COMESA comprises 21 Member States that came together to "promote regional integration through trade and the development of natural and human resources for the mutual benefit of all people in the region".¹⁶⁹ COMESA covers two-thirds of the geographical area, with an area of 12 million km² of the African Continent

¹⁶⁵ Mude 2020 *AFRICA INSIGHT* 45.

¹⁶⁶ Tadesse 2020 *International Affairs and Global Strategy* 18.

¹⁶⁷ Tadesse 2020 *International Affairs and Global Strategy* 19.

¹⁶⁸ Darku and Appau 2015 *The African Finance Journal* 48.

¹⁶⁹ COMESA 2018 *Corporate Communication* 10.

and almost 45% of its population, making it one of the largest RECs in Africa.¹⁷⁰ With membership open to Eastern and Southern African countries,¹⁷¹ COMESA has a

population of 640 million, a GDP of 1.0 trillion U.S Dollars and a global export/import trade in goods worth 383 billion U.S Dollars, COMESA forms a major marketplace for both internal and external trading.¹⁷²

COMESA was established in line with the Abuja Treaty¹⁷³ and includes countries in four African regions. It is a strategic REC for AfCFTA.¹⁷⁴ The main objectives of COMESA, as read in Article 3 of the Treaty Establishing the Common Market of Eastern and Southern Africa (COMESA Treaty), is summarily to attain sustainable economic and social progress in all Member States through increased cooperation and integration in all fields of development particularly in trade, customs and monetary affairs, transport, communication and information technology, industry and energy, gender, agriculture, environment and natural resources.¹⁷⁵ The main purpose of COMESA is to foster cooperation among Member States, achieve development for all Member States, and attract foreign and cross-border investment. This is why the COMESA Treaty specifies the strict undertakings for all Member States in Article 4. For example, regarding trade liberalisation and customs union co-operation, each Member state must:

abolish all NTBs to trade among themselves; establish a common external tariff; and co-operate in customs procedures and activities.¹⁷⁶

This rule prohibits Member States from reducing tariffs for non-member countries through other bilateral/multilateral agreements. Member States, as members of the COMESA Customs Union, can only maintain common external tariffs. The Authority of the COMESA¹⁷⁷ may impose sanctions on any Member State that fails to comply with

¹⁷⁰ Shumba 2023 *PER / PELJ* 15.

¹⁷¹ Article 1, para 2 & para 3 of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁷² COMESA 2024 <https://www.comesa.int/what-is-comesa/>.

¹⁷³ Preamble of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁷⁴ Shumba 2023 *PER / PELJ* 15.

¹⁷⁵ Article 3 (a) to (f) of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁷⁶ Article 4, para 1 (a) of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁷⁷ Article 7 of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

the objectives and specific undertakings of The COMESA Treaty.¹⁷⁸ These sanctions include suspension from COMESA, financial penalties, which must be settled by not more than two years after judgment, and expulsion from COMESA.¹⁷⁹

According to COMESA, after establishing a FTA in 2000, intra-COMESA trade has grown at an average of 7%, with higher increases reflected between intra-Free Trade Area States.¹⁸⁰ COMESA also, in 2018, successfully resolved 98% of NTBs reported since 2008.¹⁸¹ From 1995–2018 it recorded an average share of intra-regional trade at 8% and 5% with other African regions.¹⁸² COMESA also established the COMESA Monetary Harmonisation Programme, which aims at establishing a “common monetary area to facilitate economic integration and sustained economic development”.¹⁸³ It has been making strides and is one of Africa's most successful trade blocs. However, the bloc’s viability for intra-African trade remains doubtful. The trade bloc has very restricting provisions and sanctions on trading with non-members, which explains the low level of trade with other African regions. Therefore, despite these outstanding achievements, COMESA is still leaving doubt on how effective it will be in facilitating intra-African trade.

Firstly, the most prevalent challenge that COMESA faces is overlapping membership. Several COMESA members are also members of other RECS, such as Zambia and Namibia, which are both members of COMESA and SADC. The conflicting rules of origin and objectives, coupled with the varying decisions from the COMESA court and SADC Tribunal on the same issue regarding the same parties, makes it difficult to establish binding precedence and applicable rules, which in turn disrupts any possibility of effective intra-regional trade.¹⁸⁴ Secondly, COMESA faces challenges regarding the imbalances of economic, political and developmental states between its Member States. An example of this would be how COMESA has failed to achieve its desired

¹⁷⁸ Article 171, para 1 of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁷⁹ Article 171, para 3 (a) to (d) of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

¹⁸⁰ COMESA 2024 <https://www.comesa.int/our-success-stories/>.

¹⁸¹ COMESA 2024 <https://www.comesa.int/our-success-stories/>.

¹⁸² Yaduma and Khan, page 12.

¹⁸³ COMESA 2024 <https://www.comesa.int/our-success-stories/>.

¹⁸⁴ Tadesse 2020 *International Affairs and Global Strategy* 19.

level of intra-COMESA trade due to poor infrastructure, unstable power and water supply, and poor transport network of some of its Member States.¹⁸⁵ For this reason, more developed Member States are benefitting more from investments and continue growing faster, which only exacerbates the divide between the developed and developing members in the context of COMESA.¹⁸⁶ The lack of equality ultimately means much more hesitation to invest in the developing domestic economies, contributing to unequal growth among Member States and negatively affecting intra-COMESA trade.

3.4.4 ECCAS

With the purpose of forming a wider economic of Central African States, the leaders of the Central African Customs Union agreed at a summit in December 1981 to form ECCAS. It was signed in October 1983.¹⁸⁷ ECCAS was formed not long after the LPA, and the Preamble of the Treaty Establishing the Economic Community of Central African States (ECCAS Treaty) recalls the LPA and the Final Act of Lagos, in particular their measure towards the development of Africa and the progressive establishment of the African Common Market as a prelude to the AEC.¹⁸⁸ ECCAS is, therefore, in alignment with the Abuja Treaty. The aim of ECCAS, in terms of Article 4 (1) of the ECCAS Treaty, is to:

promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity, particularly in the fields of industry, transport and communications, energy agriculture, natural resources, trade, customs, monetary and financial matters, human resources, tourism, education, further training, culture, science and technology and the movement of persons, in order to achieve collective self-reliance, raise the standard of living of its peoples, increase and maintain economic stability, foster close and peaceful relations between Member States and contribute to the progress and development of the African continent.¹⁸⁹

ECCAS consists of 11 members, all of which have undertaken to direct their actions with the ambition and prospect of creating favourable conditions for the development

¹⁸⁵ Zeidy 2021 *COMESA* 7.

¹⁸⁶ Tadesse 2020 *International Affairs and Global Strategy* 19.

¹⁸⁷ African Union 2024 <https://au.int/en/recs/eccas>.

¹⁸⁸ Preamble of Treaty Establishing the Economic Community of Central African States (1983).

¹⁸⁹ Article 4, para 1 of Treaty Establishing the Economic Community of Central African States (1983).

of the Central African Community and the achievement of its aims and the harmonisation of their policies for achieving such aims through community institutions.¹⁹⁰

Despite establishing vital institutions, such as the Council of Peace and Security in Central Africa, ECCAS has struggled to make significant progress due to financial difficulties and socio-political disturbances in Central Africa.¹⁹¹ This issue continues to plague ECCAS today, hindering the REC's progress toward achieving intra-ECCAS trade. When an FTA was implemented in 2004,

a discount of 100% was to be extended to traditional craft and crude products; Mining and manufactured goods were to receive a reduction of custom duties of 50 percent in 2004, 70 percent in 2005, 90 percent in 2006 and 100 percent in 2007.¹⁹²

However, none of these were implemented by ECCAS; instead the REC has focused most of its efforts, resources, and time, on maintaining peace and stability in the individual countries as opposed to promoting economic integration.¹⁹³ Failure to effectively implement intra-regional trade among ECCAS Member States negatively affects the community as tariffs remain high and economic development remains low despite the existence of ECCAS. Therefore, ECCAS, by failing to achieve intra-regional trade, cannot be viewed as a vehicle for intra-African trade.

