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# A Critical Appraisal of the African Continental Free Trade Area Agreement

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# A CRITICAL APPRAISAL OF THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

OLABISI D. AKINKUGBE<sup>†</sup>

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## 1 INTRODUCTION

The conclusion of the Agreement Establishing the African Continental Free Trade Area (AfCFTA),<sup>1</sup> is in stark contrast to the uncertainty and current retreat from multilateralism. The AfCFTA is a mega-regional trade agreement that aims to create a single market for goods and services, and to facilitate investment and the movement of persons in order to deepen economic integration in Africa. The AfCFTA seeks to accelerate intra-African trade and elevate Africa's international economic relations in the multilateral trading regime. In this regard, the AfCFTA represents a Pan African vision that aims at uniting African states as a regional trading bloc. The bloc is supposed to strategically deploy its strength in international trade negotiations by creating a competitive African market. At a time when confidence in the multilateral trading regime is waning, with trade wars in some regions, African states, perhaps more than ever, are embracing multilateralism.<sup>2</sup>

Beyond the symbolic power of the AfCFTA, scholars have raised concerns about the extent to which the AfCFTA truly engenders a fair, equitable and radically different future for Africa.<sup>3</sup> Since colonisation, African states have devolved into a hodgepodge of highly stratified economies with widening inequalities. The deep-seated structural and socio-economic inequality and power asymmetry among African states has most recently been revealed by the COVID-19 pandemic. Despite the long history of sub-regional economic cooperation in Africa, vulnerabilities in Africa's

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<sup>1</sup> Agreement Establishing the African Continental Free Trade Area, in force 30 May 2019 [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (AfCFTA).

<sup>2</sup> [cross-reference decision-making chapter].

<sup>3</sup> See generally Obeng-Odom F 'The African Continental Free Trade Area' (2020) 79 (1) *American Journal of Economics and Sociology* 167–197; and Ajibo C 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects' (2019) 53 (5) *Journal of World Trade* 871–894.

trade regimes persist.<sup>4</sup> The new institutions of the AfCFTA will be nestled in a complex regime of sub-regional economic communities (RECs) mostly reputed for their non-economic agenda. It follows that below optimal performance of the institutions of the RECs present a unique challenge for the AfCFTA's aspirations. Since the AfCFTA increases the density of the fragmented sub-regional economic institutions in Africa, it assumes even greater importance when examined in the context of the many previous efforts among African states that have simply failed. The failure of the past continental integration initiatives, as well as the precarious struggle of the regional economic integration schemes to make any meaningful *economic* impact, is a cause for concern vis-à-vis the rhetoric of success that the conclusion of the AfCFTA has garnered. Regionally, the eventual implementation of the AfCFTA will be embedded in a complex regime of RECs and systemic deficiencies that have crippled the capacity of African regional trade agreements to thrive economically. These dynamics and the paradigm of trade alliances that emerge from them are important factors with meaningful implications for the future of the AfCFTA.

Despite Africa's fragmented sub-regional economic regimes, the AfCFTA represents a significant moment for African states to harness the continent's international trade and investment opportunities on their own terms. The AfCFTA initiates a set of complex and lengthy negotiations with a view to reducing tariffs, galvanise industrial production, and boost Africa's trade. The success of Africa's reinvigorated liberal internationalism embodied in the AfCFTA depends on a host of factors that primarily include its effective implementation.

In this chapter, I situate the AfCFTA in the historical and contemporary contexts of the mixed performance of RECs and other regimes in which its implementation will be embedded. I also examine the pre-existing structural deficiencies that the COVID-19 pandemic has brought to the fore and their implications for the AfCFTA. Building on the foregoing, I further critically examine the blind-spots of the pan-Africanist aspirations of the AfCFTA for the future of trade regime in Africa. Following this introduction, in the second section I examine the substantive provisions of the AfCFTA and its institutions, focusing on the question of supranationality in the decision-making process. In the third section, I deepen the chapter's analysis by examining the promise of the AfCFTA in the shadow of Africa's mixed record of economic cooperation. In the

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<sup>4</sup> For a discussion of such vulnerabilities, see Akinkugbe OD & Gammage C 'Symposium Introduction: Vulnerabilities in the Trade and Investment Regimes in the Age of COVID-19' (18 August 2020) *Afronomicslaw Blog Symposium* <https://www.afronomicslaw.org/2020/08/18/symposium-introduction-vulnerabilities-in-the-trade-and-investment-regimes-in-the-age-of-covid-19/> [insert 2ed of AfJIEL].

fourth section, I examine the systemic deficiencies in African regional trade regimes, as impacted by the COVID-19 pandemic. To illustrate the latter, I draw on the finance sector-debt burden conundrum and digitalisation. I selected the examples to illustrate areas where historical deep-seated challenges exist and sectors emerge that African leaders should capitalise for a better post-pandemic Africa. In the penultimate section, I contend that a critical understanding of pan-Africanism in a morphological sense that acknowledges its shortcomings is important to understanding the attitude of African states to the lethargic implementation of regional trade agreements. Operating with such consciousness, I argue, engenders a better understanding of the intrigues of the implementation phase, as opposed to the narrow, lack of political will arguments. In section six I conclude the chapter.

## 2 OVERVIEW OF THE AfCFTA

The AfCFTA is the latest layer of agreement in Africa's over half a century experimentation with regional economic cooperation. Historically, the AfCFTA builds on the aspirations of pan-Africanists and their visions for an Africa that is economically independent. More recently, the AfCFTA constitutes one of the goals on the continuum towards an African Economic Community, as envisaged by the Treaty Establishing the African Economic Community (the Abuja Treaty).<sup>5</sup> The achievement of the African Economic Community was premised on the eight recognised RECs. Notably, at the heart of the AfCFTA is the imperative of Africa's industrialisation by building on sub-regional economic integration. Thus, the AfCFTA is not a standalone project. It is anchored and complementary to other African Union (AU) initiatives for the continent's economic integration and development.

The AfCFTA is also connected with the AU's Agenda 2063 as its first flagship and a foundation on which to build Africa's progress for the attainment of the Sustainable Development Goals. Together with the Boosting Intra-African Trade (BIAT) Action Plan, African leaders hope that the AfCFTA would address the bottlenecks of intra-African trade by focusing on seven thematic areas: trade policy reform, trade facilitation, productive capacity, trade-related

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<sup>5</sup> Treaty Establishing the African Economic Community, Organization of African Unity, 3 June 1991, Abuja, Nigeria [https://au.int/sites/default/files/treaties/37636-treaty-0016\\_-\\_treaty\\_establishing\\_the\\_african\\_economic\\_community\\_e.pdf](https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf); see generally Oppong R 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92–103 92.

infrastructure, trade finance, trade information and factor market integration. In this context, the United Nations Economic Commission for Africa (UNECA) views the BIAT as a crucial policy for ‘minimi[s]ing the challenges and maximising the gains of tariff and services liberali[s]ation’ so that African states can harness the promise of the AfCFTA.<sup>6</sup>

The AfCFTA entered into force in May 2019 when the threshold for operationalising the agreement was reached.<sup>7</sup> 54 of the 55 AU members have signed the AfCFTA<sup>8</sup> and, by January 2021, 34 members had deposited the instruments of ratification with the AU Commission. At the 2019 Niamey Summit, African leaders launched five complimentary initiatives that will support the implementation of the AfCFTA.<sup>9</sup> Trading under the AfCFTA, which was initially scheduled to commence on 1 July 2020, has been postponed to 1 January 2021 because of the disruptions occasioned by the COVID-19 pandemic.<sup>10</sup>

The AfCFTA has a wide scope. It covers trade in goods and services, investment, intellectual property rights, and competition policy. The AfCFTA has general and specific objectives. The general objectives are, inter alia, the creation of a single market for goods, services, and the movement of persons and investments among African countries; the creation of a liberalised market for goods and services based on successive rounds of negotiations; laying the foundation for the establishment of a Continental Customs Union; and enhancing the competitiveness of the economies of African states both within the continent and the global

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<sup>6</sup> United Nations Economic Commission for Africa *Digital Trade in Africa: Implications for Inclusion and Human Rights* (2017) [https://www.uneca.org/archive/sites/default/files/PublicationFiles/dthr\\_en\\_full\\_rev3.pdf](https://www.uneca.org/archive/sites/default/files/PublicationFiles/dthr_en_full_rev3.pdf) 12.