3.5 Conclusion

The intricate web of RTAs in Africa, including the SADC, ECOWAS, COMESA, and the ECCAS, demonstrates the continent's diverse and complex trade landscape. While each REC has made significant strides towards regional integration and economic cooperation, numerous challenges remain, such as overlapping memberships, legal and regulatory inconsistencies, and significant economic disparities among Member States. The conflicting trade rules and policies and duplicity of RTA and REC membership lead to inconsistencies regarding rules of origin, tariffs and NTBs, dispute resolution mechanisms, and intellectual property and investment laws. These obstacles

¹⁹⁰ Article 5, para 1 and para 2 of Treaty Establishing the Economic Community of Central African States (1983).

¹⁹¹ Darku and Appau 2015 *The African Finance Journal* 49.

¹⁹² Darku and Appau 2015 *The African Finance Journal* 49.

¹⁹³ Darku and Appau 2015 *The African Finance Journal* 49.

hinder the full potential of intra-African trade, which remains considerably lower than trade with external partners. To successfully cater for intra-African trade, RECs need to enforce their legal harmonisation policies with greater effect. For RTAs to realise their full potential within this new continental framework, comprehensive legal and institutional reforms and innovative approaches to dispute resolution and legal harmonisation will be essential. As Africa stands at this critical juncture, the successful implementation of AfCFTA, supported by effective RTAs, could pave the way for a more integrated, prosperous, and economically resilient continent.

Chapter 4: Conflicts and implementation challenges

4.1 Introduction

Implementing AfCFTA could lead to consolidation and conflicts with existing RTAs. While AfCFTA aims to streamline and harmonise trade rules across the continent, overlapping agreements can create complexities. For instance, overlapping tariff reductions or inconsistent rules of origin may result in trade frictions. Decision-makers must address these issues to ensure coherent and conflict-free trade policies. There is a significant need to analyse these trade conflicts. This chapter analyses the most significant challenges related to AfCFTA's implementation and how those challenges will affect existing RTAs and RECs. The two most prevalent challenges analysed in this chapter are overlapping memberships and issues with the harmonisation of trade.

4.2 Overlapping memberships

The legal compatibility of AfCFTA and existing RTAs can present challenges due to overlapping provisions and conflicting regulatory frameworks. AfCFTA aims to create a unified market by reducing tariffs and NTBs across Member States, while RTAs often have specific terms tailored to the participating countries' needs and interests. This can lead to inconsistencies in trade rules and obligations, potentially causing friction between AfCFTA's broad, inclusive framework and the more specialised, sometimes restrictive terms of RTAs.

As mentioned above, the building blocks of the AfCFTA are the eight AU recognised RECs,¹⁹⁴ which are multilateral agreements between countries in certain regions. However, multiple bilateral and multilateral agreements exist between countries in these regions and abroad. This infers that most countries in Africa hold membership in multiple RECs and are parties to multiple other trade agreements with nations from within, but mostly outside of Africa, such as BRICS and the WTO. One of the major challenges to regional integration in Africa has been overlapping memberships.¹⁹⁵ The successful implementation of AfCFTA is in jeopardy due to the multiple overlapping and often conflicting arrangements between countries in the same region.¹⁹⁶ The

¹⁹⁴ Article 5 (a) of the Agreement Establishing the African Continental Free Trade Area (2019).

¹⁹⁵ Garba and Alexander 2023 *AJPAS* 719.

¹⁹⁶ Garba and Alexander 2023 *AJPAS* 719.

challenge of overlapping memberships often leads to drawn out and strained negotiations as there are more conflicting interests. Also, overlapping memberships weaken intra-regional trade efforts by obstructing policy coordination of regional trade blocs.¹⁹⁷ According to Mapuva, a practical example of the problem created by overlapping memberships is as follows:

Zambia which has been a member of both the SADC and the COMESA. Under the SADC Trade Protocol Zambia had agreed to dismantle tariffs for SADC members to zero. Consequently, since South Africa is a member of SADC, Zambia had agreed to reduce tariffs to South Africa to zero. On the other hand, Zambia being a member of COMESA Customs Union, had agreed to a common external tariff regime for countries that are not members of COMESA. Since South Africa is not a member of COMESA, this did not apply to South Africa. This would translate into the fact that Zambia had agreed to reduce tariffs for South Africa (under the SADC conditions) but to maintain tariffs for South Africa (under the COMESA provisions). This scenario leaves Zambia in a quagmire.¹⁹⁸

In this scenario, Zambia is unable to fully play its role, either as a member of SADC or COMESA. This puts Zambia at risk of sanctions from both RECs.¹⁹⁹ The different RECs have different rules on exporting the same product to different regions; therefore, compliance will be duplicated by overlapping membership.²⁰⁰

Due to the AfCFTA being member driven, and will preserve the *aquis* of RECs, this implies that the implementation of AfCFTA will face challenges with overlapping membership.²⁰¹ A common side effect of overlapping memberships in the African trade landscape has been the clashing of inconsistent trade policies due to RTAs and RECs that were created on contrasting interests. The historical significance of RECs is that they were created from a former colonial grouping in that former Anglophone colonies formed their own RECs, and so did former Francophone colonies. This means that countries from different RECs in Africa coming together results in “competing colonial interests”.²⁰² The AfCFTA Agreement aims to resolve the challenges of multiple and overlapping membership.²⁰³ As such, the AfCFTA implementation poses, and will face, significant challenges due to the varying interests amongst African states. This chapter

¹⁹⁷ Fanta *Overlapping Memberships and Its Impact on Regional Trade* 16.

¹⁹⁸ Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 27.

¹⁹⁹ Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 27.

²⁰⁰ Tralac 2021 *How will the AfCFTA co-exist with other African Trade Arrangements?*

²⁰¹ Tralac 2021 *How will the AfCFTA co-exist with other African Trade Arrangements?*

²⁰² Garba and Alexander 2023 *AJPAS* 722.

²⁰³ Article 3 (h) of the Agreement Establishing the African Continental Free Trade Area (2019).

analyses the areas where overlapping memberships may pose a significant challenge to existing RTAs in Africa.

4.2.1 Dispute resolution

One of the most prominent challenges that may result from overlapping membership is dispute resolution. Article 20 of the AfCFTA Agreement establishes a Dispute Resolution Mechanism that “shall apply to the settlement of disputes arising between State Parties”. It is administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes (PRPSD), which has established the DSB. The PRPSD establishes the DSB to adjudicate disputes between Member States after failure to secure amicable resolution during consultations, which form a Panel that will make recommendations or rulings binding on the parties to the dispute.²⁰⁴ Rulings that the Panel makes may be appealed to the Appellate Body, which the DSB also establishes to hear appeals from the Dispute Settlement Panel and make final, binding decisions.²⁰⁵

One of the most obvious challenges that can be observed is that the DSB leaves little room for non-state parties to bring matters to the DSB. Article 7 of the PRPSD makes provision for how State Parties may refer a dispute to the DSB for consultation,²⁰⁶ whereas Article 8 also refers to State Parties in a dispute referring a dispute for voluntary good offices, conciliation, or mediation.²⁰⁷ What becomes apparent is that non-state actors may not refer disputes to the DSB; for example, businesses and other institutions may not refer disputes with governments regarding NTBs to the DSB.²⁰⁸ According to Ajok, “The exclusion of these actors limits their ability to address trade-related grievances or concerns”.²⁰⁹ This is a genuine cause for concern, as regional integration primarily concerns businesses and other non-state actors by enhancing their interaction and cooperation with each other across borders and creating

²⁰⁴ Article 6 (2) to (5) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²⁰⁵ Article 20 of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²⁰⁶ Article 7 of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²⁰⁷ Article 8 of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²⁰⁸ Milej 2023 *SSRN Electronic Journal* 1.