<sup>7</sup> See generally Luke D & MacLeod J ‘Bringing About Inclusive Trade in Africa with the African Continental Free Trade Area’ in Luke D & MacLeod J (eds) *Inclusive Trade in Africa: The Africa Continental Free Trade in Comparative Perspective* (2019) 1–4; Gathii J ‘Agreement Establishing the African Continental Free Trade Area’ (2019) 58 *International Legal Materials* 1028–1083; and AU & UNECA ‘African Continental Free Trade Area, Updated Questions & Answers’ (January 2020)

<https://repository.uneca.org/bitstream/handle/10855/43253/b11975106.pdf?sequence=1&isAllowed=y>.

<sup>8</sup> Eritrea is the only country that has not signed the AfCFTA.

<sup>9</sup> These are, the AfCFTA product-specific rules of origin covering 90 per cent of tariff lines; the Continental Online Mechanism for Monitoring, Reporting and Eliminating Non-Tariff Barriers; the Pan-African Payments and Settlements System; the Online Portal for Trade in Goods Tariffs Negotiations; and the AU Trade Observatory. Addressing the summit, Afreximbank’s president Benedict Oramah said: ‘The PAPSS is a platform that will domesticate intra-regional payments, save the continent more than US\$5bn in payment transaction costs per annum, formalise a significant proportion of the estimated US\$50bn of informal intra-African trade, and above all, contribute in boosting intra-African trade’ (Wass S ‘Africa’s Continent-wide Payment and Settlement System Launched’ (9 July 2019) *Global Trade Review* <https://www.gtreview.com/news/Africa/africas-continent-wide-payment-and-settlement-system-launched/>).

<sup>10</sup> See AU ‘Africa is Open for Business, Based on a Single Rule-Book for Trade and Investment’ (9 September 2020) <https://au.int/ar/node/39287>; UNECA ‘African Union Approves Start of Trading Under AfCFTA on 1 January Next Year as Earlier Agreed’ (5 December 2020) <https://www.uneca.org/stories/african-union-approves-start-trading-under-afcfta-1-january-next-year-earlier-agreed>.

market.<sup>11</sup> Moreover, the AfCFTA aspires towards a better coordination of African trade regimes and the elimination of challenges associated with multiple and overlapping trade agreements across the continent.<sup>12</sup> The general objectives of the agreement also include socio-economic development, gender equality, and structural transformation of the State Parties.<sup>13</sup>

The specific objectives mandate the parties to progressively eliminate tariffs and non-tariff barriers (NTBs) to trade in goods and liberalise trade in services.<sup>14</sup> State Parties shall cooperate on investment, intellectual property rights and competition policy,<sup>15</sup> and establish a mechanism for the settlement of disputes concerning their rights and obligations.<sup>16</sup> The State Parties shall also maintain an institutional framework for the implementation and administration of the AfCFTA.<sup>17</sup>

While the objectives of the AfCFTA are clearly specified, the means by which they will be achieved are unclear. Major prerequisites for trade liberalisation such as specific agreement on the products for which tariffs are to be reduced, how far to reduce, and when to do so, as well as rules of origin are yet to be finalised. The negotiation and agreement on the rules of origin in particular is a sine qua non for any free trade agreement. Lack of agreed rules of origin creates a loophole

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<sup>11</sup> Art 3(h) of the AfCFTA provides that the general objectives of the AfCFTA include the resolution of ‘the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.’

<sup>12</sup> See generally Gathii J ‘African Regional Trade Agreements as Flexible Legal Regimes’ (2009) 35 *North Carolina Journal of International Law and Commercial Regulation* 571–666; Busch M ‘Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade’ (2007) 61 (4) *International Organization* 735–761.

<sup>13</sup> See Art 3(e) of the AfCFTA; on gender and gendering in regional economic integration in Africa, see generally Gammage C & Momodu M ‘The Economic Empowerment of Women in Africa: Regional Approaches to Gender Sensitive Trade Policies’ (2020) 1 *African Journal of International Economic Law* 1–40.

<sup>14</sup> See Arts 4(a) & (b) of the AfCFTA. see also Simo R ‘Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility’ (2020) 23 (1) *Journal of International Economic Law* 65–95. (Discussing the contribution of the Protocol in Trade and Services in the achievement of an African Economic Community and introducing the importance of services in both developing and developed world justifying their inclusion in modern trade agreements like the AfCFTA).

<sup>15</sup> See Art 4(c) of the AfCFTA. See generally, Büthe T & Kigwiru VK, ‘The Spread of Competition Law and Policy in Africa’, (2020) Volume 1, *African Journal of International Economic Law*, 41-83. (Taking stock of the status of competition laws and agencies at the national and regional level in Africa by providing an overview of the history and current state of competition law and policy); Adebola T, *Mapping Africa’s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property, (IP), Protocol*, (2020) Volume 1, *African Journal of International Economic Law*, 233-290. (comprehensively mapping and analysing the fragmented intellectual property (IP) architecture in Africa in light of the pending African Continental Free Trade Area (AfCFTA) IP Protocol and arguing that the AfCFTA IP Protocol presents a timely, albeit arduous, opportunity for Africa to reconstruct its broken IP architecture.)

<sup>16</sup> See Art 4(f) of the AfCFTA. See generally, Akinkugbe OD ‘Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment’ (2019) 28 *Supplement African Journal of International and Comparative Law* 138–158. (examining the challenges of operationalising the AfCFTA’s dispute settlement mechanism in the context of discontent with similar WTO-styled DSM in African regional economic communities and international arbitration at the national level.)

<sup>17</sup> See Art 4(g) of the AfCFTA.

which third-country producers may exploit.<sup>18</sup> The outcome of the on-going negotiations is therefore critical to the future of the AfCFTA and its objectives.

### 3 INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE AfCFTA

Although institutions of RECs in Africa are marked by a wide array of diversity, a common thread that connects them all is their lacklustre performance. Weak and ineffective institutions have been a challenge in regional economic integration. Trade agreements require effective institutions to oversee, promote and monitor the implementation of obligations by their members. Effective institutions are important drivers of a successful trade agreement.<sup>19</sup>

The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA consists of the Assembly, the Council of Ministers, the Committee of Senior Trade Officials and the Secretariat.<sup>20</sup> The Assembly of the AU is the highest decision-making organ.<sup>21</sup> It provides oversight and strategic guidance on the AfCFTA, as well as BIAT. The Assembly has exclusive authority to adopt interpretations of the AfCFTA on the recommendation of the Council of Ministers.<sup>22</sup> The ‘involvement of the Assembly ensures that the AfCFTA’s institutions are firmly within the circuit of, and aligned with, the [AU] institutions under the supervision of the Assembly’.<sup>23</sup>

The Council of Ministers is mandated to ensure the effective implementation and enforcement of the agreement and, where necessary, take measures to promote the objectives of the AfCFTA and associated instruments.<sup>24</sup> The Council of Ministers will also collaborate with the relevant organs and institutions of the AU and promote the harmonisation of appropriate policies, strategies, and measures for the effective implementation of the AfCFTA.<sup>25</sup> Article 11.5 of the

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<sup>18</sup> See UNCTAD *Economic Development in Africa Report: Made in Africa – Rules of Origin for Enhanced Intra-Africa Trade* (26 June 2019) [https://unctad.org/system/files/official-document/aldafrica2019\\_en.pdf](https://unctad.org/system/files/official-document/aldafrica2019_en.pdf). The edition focuses on the role of preferential rules of origin in shaping the development of regional value chains in the AfCFTA with a view to maximising gains from the area for structural transformation.

<sup>19</sup> See generally Kufuor KO *The Institutional Transformation of the Economic Community of West African States* (2006); and Steger D ‘Institutions for Regulatory Cooperation in “New Generation” Economic and Trade Agreements’ (2012) 38 (4) *Legal Issues of Economic Integration* 109–126.

<sup>20</sup> Arts 9 & 12 of the AfCFTA expatiate of the composition and mandate of the Committee of Senior Trade Officials. The Committee consists of Permanent or Principal Secretaries or other officials designated by each State Party.

<sup>21</sup> See Art 10(1) of the AfCFTA.

<sup>22</sup> See Art 10(2) of the AfCFTA.

<sup>23</sup> Sodipo B ‘Governance for an Effective AfCFTA’ in Luke & MacLeod (n 7 above) 120–133 120 121.

<sup>24</sup> See Art 11(3)(a, b & c) of the AfCFTA.

<sup>25</sup> See Art 11(3)(d & e) of the AfCFTA.