²⁰⁹ Ojok 2023 <https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis/>

transborder networks.²¹⁰ As such, RTAs are tasked with fostering these interactions of non-state actors within the contracting nations. Therefore, being unable to bring disputes to the DSB robs these non-state actors of effective dispute resolution mechanisms and brings into question the legitimacy of the RTA.

The dispute settlement mechanism of the AfCFTA Agreement will most certainly be used as a tool to foster peace and security in Africa through trade. Article 4(1) of the PRSPSD embodies this by establishing the AfCFTA's dispute settlement mechanism as "a central element in providing security and predictability to the regional trading system".²¹¹ The dispute settlement mechanism preserves the rights and obligations of State Parties under the AfCFTA Agreement.²¹² Though the AfCFTA Agreement does have the potential to defuse tensions within Africa's regional trading system, which will, in turn, boost intra-African trade, the Dispute Resolution Mechanism poses a threat of undermining other dispute resolution mechanisms used by RTAs and RECs. To elaborate further, The AfCFTA Agreement is binding on all State Parties and has overreaching authority on matters agreed within the agreement. The AfCFTA Agreement also prevails over any regional agreement in the event of an inconsistency or conflict to the extent of that specific inconsistency.²¹³ Therefore, theoretically, any State Party may refer a decision made by a DSB of an RTA or REC that was supposed to be binding on disputing parties to the AfCFTA DSB, which may make its own decision and set aside the previously made ruling if it is inconsistent with the AfCFTA Agreement. Also, a dispute resolution mechanism by a REC or RTA that contains provisions that do not align with the AfCFTA PRSPSD, in that it is inconsistent with the AfCFTA Agreement, would face the possibility of being invalidated due to Article 19(1) and the AfCFTA Agreement prevails.²¹⁴

The legal effects of this would undermine RECs and RTAs' dispute resolution mechanisms and the effectiveness of their decisions. The AfCFTA's DSB holds authority and jurisdiction over all disputes between State Parties and can potentially make

²¹⁰ Milej 2023 *SSRN Electronic Journal* 6.

²¹¹ Article 4(1) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²¹² Article 4(1) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

²¹³ Article 19(1) of the Agreement Establishing the African Continental Free Trade Area (2019).

²¹⁴ Dispute Settlement under the African Continental Free Trade Area 11.

decisions made by RECs useless. The lack of uniformity between African countries almost guarantees that several RTAs may conflict with the dispute resolution mechanism of the AfCFTA, which will render those agreements inconsistent with the AfCFTA Agreement and, therefore, nullify its decisions.²¹⁵ A good example is the conflicts and sanctions that have plagued ECOWAS Member States, which ECOWAS has not effectively dealt with. ECOWAS is a building block of AfCFTA; however, it is at risk of being undermined by the AfCFTA's DSB because of the trade bloc's failure to maintain peace and effectively carry out sanctions, as Article 19 of the AfCFTA Agreement provide that where inconsistencies appear the AfCFTA will prevail.²¹⁶ The current state of how disputes are being handled within ECOWAS, with the rogue nations of ECOWAS determined to break out into the Alliance of the Sahel,²¹⁷ which will negatively affect ECOWAS and "peace" in the region, AfCFTA will be expected to step in and make effective and binding decisions to resolve the current dispute. This is because the AfCFTA PRPSD is modelled after the WTO DSU, serving as a "central element to provide security, predictability, certainty, as well as the rule of law in the within the African continent".²¹⁸ This overreaching jurisdiction will likely bring into question the legitimacy of the ECOWAS Dispute Resolution Mechanism and its jurisdiction. This may be troubling to AfCFTA as well, as the demise of the WTO's Appellate Body saw many Members States relying on RTAs for dispute resolution.²¹⁹

4.2.2 Rules of origin

Rules of origin are a set of laws and regulations applicable to the country from which goods originate.²²⁰ These laws set criteria for what is needed to determine the nation from which the goods originate. The source of imports is used to determine the duties and restrictions on imports, which is why rules of origin are extremely important. Rules of origin can be divided into two categories: non-preferential trade rules of origin and

²¹⁵ Dispute Settlement under the African Continental Free Trade Area 12

²¹⁶ Oloyede 2024 *SSRN* 12

²¹⁷ Alliance Sahel 2024 <https://www.alliance-sahel.org/en/sahel-alliance/>

²¹⁸ Oloyede 2024 *SSRN* 8

²¹⁹ Howse 2023 <https://www.iisd.org/articles/policy-analysis/wto-dispute-settlement-without-appellate-body>

²²⁰ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 365.

preferential trade rules of origin.²²¹ Non-preferential trade rules of origin simply refer to duties and restrictions on “goods traded between two countries who are not mutually connected by a Preferential trade agreement”.²²² However, non-preferential trade rules of origin also apply to the goods being traded that are not covered by the existing FTA.²²³ Preferential trade rules of origin are the rules of trade between countries mutually connected by a preferential trade agreement.²²⁴ The FTA sets criteria for the goods to determine whether they qualify for duties to be “levied on preferential terms under the agreement before they are imported”.²²⁵ The importance of rules of origin cannot be understated, which is why they are negotiated separately from the enabling agreement and then annexed thereto or put in effect as a Protocol of the AfCFTA Agreement.²²⁶

Taking into consideration the objectives of AfCFTA, rules of origin are bound to play a vital role in its successful implementation. However, AfCFTA is the largest FTA in the world. Therefore, AfCFTA hosts a myriad of varying interests. For example, according to Chitimira, developing countries and less developed countries in Africa will vary in their preferred interests on rules of origin; developed countries will prefer stricter rules of origin while developing countries will prefer a more flexible approach.²²⁷ These varying interests and approaches will likely result in trade deflection, which developing countries are wary of when taking a relaxed approach.²²⁸ Trade Deflection is a “redirection of trade flows from third countries via the lower external tariff in a Preferential Trade Agreement”.²²⁹

The current trade regime in Africa is characterised by an abundance of RTAs and RECs, the presence of which best represents the interests of each region in Africa. As established above, these RECs have legal instruments that have a binding effect on members. The differing legal positions and interests that each REC takes on Rules of

²²¹ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²² Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²³ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²⁴ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²⁵ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²⁶ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 366.

²²⁷ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 367.

²²⁸ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 368.

²²⁹ European Parliament *Customs unions and FTAs Debate with respect to EU neighbours 2*.

Origin create a challenge for the harmonisation of policies through the AfCFTA. A great example is COMESA, which contains provisions that establish preferential trade and tariff reduction between members. As stated in Article 48 of the COMESA Treaty, “goods shall be accepted as eligible for Common Market tariff treatment if they originate in the Member States”.²³⁰ However, Article 47 of the COMESA Treaty prescribes the establishment of a common external tariff for goods imported from non-members into Member States.²³¹ This creates a conundrum for members with overlapping memberships, as RECs such as SADC are also dismantling tariffs to zero percent for goods originating from a member state.²³²

AfCFTA Rules of Origin negotiations are already becoming a hurdle for the FTA. Depending on the interests of each member, whether the AfCFTA Rules of Origin are too strict or too relaxed, traders will seek other avenues of trade, such as relying on the preferential trade policies entrenched in their respective RECs. On a national level, countries such as South Africa and Nigeria are more interested in stricter rules of origin, as they are the two biggest economies.²³³ Smaller countries prefer a more relaxed approach to rules of origin.²³⁴ This is also the position that we expect would be taken by the different RECs. SADC would aspire to a stricter approach to rules of origin than those sought by ECOWAS or ECCAS. As such, the inconsistency between RECs and AfCFTA’s Rules of Origin may result in countries preferring to trade within their respective RECs, which are more favourable to their needs, ultimately causing trade deflection and limiting intra-African trade.²³⁵ Rules of origin are pivotal for securing intra-African Trade and other AfCFTA objectives. However, the vast differences in continental aspirations and national and regional interests are already clashing and are the reason for the delay in the completion of AfCFTA rules of origin negotiations.²³⁶

4.2.3 Most Favoured Nation Treatment

²³⁰ Article 48(1) of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

²³¹ Article 47 of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

²³² Mapuva and Muyengwa-Mapuva 2014 *LAW, DEMOCRACY & DEVELOPMENT* 27.

²³³ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 368.

²³⁴ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 368.

²³⁵ Bisong 2020 <https://shorturl.at/crdgH>

²³⁶ Tayo 2023 <https://afripoli.org/the-road-to-africas-single-market-progress-so-far-and-challenges-for-the-future>

The main purpose of the RTAs is to facilitate preferential trade between members. However, the example above, by Mapuva, illustrates how overlapping memberships make it difficult to give effect to preferential rules of origin, which frustrates intra-regional trade. The AfCFTA Agreement contains policies and regulations that aim to address overlapping membership, such as Article 5(g), which prescribes that the AfCFTA Agreement shall be governed by principles of the Most Favoured Nation (MFN) Treatment.²³⁷ However, the MFN clauses also pose a significant legal threat to RTAs in terms of competition. Article 4 of the International Law Commission Draft Articles on Most Favoured Nation Clause (Draft Articles) defines MFN clauses as “a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations”.²³⁸ In short, an MFN clause obliges State Parties to an agreement to extend the same preferential treatment they accord third party states to other members of the AfCFTA Agreement.

Article 18(1) of the AfCFTA Agreement gives effect to the MFN treatment principle by prescribing that members “accord each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties”.²³⁹ Article 18(2) further provides that State Parties must afford other State Parties the opportunity to negotiate preferences that are extended to third parties prior to the AfCFTA Agreement’s entry into force.²⁴⁰ The Protocol on Trade in Goods further establishes that this Protocol will not prevent State Parties from entering into agreements with third parties, provided that said agreement does not impede or frustrate the purposes of this protocol,²⁴¹ and “that any advantage, concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis”.²⁴² The MFN principle of the AfCFTA Agreement is unique for our time in that the principle is conditional on the preferences being on a reciprocal basis.²⁴³

²³⁷ Article 5(g) of the Agreement Establishing the African Continental Free Trade Area (2019).

²³⁸ Article 4 International Law Commission Draft Articles on Most Favoured Nation Clause, 1978

²³⁹ Article 18 (1) of the Agreement Establishing the African Continental Free Trade Area (2019), read with Article 4(1) of AfCFTA Protocol on Trade in Goods (2019).

²⁴⁰ Article 18 (2) of the Agreement Establishing the African Continental Free Trade Area (2019).

²⁴¹ Article 4(2) of AfCFTA Protocol on Trade in Goods (2019).

²⁴² Article 4(2) of AfCFTA Protocol on Trade in Goods (2019).

²⁴³ Tsorme and Amoah 2024 *World Trade Review* 94.

The issue that may develop because of the MFN clause will directly hit competition. Member States may be less likely to negotiate and establish new RTAs. This is because cost-cutting measures negotiated within an RTA are raised on the seller when extended to parties outside of the RTAs for the same product. Therefore, the RTA becomes a liability to the seller.²⁴⁴ This will likely deter Member States of the AfCFTA from negotiating new RTAs, as Article 18 of the AfCFTA Agreement, read with Article 4 of the Protocol of Trade in Goods, binds the members to extend the preferences of new RTAs to other Member States of the AfCFTA. This, however, is a “necessary compromise”, as the provisions of the AfCFTA MFN clauses are created to promote non-discrimination.²⁴⁵ The AfCFTA MFN clauses are conditional, as they must be on a reciprocal basis, which protects both parties from discrimination through a non-automatic MFN clause.²⁴⁶ Also, Article 4(4) of the Protocol of Trade in Goods, read with Article 18(3) of the AfCFTA Agreement, establishes members of pre-existing RTAs need only extend an opportunity to negotiate preferences of the agreement to other AfCFTA Members, on a reciprocal basis.²⁴⁷ The MFN clause of the AfCFTA Agreement is not an ordinary MFN clause for modern times.²⁴⁸ However, the conditional nature of the MFN clause will make it less likely to derail less developed countries from establishing new RTAs.²⁴⁹

4.3 Legal harmonisation

Most African countries are members of multiple bilateral and multilateral trade agreements on the continent and abroad, which has resulted in a trade regime categorised by various regional FTAs and customs unions.²⁵⁰ The main objectives of most of these arrangements are to promote trade and boost economic integration in Africa. However, to effectively promote these objectives, “there is also a need to tackle trade impediments, including the problem of diversity of laws.”²⁵¹ One of the key

²⁴⁴ Baker and Chevalier 2013 *American University Washington College of Law* 23.

²⁴⁵ Tsorme and Amoah 2024 *World Trade Review* 105.

²⁴⁶ Tsorme and Amoah 2024 *World Trade Review* 105.

²⁴⁷ Article 4(4) of AfCFTA Protocol on Trade in Goods (2019), read with, Article 18(3) Agreement Establishing the African Continental Free Trade Area (2019).

²⁴⁸ Tsorme and Amoah 2024 *World Trade Review* 93.

²⁴⁹ Tsorme and Amoah 2024 *World Trade Review* 105.

²⁵⁰ Shumba 2015 *Law Democracy & Development* 127.

²⁵¹ Shumba 2015 *Law Democracy & Development* 127.

developments in forming a REC is the harmonisation of multiple domestic trade laws. Despite legal harmonisation not having an official definition, the term 'harmonisation' can be defined as the alignment of "different legal systems, laws or rules, principles, policies, standard practices, or regulations, which institutions, governments, or States freely agree to make identical".²⁵² Within the EU, harmonisation of law refers to "creating common standards across the internal market to achieve uniformity within member states".²⁵³ The main purpose of legal harmonisation is to synchronise diverse laws and structures by eliminating dissimilarities and forming minimum standards.²⁵⁴

With the pressures of globalisation, the need to harmonise laws is as prevalent in Africa as in the rest of the world.²⁵⁵ Rule of law, which incorporates a strong and impartial judicial system capable of enforcing contracts and agreements, emerged as the second most listed potential solution for the issues arising from the business environment in Africa.²⁵⁶ Efforts for legal harmonisation in Africa date back to 1963,²⁵⁷ as Article II (2) of the OAU Charter obliged members to "co-ordinate and harmonise their general policies" in many fields, such as economic development.²⁵⁸ This focus on economic integration was instrumental to, and entrenched in, the signing and ratification of the Abuja Treaty.²⁵⁹ The AU was established in 2002, with its main objective being "the co-ordination and harmonisation of the policies of existing and future RECs".²⁶⁰ However, according to Achancho "currently, there is no economic integration area in the AU where harmonisation has been attained".²⁶¹ The low levels of legal harmonisation within RECs have mostly been due to Member States failing to effectively implement the uniform commercial laws and most RECs legal harmonisation processes falling short. The COMESA Treaty is a prime example, as despite the Treaty entrenching processes for legal harmonisation, there is still no set of uniform

²⁵² Achancho 2023 *Comparative and International Law Journal of Southern Africa* 4.