AfCFTA provides that the decisions taken by the Council of Ministers, while acting within its mandate, are binding on the parties. The decisions that have legal, structural or financial implications become binding upon their adoption by the Assembly.<sup>26</sup>

The Secretariat of the AfCFTA will be a functionally autonomous institutional body within the AU system with an independent legal personality.<sup>27</sup> The roles and responsibilities of the Secretariat shall be determined by the Council of Ministers of Trade.<sup>28</sup> In February 2020, at the AU's 33<sup>rd</sup> Ordinary Session, the AU Assembly of Heads of State and Government elected its inaugural Secretary General, Mr. Wamkele Mene.<sup>29</sup> The Secretary General is expected to provide leadership and technical support to the AfCFTA Secretariat and overall management of the day-to-day functioning of the Secretariat. Moreover, the Secretary General will be responsible for the implementation of the AfCFTA, including strategic collaborations, stakeholder engagement, and resource mobilization.<sup>30</sup> The headquarters of the AfCFTA Secretariat are in Accra, Ghana.

Outside of the governance mechanism, the Protocol on Dispute Settlement provides the process and procedure for the settlement of disputes concerning the rights and obligations of the parties to the AfCFTA.<sup>31</sup> This dispute settlement mechanism is modelled after the World Trade Organisation's (WTO), with the promise of certainty, predictability and a rules-based regime. Africa, however, has various formal dispute settlement institutions existing in sub-regional communities. These existing structures include mediation or adversarial institutions, such as courts or tribunals. The challenge with these sub-regional dispute settlement institutions is that African states hardly resort to them for the settlement of disputes.<sup>32</sup> The question therefore is whether the dispute settlement mechanism of the AfCFTA will be relevant for the African states.<sup>33</sup>

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<sup>26</sup> See Art 11(5) of the AfCFTA.

<sup>27</sup> See Art 13.3 of the AfCFTA.

<sup>28</sup> See Art 13.6 of the AfCFTA.

<sup>29</sup> See AU 'Newly Sworn-In AfCFTA Secretary General, Wamkele Mene, Undertakes to Serve Africa with Resolute Determination' (18 April 2020) <https://au.int/en/pressreleases/20200418/newly-sworn-afcfta-secretary-general-wamkele-mene-undertakes-serve-africa>.

<sup>30</sup> Ibid.

<sup>31</sup> See Art 20 (1-3) of the AfCFTA.

<sup>32</sup> See generally Akinkugbe OD 'Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2019) 28 *Supplement African Journal of International and Comparative Law* 138–158.

<sup>33</sup> See generally Maluwa T 'The Peaceful Settlement of Dispute Among African States, 1963–1983: Some Conceptual Issues and Practical Trends' (1989) 32 (2) *International & Comparative Law Quarterly* 299–320.



The single market economy aspirations of the AfCFTA will not be achieved without effectively strengthening the RECs that constitute its pillars.<sup>34</sup> A nagging challenge with the institutions of the existing RECs in Africa is that they lack supranational powers as they have largely been intergovernmental institutions unlike their counterparts in Europe. Supranational authorities are distinguished by their autonomy in decision-making (in particular the rule of the voting majority as opposed to consensus), the superiority of regional laws and preclusion of members from enacting contradictory laws, ‘the institutional autonomy of an organisation from its member states, and the direct binding effect of laws emanating from regional organisations on natural and legal persons in member states’.<sup>35</sup> The lack of supranational authority, particularly with respect to the consensus decision-making process, is an impediment to the implementation of trade and integration commitments of the AfCFTA. The experience of African states so far has shown that the majoritarian approach would be a more progressive route.

Seeking the appropriate balance between African countries’ sovereignty to adopt economic policies in the interest of their nations, and the powers the AfCFTA institutions require to operate in an effective and efficient manner is central to the single community and overall economic and sustainable development aspirations of the AfCFTA. One thing is clear: institutions matter. The new institutions of the AfCFTA add to the *spaghetti bowl* of institutions under the various RECs. It is too early to say whether these institutions will be different in terms of charting a new course for trade liberalisation in Africa. However, creating a convergence between the informal norms of African regional economic integration and the formal rules will be critical to the effectiveness of the institutions and therefore the AfCFTA. The formal rules of trade institutions should be designed to achieve socially inclusive outcomes. Likewise, they should address the trade concerns of the powerful and less economically powerful members of the group alike. Whereas the design of trade agreements tend to serve the interests of those with the bargaining power to create new

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<sup>34</sup> See generally Bisong A ‘ECOWAS and the role of the RECs in AfCFTA Implementation’ (2020) 9 (1) *Great Insights* 23–24.