²⁵³ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 4.

²⁵⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 5.

²⁵⁵ Shumba 2015 *Law Democracy & Development* 128

²⁵⁶ Ajai 2016 *JCLA* 7.

²⁵⁷ Shumba 2015 *Law Democracy & Development* 128

²⁵⁸ Article II (2) of the OAU Charter 1963.

²⁵⁹ Shumba 2015 *Law Democracy & Development* 128.

²⁶⁰ Shumba 2015 *Law Democracy & Development* 129.

²⁶¹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

commercial laws for Member States to implement domestically.²⁶² Also, due to the differences between these RECs, the attempts at harmonisation have revealed shortcomings within these RECs when they have attempted to create agreements between RECs, such as the TFTA Agreement. As such, attempts between SADC and COMESA to harmonise trade policies have exposed SADC's shortcomings.²⁶³

For AfCFTA to successfully facilitate intra-African trade and develop the African continent's economic markets, legal harmonisation is of vital importance. The vehicles created by the Abuja Treaty and the Constitutive Act of the AU to effect legal harmonisation of trade policies play a vital role in this regard. The level of integration that is desired by the AfCFTA will effectively determine the scope of harmonisation.²⁶⁴ However, the harmonisation of laws among sovereign nations is often troublesome, as these nations often see harmonisation as surrendering their state sovereignty.²⁶⁵ The idea is for the nations within the regional integration arrangement to work collectively and not make unilateral decisions, ultimately sacrificing their sovereign policy space.²⁶⁶ The failure of RECs to effectively harmonise trade laws within their trade blocs now means that the AfCFTA faces the challenge of legal harmonisation amongst 54 Member, as it has to go beyond the eight RECs. The legislators who drafted the AfCFTA Agreement also seem to be aware of this conundrum, as Article 4 of the AfCFTA Agreement stipulates that "State Parties shall cooperate on investment, intellectual property rights and competition policy".²⁶⁷ However, members of AfCFTA cannot be expected to effectively fulfil the levels of envisioned intra-African trade through mere cooperation; there needs to be a harmonisation of laws.²⁶⁸

African countries operate on varying legal frameworks, from common law to civil law to mixed versions such as the South African Roman-Dutch law.²⁶⁹ Failure to effectively harmonise trade laws within a supranational organisation, such as the EU, would be

²⁶² Achancho 2023 *Comparative and International Law Journal of Southern Africa* 14.

²⁶³ Shumba 2015 *Law Democracy & Development* 129.

²⁶⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

²⁶⁵ Erasmus 2022 <https://www.tralac.org/blog/article/15620-to-cooperate-or-to-harmonise.html>

²⁶⁶ Erasmus 2022 <https://www.tralac.org/blog/article/15620-to-cooperate-or-to-harmonise.html>

²⁶⁷ Article 4 of the Agreement Establishing the African Continental Free Trade Area (2019).

²⁶⁸ Erasmus 2022 <https://www.tralac.org/blog/article/15620-to-cooperate-or-to-harmonise.html>

²⁶⁹ Ajai 2016 *JCLA* 8.

detrimental to achieving its objectives. Not binding Member States to a set of laws that effectively align trade policies amongst the members would essentially make the arrangement soft law. Member states would make unilateral decisions, such as implementing cross-border NTBs, that could frustrate the progression of the arrangement. According to Ajai,

it is not the lack of the right laws and protocols that hinders intra-African trade, but a lack of uniformity in their interpretation, such as varying interpretation of rules of origin and valuation by customs officials in different countries.²⁷⁰

If members of the AfCFTA Agreement do not harmonise laws, intra-African trade would be an unattainable dream. This lack of binding uniform trade laws creates inconsistencies and challenges to legal harmonisation in Africa, as every REC operates on different sets of rules and regulations to each other and therefore impedes intra-African trade.²⁷¹ However, the continued existence of RTAs rests heavily on their levels of regional integration, as RTAs who have higher levels of regional integration than under the AfCFTA Agreement are expected to maintain those levels of regional integration.²⁷² This chapter now turns the attention to the areas of the AfCFTA that should effectively harmonise policies and the issues that may arise with RECs.

4.3.1 Non-tariff barriers

NTBs are obstacles or restrictions to trade that are not in the form of traditional tariffs or customs duties. According to Achancho, countries usually make use of sanctions, embargoes, licenses, and quotas “as part of their political and economic strategies to curtail the amount of trade they conduct with other nations”.²⁷³ However, as Odhiambo observed, legal and institutional differences also constitute legal barriers to trade.²⁷⁴ As barriers to trade that often serve a legitimate purpose, AfCFTA must offer effective methods for harmonising NTBs. Harmonisation is necessary, as opposed to eliminating NTBs, because NTBs are usually meant to protect consumers’ rights, enhance their confidence in goods traded, and encourage firms to invest in manufactured goods and process innovation.²⁷⁵ The total elimination of NTBs within regional trade blocs is

²⁷⁰ Ajai 2016 *JCLA* 8.

²⁷¹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 1.

²⁷² Article 19(2) of the Agreement Establishing the African Continental Free Trade Area (2019).

²⁷³ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 2.

²⁷⁴ Odhiambo 2022 *EALR* 129.

²⁷⁵ Doan and Ghodsi 2023 *ERIA Discussion Paper Series* 15.

practically impossible, and the harmonisation of NTBs means having common or similar acceptable restrictions within the regional trade bloc.²⁷⁶ Therefore, to effectively promote intra-African trade, the AU and AfCFTA should prioritise the harmonisation of NTBs by removing major dissimilarities of restriction.²⁷⁷ This may be achieved by aligning regulatory standards and removing inconsistent national restrictions. A Mutual recognition agreements and coordinated capacity-building can further support the consistent application of harmonised rules across member states.

The low legal harmonisation of NTBs within RECs in Africa hasn't been due to a lack of attempts, but implementation failures have halted the process even when laws and protocols have been put in place to legally harmonise NTBs. The result of this is that most RECs have attempted to eliminate NTBs. However, this raises more challenges than it resolves. The COMESA Treaty, which prioritises harmonisation of policies²⁷⁸ as envisioned by the Abuja Treaty²⁷⁹, is a good example. The COMESA Treaty "abolishes all NTBs and harmonises trading documents among the member states".²⁸⁰ COMESA has since enacted multiple protocols and created an FTA and a Customs Union, all in an attempt to eliminate NTBs within the region.²⁸¹ The enactment of these regulations can be viewed as a success, as 98% of NTBs have been resolved by COMESA through these mechanisms.²⁸² However, the main issue has been that despite the high levels of success, COMESA has had to deal with Member States continuing to create new NTBs as more are resolved. This is the reality for COMESA because the rules and regulations the REC has created have not been fully implemented by Member States as national laws.²⁸³ Therefore, Member States will continue to create NTBs that serve their nations within their borders.

Another prime example is the EAC, which has pledged legal cooperation as the primary objective of the REC, making harmonisation fundamental to achieving the EAC

²⁷⁶ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 2.

²⁷⁷ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 2.

²⁷⁸ Article 4 of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

²⁷⁹ Article 6(c) of Treaty Establishing the Common Market for Eastern and Southern Africa (1993).

²⁸⁰ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 13.

²⁸¹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 14.

²⁸² Tralac 2018 <https://www.tralac.org/news/article/13383-comesa-98-of-regional-non-tariff-barriers-resolved.html>

²⁸³ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 14.

objectives.²⁸⁴ As the leader of progressive methods for legal harmonisation within African RECs, the EAC uses multiple methods for legal harmonisation.²⁸⁵ Article 9 of the Treaty Establishing the East African Community (The EAC Treaty) policies establishes institutions and organs²⁸⁶ to oversee and maintain policies and regulations to harmonise trade policies and eliminate NTBs in the region. The EAC developed its processes through methods such as approximation of laws within national territories, creating model laws for Member States, and issuing directives and regulations that have a direct effect on national laws.²⁸⁷ These processes are overseen and maintained by the Council, and monitoring systems have been put in place to track and eliminate NTBs.²⁸⁸ However, the EAC has faced challenges with the implementation of these laws in national territories due to a lack of a determined timeline for implementation and ratification.²⁸⁹ The failure of the treaty to make specific reference to Legal Harmonisation of NTBs, Article 75 of the EAC Treaty calls for eliminating NTBs,²⁹⁰ which is an impossible feat to achieve. Also, monitoring mechanisms to ensure compliance and implementation have been lacking.²⁹¹ The processes are progressive in theory; however, the practical implementation has been lacking in checks in the form of monitoring systems, allowing Member States to disregard laws they feel are to their nations' disadvantage.

The SADC region also presents the same challenges for the legal harmonisation of NTBs. Article 5(2)(a) of the SADC Treaty provides for the legal harmonisation of socio-economic and political policies.²⁹² Article 5(2)(d) of the SADC Treaty supports the development of policies to progressively eliminate NTBs²⁹³ that halter trade and cooperation in the SADC Region. SADC has since established the 1996 Protocol on Trade,

²⁸⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 14.

²⁸⁵ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 15

²⁸⁶ Article 9 of The Treaty Establishing the East African Community (1984).

²⁸⁷ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 16.

²⁸⁸ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 16.

²⁸⁹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 18.

²⁹⁰ Article 75 of The Treaty Establishing the East African Community (1984).

²⁹¹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 17.

²⁹² Article 5(2)(a) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

²⁹³ Article 5(2)(d) of the Consolidated Text of the Treaty of the Southern African Development Community (2015).

which was amended in 2010. In 2003, SADC adopted a Regional Indicative Strategic Development Plan.²⁹⁴ However, SADC has faced implementation challenges from Member States and also has been struggling with the multiplicity of REC memberships of the Member States.²⁹⁵ Member States continue to prioritise the advantages to their nations of continuing to hold NTBs against the cost of implementing rules to facilitate regional provisions to tackle NTBs.²⁹⁶ There is still major reluctance from Member States to enforce regional commitments to “enhance the elimination of NTBs even when they believe it will benefit the regional economy”²⁹⁷.

The harmonisation of trade policies under the AfCFTA, with respect to NTBs, will have a significant effect on existing RTAs. As AfCFTA seeks to streamline and reduce NTBs across the continent, RTAs will need to adapt their regulations and procedures to align with these new standards.²⁹⁸ This alignment could involve revising or eliminating existing NTBs that are inconsistent with AfCFTA’s objectives, which might necessitate changes in the regulatory frameworks of RTAs. The legal integration of AfCFTA’s NTB provisions could lead to reassessing how NTBs are managed and resolved within RTAs, potentially requiring the modification of dispute resolution mechanisms and compliance protocols. The harmonisation process aims to reduce barriers to trade and improve market access,²⁹⁹ but could also create legal complexities as RTAs reconcile their NTB policies with those mandated by AfCFTA. This effort will demand careful coordination to ensure that the reductions in NTBs under AfCFTA do not inadvertently disrupt the operational stability or effectiveness of existing RTAs

4.3.2 Legal compatibility

As established above, the AfCFTA is built with the eight RECs as the building blocks,³⁰⁰ and shall be governed by principles of RECs’ FTAs as building blocks for the AfCFTA.³⁰¹ Also, Article 18(3) of the AfCFTA Agreement states that the rights and obligations,

²⁹⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 20.

²⁹⁵ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 21.

²⁹⁶ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 23.

²⁹⁷ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 23.

²⁹⁸ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 23.

²⁹⁹ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁰⁰ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁰¹ Article 5(b) of the Agreement Establishing the African Continental Free Trade Area (2019).

under pre-existing agreements, State Parties have made with third parties will not be nullified, modified or revoked by the implementation of the AfCFTA Agreement.³⁰² The AfCFTA Agreement is intended to operate alongside pre-existing RTAs, and is built on the eight RECs. RECs are the backbone of the AfCFTA Agreement, just as they were tools for integration for the AU's goals to forming the AEC. However, the legal compatibility of pre-existing agreements with the AfCFTA Agreement is called into question by the AfCFTA Agreement. Article 19(1) invalidates any regional agreement that is in conflict or is inconsistent with the provisions of the AfCFTA Agreement to the extent of the specific inconsistency, except as otherwise provided in this Agreement.³⁰³

Despite the AfCFTA Agreement clarifying that it will prevail to the extent of the specific inconsistency,³⁰⁴ the provision still calls into question the legal compatibility of pre-existing agreements with the AfCFTA. Article 19(1) obliges pre-existing agreements to harmonise their trade rules with the AfCFTA Agreement to avoid any inconsistency with the AfCFTA Agreement and its protocols. It has been established that the African trade regime lacks uniformity, with most nations refusing to negotiate where they feel they will lose their sovereignty. To achieve successful legal harmonisation, uniformity of State Parties would be vital to creating common standards.³⁰⁵ However, there have been very low levels of successful legal harmonisation within RECs, which has resulted in a low level of regional integration. As such, in the case of an inconsistency, not many RTAs may rely on Article 19(2) of the AfCFTA Agreement.³⁰⁶ The low levels of regional integration within RECs and RTAs in Africa mean there are not many pre-existing agreements that may attain and maintain higher levels of regional integration than the AfCFTA. Therefore, many RTAs risk having invalid provisions should there be a conflict or inconsistency.

4.4 Conclusion

RTAs that have existed in Africa prior to the AfCFTA Agreement, but the continents will face inevitable challenges during the implementation of AfCFTA. The overlapping

³⁰² Article 18(3) of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁰³ Article 19(1) of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁰⁴ Article 19(1) of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁰⁵ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 4.

³⁰⁶ Article 19(2) of the Agreement Establishing the African Continental Free Trade Area (2019).

memberships within multiple RTAs and RECs will cause significant challenges in terms of operational and legal frameworks, particularly in dispute resolution mechanisms, rules of origin, and MFN principles. The conflict obligations caused by overlapping memberships complicate unification methods and effective legal harmonisation of trade. The result of these conflicts is a frustration of AfCFTA's aims of intra-African trade. The successful implementation of AfCFTA is dependent on the different State Parties working together; as such, RECs are the building blocks of AfCFTA.³⁰⁷ Failure to successfully harmonise trade policies, and unite the multiple RECs, will result in trade divergence due to legal incompatibilities. This could lead to exorbitant trade costs, which will frustrate AfCFTA's efforts. Therefore, a unified approach, by pre-existing RTAs and AfCFTA stakeholders, will need to play an immense role in curtailing these challenges and unifying trade in Africa. Renegotiations of RTAs and reassessments are inevitable to make effective readjustments of RTAs and legally harmonise trade.