<sup>35</sup> Fagbayibo B ‘Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview’ (2013) 16 (1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 31–69 33; see generally Fagbayibo B ‘Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union’ (2013) 20 (3) *South African Journal of International Affairs* 411–442.

rules, in the African context, balancing the interests and development of less economic endowed members is critical.<sup>36</sup>

The AfCFTA envisions a rules-based trade liberalisation regime with a view to creating a single market economy. Yet, the experience of the practices of its members differ significantly. The general notion that law has prominence over politics in the implementation phase of trade agreements has not been true for African countries. The effectiveness of the AfCFTA institutions, and by extension its single market economy aspiration, is dependent on the convergence and alignment of the informal aspects of African regional economic integration and the formal architecture enunciated in the AfCFTA. Wholesale transplantation of the design of institutions of integration regimes from the WTO is bound to only reinforce the ineffectiveness of African regional trade regimes.<sup>37</sup> As such, variations that take account of local peculiarities in the implementation of the legal institutions are important.

The formal rules of economic integration as enshrined in the AfCFTA and the protocols are legitimised in practice only if the informal norms of African economic integration are strategically empowered and aligned with the formal approach. In other words, for the institutions of the AfCFTA, such as the dispute settlement mechanism, to be effective, African leaders have to confront and change the course of the divergence that has characterised the practice of African economic integration.

The dream of an *Africa We Want* and a single market economy pursuant to the AfCFTA is realistic only to the extent that each participating member commits to a timely and effective enforcement of the rules and meaningful support for the work of the institutions of the AfCFTA. As Kufuor notes,

formal and informal constraints interact to shape organisational paths. Once on a given institutional path, an organisation's decision-makers and interests obtain advantage from the 'increasing returns to the institutional matrix' and, as a consequence institutions will endure notwithstanding whether they are efficient or inefficient and even if there is an alternative path for the organisation that is demonstrably more efficient.<sup>38</sup>

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<sup>36</sup> See generally Drahos P 'When the Weak Bargain with the Strong: Negotiations in the World Trade Organization' (2003) 8 (1) *International Negotiation* 79–109; and Crystal J 'Bargaining in the Negotiations over Liberalizing Trade in Services: Power, Reciprocity and Learning' (2003) 10 (3) *Review of International Political Economy* 552–578.

<sup>37</sup> See generally Naldi J & Magliveras K 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure' (1998) 24 (3) *North Carolina Journal of International Law & Commercial Regulations* 601–631.

<sup>38</sup> Kufuor K *The Institutional Transformation of the Economic Community of West African States* (2006) 35.

In other words, there is a complex interaction between formal and informal norms and rules of the behaviour of African states when it comes to regional economic integration. Hence, understanding when and how informal norms of African regional economic integration can reinforce formal institutions and, vice versa, will be paramount to the success and effectiveness of the AfCFTA in liberalising trade in Africa.<sup>39</sup>

#### 4 THE AfCFTA'S IMPLEMENTATION IN THE SHADOW OF AFRICA'S MIXED RECORD OF REGIONAL TRADE REGIME

The implementation of the AfCFTA lies in the shadow of Africa's *mixed* record of economic cooperation. The choice of *mixed* record as opposed to *failed* regime is deliberate. Regionalism in Africa has both economic and non-economic dimensions. It is a notorious fact that economic integration among African states has been slow. Non-economic cooperation has however been more successful. Failure narratives of African regional trade agreements do not make these distinctions. The distinction is important because unnuanced assessments of the performance of African regional trade agreements inadvertently affirm the universality of the European Union approaches.<sup>40</sup> African trade regimes are heterogeneous and constituted by formal and informal economies with a multidimensional economic and non-economic focus.<sup>41</sup> Hence, I opt for a nuanced understanding rather than universalise failure of the trade regimes. Accordingly, the *mixed* narrative acknowledges the modest progress that sub-regional economic organisations have achieved.<sup>42</sup>

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<sup>39</sup> See generally Acemoglu D & Johnson S 'Unbundling Institutions' (2005) 113 (5) *Journal of Political Economy* 949–995.

<sup>40</sup> For an analysis of the case for reconceptualising failure narratives in African court regimes, see generally Akinkugbe OD 'Revisiting the Economic Community of West African States: A Socio-Legal Analysis' (20 December 2017) *Doctoral Thesis, University of Ottawa* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3354070](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3354070); and Gathii J, *African Regional Trade Agreements as Legal Regimes*, (2011).

<sup>41</sup> See Akinkugbe OD 'Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)' (2020) 1 *African Journal of International Economic Law* 293–320 297.

<sup>42</sup> See Ndomo A 'Regional Economic Communities in Africa: A Progressive Overview' (May 2009) *TRALAC* 5 [https://www.tralac.org/images/News/Reports/Regional\\_Economic\\_Communities\\_in\\_Africa\\_A\\_Progress\\_Overview\\_Atieno\\_Ndomo\\_GTZ\\_2009.pdf](https://www.tralac.org/images/News/Reports/Regional_Economic_Communities_in_Africa_A_Progress_Overview_Atieno_Ndomo_GTZ_2009.pdf), arguing that 'in terms of progress made in advancing the goals of regional integration, the results are mixed with a general sense that there remain substantial gaps in achievements. Although some RECs have made strides towards free trade and a customs union, progress towards harmonised and integrated sub regional markets is slow'.

As previously highlighted, the promise of a single economic community under the AfCFTA hinges on the RECs as its building blocks. There are eight recognised RECs by the AU: the Community of Sahel-Saharan States (CEN-SAD);<sup>43</sup> the Arab Maghreb Union (AMU);<sup>44</sup> the Intergovernmental Authority on Development (IGAD);<sup>45</sup> the Southern African Development Community (SADC);<sup>46</sup> the East African Community (EAC);<sup>47</sup> the Economic Community of Central African States (ECCAS);<sup>48</sup> the Common Market for Eastern and Southern Africa (COMESA);<sup>49</sup> and the Economic Community of West African States (ECOWAS).<sup>50</sup> SADC, EAC, ECCAS and COMESA, for instance, have pursued different trade programmes within their regional blocs. As such, they are at different stages of economic integration. Some of the obstacles that are common to the RECs in their pursuit of an effective intra-regional trade integration include policies that are informed by national interests, geo-political contests and social conflicts, slow progress on removal of NTBs, half-hearted commitment to the freedom of movement of persons and goods across regional borders, ill-attention to the plight of informal cross-border trade, and an underdeveloped infrastructure that amplifies the costs of intra-regional trade. The reasons that the economic gains have not translated into substantive growth are colonial and post-colonial in nature. They are colonial in the sense that African states were created into a structure of international economic inequality that pauperise their economic endowments through economic policy measures adopted in the global economic regime. For example, the position of many African states mainly as commodities suppliers and highly vulnerable to fluctuations in international markets has contributed to the affirmation of global patterns of inequality.<sup>51</sup> In the

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<sup>43</sup> Community of Sahel-Saharan States Revised Treaty, 16 February 2013 <https://www.nepad.org/file-download/download/public/14488>

<sup>44</sup> Treaty Instituting the Arab Maghreb Union, 29 September 1989 [https://www.wipo.int/edocs/lexdocs/treaties/en/amu/trt\\_amu.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/amu/trt_amu.pdf).

<sup>45</sup> Agreement Establishing the Inter-Governmental Authority on Development, 21 March 1996 <http://www.kenyalaw.org>.

<sup>46</sup> Consolidated Text of the Treaty of the Southern African Development Community, 21 October 2015 [https://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf).

<sup>47</sup> Treaty for the Establishment of the East African Community, 1999 [https://www.eacj.org/?page\\_id=33](https://www.eacj.org/?page_id=33).

<sup>48</sup> Treaty Establishing the Economic Community of Central African States, October 1983 [https://www.wipo.int/edocs/lexdocs/treaties/en/eccas/trt\\_eccas.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/eccas/trt_eccas.pdf).

<sup>49</sup> Treaty Establishing the Common Market for Eastern and Southern Africa, 1993 <https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>.

<sup>50</sup> Revised Treaty of the Economic Community of West African States, 24 July 1993 <https://www.ecowas.int/ecowas-law/treaties/>.

<sup>51</sup> See generally Deaton A 'Commodity Prices and Growth in Africa' (1999) 13 (3) *Journal of Economic Perspectives* 23–40.

post-colonial era, while the unequal economic structure remains, physical infrastructure challenges, ineffective trade policies at the regional level, and the lack of political will among African leaders have contributed to the poor economic performance of the formal regional trade regimes. With these challenges unabated, trading with states outside Africa has thrived to the detriment of intra-regional trade.