³⁰⁷ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

Chapter 5: Recommendations to address implementations conflicts and challenges and Conclusion

5.1 Introduction

The AfCFTA was founded using the eight RECs as foundations and set to preserve pre-existing RTAs; therefore, there is a need for AfCFTA provisions and regulations to maintain the existence of these agreements. Due to the implementation of AfCFTA, the challenges these agreements will face may be enough to set aside whole agreements completely. Article 19(2) of the AfCFTA Agreement is the hail-mary for these agreements.³⁰⁸ However, regional integration has always been low in Africa, and existing RTAs are not projected to maintain higher integration levels than AfCFTA. As many African countries are members of RTAs with countries outside of Africa, the renegotiation of said RTAs' rules and regulations will be difficult. With many RTAs that were concluded with Western Powers being rooted in colonialism and imperialist ideals, many of these agreements are likely to have founding provisions and principles that are inconsistent with the AfCFTA Agreement. With this readjusted bargaining capacity, African countries are unlikely to renegotiate one-sided agreements with Western States, which may lead to many RTAs being dissolved. However, there are recommendations on what inevitable negotiations must involve to ensure the survival of existing RTAs.

5.2 Overlapping membership

As established above, overlapping membership creates legal and procedural complexities that need to be addressed and resolved for the successful implementation of the AfCFTA. To effectively resolve the challenges associated with overlapping membership, this study extends recommendations to address the legal challenges that will arise in implementing the AfCFTA against pre-existing RTAs. These recommendations are focused on the three main areas discussed in this study as affected by overlapping membership: dispute settlement mechanisms, rules of origin, and MFN.

³⁰⁸ Article 19(2) of the Agreement Establishing the African Continental Free Trade Area (2019).

5.2.1 Dispute resolution

The AfCFTA DSB's potential to extend its jurisdiction to include disputes between members of RECs and RTAs within the relevant agreement matters poses a threat for the AfCFTA DSB as well as it does for RECs and RTAs. The DSB is at risk of being accused of overreaching its jurisdiction, as has happened with the WTO Appellate Body, which ceased operation in 2019 after two of the then three sitting judges' terms ended.³⁰⁹ The United States accused the Appellate Body of overreaching in its jurisdiction. It effectively halted the appointment and reappointment of Appellate Body judges, which left the WTO Appeals system in limbo.³¹⁰ The AfCFTA DSB is comprised of representatives of the State Parties.³¹¹ The DSB is responsible for formulating an Appellate Body³¹², which comprises seven persons, each on a four-year term and may be reappointed once.³¹³ As these are procedural requirements, the AfCFTA Agreement prescribes that decisions on Appellate Body appointments are to be taken on a simple majority.³¹⁴

Although this arrangement does not pose the threat created by the WTO Appellate Body, it raises the chances of procedural decisions of the AfCFTA being frustrated by way of REC members coming together to vote in unison with their other Member States. AfCFTA runs the risk of REC members forming voting blocs, to collectively delay the appointment of panel members. The result would be as in the WTO Appellate Body, frustrating appointments of AfCFTA Appellate Body panels and halting the Appeals system. Therefore, one of AfCFTA DSB's primary initiatives should be to legally harmonise the provisions of the DSB with RECs, which will create legal coherence through stronger coordination and cooperation. Legally harmonising the DSB and RTA dispute resolution bodies would have added benefits of deterring conflicting decisions from the multitude of dispute resolution bodies in Africa and provide a unified approach

³⁰⁹ Erasmus 2024 <https://www.tralac.org/blog/article/16297-the-wto-dispute-settlement-impasse-what-is-happening.html>

³¹⁰ Erasmus 2024 <https://www.tralac.org/blog/article/16297-the-wto-dispute-settlement-impasse-what-is-happening.html>

³¹¹ Article 5(2) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

³¹² Article 5(3)(a) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

³¹³ Article 20 (2) & (4) of AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (2019).

³¹⁴ Article 14(3) of the Agreement Establishing the African Continental Free Trade Area (2019).

to dispute resolution. Further, enhancing coordination between AfCFTA DSB and RECs will clarify the division of responsibilities between AfCFTA DSB and the dispute settlement mechanisms of the different RECs, conflicts over which body has jurisdiction can be minimised, ensuring that trade disputes are handled efficiently without duplication. Lastly, AfCFTA could benefit greatly from including non-state actors in the DSB, as this may contribute to a more comprehensive and balanced dispute resolution framework.³¹⁵

5.2.2 Rules of Origin

One of the recommendations extended by Chitimira is that "AfCFTA adopts self-certification with regards to the acquisition of certificates of origin by exporters".³¹⁶ AfCFTA can implement a system for rules of origin self-certification across the AfCFTA and RECs. This system would be digitised and supported by a centralised database of rules of origin accessible to State Parties. This digital certification system would afford AfCFTA members a simple and modern verification process by reducing paperwork and improving transparency. State parties would, therefore, have access to information on rules of origin compliance, minimising trade delays and inconsistencies due to overlapping rules.³¹⁷ Secondly, the AfCFTA should seek to legally harmonise rules of origin. AfCFTA can enact uniform standards for determining the origin of goods traded within the continent. Formulating standards will require extracting minimum common rules from national laws to evaluate regional standards.³¹⁸ Lastly, Chitimira suggests that a cautious approach be adopted by AfCFTA State Parties "so that the gains to be reaped from the agreement are not overwhelmed by the risk of a borderless Africa".³¹⁹

5.2.3 Most Favoured Nation Treatment

As mentioned above, the MFN treatment principles of the AfCFTA are a necessary compromise as they are structured to promote non-discrimination. The MFN principles are important to further the AfCFTA agenda. However, AfCFTA needs to enact clear

³¹⁵ Ojok 2023 <https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis/>

³¹⁶ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 370.

³¹⁷ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 370.

³¹⁸ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 9.

³¹⁹ Chitimira and Hamadziripi 2022 *Perspectives of Law and Public Administration* 370.

guidelines for the implementation of the MFN treatment, which lays out the definition and scope of application of the MFN treatment under the AfCFTA Agreement. These guidelines would provide a mirror application of GATT Article 1 General Most Favoured Nation Treatment, which provides WTO Members with concise legal guidelines, including scope of application and definitions, to the WTO MFN treatment.³²⁰ This would essentially prevent legal conflicts where countries might be bound by different MFN obligations due to overlapping memberships. It is worth noting that Article 6 of the Protocol on Trade in Goods provides flexibility when implementing MFN Treatment for other state parties at different economic levels.³²¹ This flexible approach promotes “uniformity in trade relations and the predictability of judicial outcomes”.³²² This approach will be crucial for less developed countries to harmonise their RTA trade policies with AfCFTA. However, the most important aspect of remedying the conflict that may arise between the implementation of AfCFTA MFN Treatment and existing RTAs is harmonising REC and RTA MFN treatments with AfCFTA. AfCFTA may enact certain conditions allowing exceptions to MFN treatment across RECs and the AfCFTA, such as with the conditions set by GATT. An example of an exception that exists conditionally within the AfCFTA Agreement is Article 4(3) of the Protocol on Trade in Goods, which requires pre-existing RTAs to only extend negotiations to other State Parties, but there is no requirement to extend preferential trade arrangements.³²³

5.3 Legal harmonisation

As previously established above, none of the regions in Africa have attained successful legal harmonisation.³²⁴ These shortcomings have resulted in low levels of integration in Africa, which does not look hopeful for AfCFTA as the RECs are the foundations of AfCFTA. However, a regional arrangement in Africa that has attained legal harmonisation of its seventeen Francophone African nations is the Organization for the Harmonization of Business Law in Africa (OHADA).³²⁵ This warrants emulation by RECs

³²⁰ Article 1 of General Most Favoured Nations Treatment GATT 1994.

³²¹ Article 6 of AfCFTA Protocol on Trade in Goods (2019).

³²² Tsorme and Amoah 2024 *World Trade Review* 107.

³²³ Article 4(3) of AfCFTA Protocol on Trade in Goods (2019).

³²⁴ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

³²⁵ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

and the AfCFTA.³²⁶ Article 10 of the Treaty on the Harmonization of Business Law in Africa 1993 (OHADA Treaty) prescribes that “Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law”.³²⁷ OHADA unifies and harmonises laws in the following areas, inter alia, “contract law, commercial law, commercial companies and economic interest groupings, securities, and insolvency by means of nine Uniform Acts”.³²⁸ What becomes obvious in this case is that OHADA takes a very direct approach to legal harmonisation, with members willingly surrendering some of their national sovereignty to the supremacy of the OHADA Treaty’s Uniform Acts.³²⁹ The Uniform Acts apply directly to each country, overriding domestic laws.³³⁰ This subsection continues by recommending methods to attain successful legal harmonisation in terms of NTBs and legal compatibility.

5.3.1 Non-tariff barriers

As established above, it is worth noting that the direct approach taken by OHADA can be a solution to harmonising NTBs. One of the key aspects of a direct application to legal harmonisation is commonality within the parties. OHADA is an organisation created by Francophone countries in Africa.³³¹ The colonial history of these countries binds them and creates familiarity in terms of their economic interests. This makes it easier to implement model laws. According to Achancho, model laws are rules and regulations “designed to guide the adoption of domestic instruments that are formulated”.³³² The model laws method is a system that introduces regional rules and regulations that have supranational applicability.³³³ The implementation of model laws has been successfully implemented by supranational organisations such as OHADA, which have achieved the most legal harmonisation in Africa. According to Ajai, “The

³²⁶ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

³²⁷ Article 10 of Treaty on the harmonization of the business law in Africa 2008.

³²⁸ Ajai 2016 *JCLA Africa* 8.

³²⁹ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 6.

³³⁰ Ajai 2016 *JCLA* 8.

³³¹ Ajai 2016 *JCLA* 8.

³³² Achancho 2023 *Comparative and International Law Journal of Southern Africa* 9.

³³³ Zeller 2016 *Journal of Law, Society and Development* 92.

Uniform Acts apply directly in each country, overriding local laws and providing fairly harmonised practices generally throughout the OHADA region”.³³⁴

Annex 5 of the Protocol on Trade in Goods (Annex 5) implements provisions that establish systems for the “identification, categorisation, monitoring and elimination of Non-Tariff Barriers by State Parties”.³³⁵ RECs are vital to implementing these procedures, as Article 10 of Annex 5 provides that RECs are responsible for the tracking and monitoring NTBs affecting intra-African trade and the “reporting, monitoring and evaluation tools such as the web-based system”.³³⁶ The AfCFTA’s elimination of NTB provisions has also not been effective due to, amongst others, “continuous weak compliance with implemented mechanisms, lack of sanctions or restrictive measures to deter state parties from enforcing new NTBs”.³³⁷

The process formulated by Annex 5 to address NTBs is aimed at enforcing transparency and simplifying the tracking of NTB disputes. Therefore, the proper implementation of Annex 5 is crucial. Annex 5 could also include regular assessments, which would allow reviews of the progress made towards NTB eradication. To ensure compliance with Annex 5, AfCFTA can issue directives that will be approximated into national laws. These directives would set deadlines for RECs and RTAs to implement advised rules and standards and comply with Annex 5. And lastly, the AfCFTA may also issue standards for good business practices. These standard norms and practices may include “formulating recommended standard practices or extracting minimum common rules from national laws to evaluate regional standards”.³³⁸ This approach has been ineffective in the AU; however, it could greatly assist the implementation of Model Laws and approximation of directives.

5.3.2 Legal compatibility

The conflict created by legal incompatibility among RECs will negatively affect the implementation of AfCFTA and efforts towards intra-African trade. Smaller RTAs,

³³⁴ Ajai 2016 *JCLA* 8.

³³⁵ Article 2 (3)(a) to (d) of Annex 5 of AfCFTA Protocol on Trade in Goods (2019).

³³⁶ Article 10(1)(a) & (b) of Annex 5 of AfCFTA Protocol on Trade in Goods (2019).

³³⁷ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 24.

³³⁸ Achancho 2023 *Comparative and International Law Journal of Southern Africa* 9.

especially those involving countries outside of Africa, are at a higher risk of being invalidated due to incompatibility with AfCFTA. To ensure the continued existence of pre-existing RTAs and avoid conflicts and confusion for businesses and policymakers, it will be important for AfCFTA to take an active approach to ensure RTAs are legally compatible with AfCFTA provisions. Firstly, the AfCFTA Secretariat, to identify conflicting policies and areas of duplication, can conduct thorough legal audits of RTAs. RTAs will continue to be important because of the significant role they can play in implementing domestic reforms and opening to global competitive market pressure at a sustainable pace, facilitating their economic integration into the global economy.³³⁹ Comprehensive audits of RTAs would provide AfCFTA with clear roadmaps to legal reforms and highlight overlapping obligations, which would be crucial to aligning RTAs with AfCFTA.

Second, the AfCFTA may introduce an integration plan over a period. An integration plan is a phased approach to “implementation and allows time in the initial phases to gather first-hand information about project characteristics”.³⁴⁰ Implementing an integration plan would allow overlapping legal frameworks, RTAs and RECs to gradually align with AfCFTA rules over an agreed transitional period. This approach provides flexibility; this would allow RTAs to align their legal frameworks to AfCFTA without causing disruptions to trade. It also ensures that State Parties have enough time to adapt their domestic and regional trade laws to AfCFTA provisions. AfCFTA primarily needs to strengthen cooperation with RECs and allow RTAs time to harmonise with AfCFTA provisions.

5.4 Conclusion

The AfCFTA promises to be a groundbreaking initiative for the African continent. It will achieve its goals through intra-African trade, which requires in-depth regional integration. The existence of RTAs in Africa may have achieved low levels of regional integration; however, regional agreements still have a role to play in achieving AfCFTA objectives. The existing RTAs and RECs are likely to conflict with the provisions of

³³⁹ Chipanda and Cilliers 2024 <https://futures.issafrica.org/thematic/08-afcfta/>

³⁴⁰ PM Alliance 2024 <https://pm-alliance.com/phased-project-management-implementation/>

AfCFTA. The curse of overlapping memberships and struggles with legal harmonisation will inevitably require renegotiations and reassessing by existing RTAs. With RECs remaining as the foundation of AfCFTA,³⁴¹ it is important to successfully legally harmonise their provisions with that of AfCFTA. Pre-existing agreements will not be nullified, revoked, or modified, by the AfCFTA Agreement.³⁴² These agreements are extremely important to ensuring State Parties comply with AfCFTA provisions, particularly legal harmonisation of NTBs, dispute resolution, rules of origin, tariffs, etc. Regional agreements are particularly important for regional integration and the AfCFTA will benefit immensely from their continued existence. Therefore, the conflicts that are a result of AfCFTA implementation must be addressed and resolved as soon as possible.

This mini-dissertation has systematically addressed the research question- What are the legal consequences of the implementation of the AfCFTA and its effect on RTAs in Africa?- by examining key treaties, journals, and statutory provisions in a structured manner. Chapter One introduced the research problem and outlined the legal context, establishing the relevance of the AfCFTA Agreement and RTAs in the African Regional Framework. Chapter Two provided a comprehensive review of the importance of the AfCFTA Agreement. Chapter Three delved into the complexities of RTAs in Africa. Chapter Four analysed the possible conflicts and implementation challenges that may be apparent in the AfCFTA implementation phases. Finally, Chapter Five synthesised the three discussions, offering recommendations to address implementations conflicts and challenges and concluding the discussion. Through this structure, the mini-dissertation has effectively answered the central research question and provided a cohesive legal analysis of the topic.

³⁴¹ Preamble of the Agreement Establishing the African Continental Free Trade Area (2019).

³⁴² Article 18(3) of the Agreement Establishing the African Continental Free Trade Area (2019).

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