Further, the experience in sub-regional organisations reveal that African states prioritise national economic development policies over regional ones. Regional trade policies are frequently subverted by a combination of the slow or incomplete domestication of regional commitments. The delay in the ratification of the AfCFTA by the parliament of some African states illustrates this problem.<sup>52</sup> However, while the enthusiasm regarding the coming into force of the AfCFTA has been encouraging, navigating an accelerated economic integration agenda that centres Africa's interests presents more formidable political, economic, legal, and functional/institutional challenges.<sup>53</sup>

In this regard, the AfCFTA's proposal to build on the RECs without providing a specific plan of how to do it is at best murky and aspirational. Disentangling the complex web of RECs in Africa for the implementation of the AfCFTA is critical to the success of the agreement. It is not enough that the AfCFTA proposes to build on the *acquis* of the RECs. The lack of trust and colonial divisions along Francophone, Anglophone and Lusophone countries engendered will simply be extended into the AfCFTA's implementation process. A possibility that may ensue is a reproduction of the impediments that the RECs have experienced.

The growing scholarly assessments of the AfCFTA promise are both optimistic and sceptical. On paper, both optimists and sceptics recognise the promise of the AfCFTA to transform the economic development struggles of African states in pursuit of a meaningful and substantive industrialisation agenda.

The optimistic view is championed mostly by institutional actors and representatives. For understandable reasons, they touted the win-win nature of the agreement. However, the extent to

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<sup>52</sup> Nigeria, among a bouquet of other countries, would have missed the official commencement trading date of 1 July 2020, but for the postponement due to the COVID-19 pandemic (see Adegboyega A 'Nigeria Set to Ratify AfCFTA Agreement – Minister' (22 September 2020) *Premium Times* <https://www.premiumtimesng.com/business/416280-nigeria-set-to-ratify-afcfta-agreement-minister.html>).

<sup>53</sup> See UNCTAD *African Continental Free Trade Area: Advancing Pan-African Integration – Some Considerations* UNCTAD/WEB/DITC/2016/5 (2016) 1–21 <https://unctad.org/webflyer/african-continental-free-trade-area-advancing-pan-african-integration-some-considerations> (providing an overview of the opportunities and challenges for African continental economic integration through the AfCFTA).

which a trade agreement equalises the relationship of the participating states is questionable. The African states comprise developing and least developed countries (LDCs). The potential that the AfCFTA will benefit the more economically endowed members is high. Luke & MacLeod argue that the 'AfCFTA is win-win for all African countries'.<sup>54</sup> Their argument is predicated on the flexibility and variable geometry principles of the AfCFTA. In Luke & MacLeod's view, industrialised African countries will gain from the opportunities for manufactured products, while the less-industrialised countries can derive their benefit from linking to the regional value chains.<sup>55</sup> Agricultural producing countries will gain from producing food for Africa's food security, while the benefits arising from reduced tariffs, trade facilitation, and customs cooperation should alleviate the predicament of land-locked African states. The LDCs can take advantage of programs such as the Accelerated Industrial Development for Africa<sup>56</sup> and educational and skills training courses to address their concerns.<sup>57</sup> The challenge however is that the RECs have not been able to translate these flexibilities into substantive intra-African trade and economic development.

The sceptics, however, diverge on the substantive capacity of the AfCFTA to achieve the goals without addressing, at least simultaneously, some of the urgent pre-existing impediments. Critics of the AfCFTA argue that for its promise to be realised the perennial challenges of regional trade agreements and cooperation in Africa must be addressed. Ajibo argues that to optimise effective trading in goods and services, the AfCFTA will need to address deficiencies in technical capacity, financial resources, physical infrastructure, elimination of non-tariff measures, and create a reliable remedies regime.<sup>58</sup> More pointedly, in assessing the promise of the AfCFTA to address the plight of the LDCs in Africa, Ndonga, Laryea & Chaponda contend that the AfCFTA 'does not and cannot address many other problems that beset African international trade performances, such as poor infrastructure and low production and productivity.'<sup>59</sup> They argue that, to maximise the potential of the AfCFTA, African states must pivot from patterns of trading, national economic

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<sup>54</sup> Luke & MacLeod (n 7 above) 1 10.

<sup>55</sup> See *ibid.*

<sup>56</sup> See Action Plan for the Accelerated Industrial Development of Africa, Ex.CL/379 (XII) Annex II, AU [https://www.au.int/web/sites/default/files/documents/30985-doc-plan\\_of\\_action\\_of\\_aida.pdf](https://www.au.int/web/sites/default/files/documents/30985-doc-plan_of_action_of_aida.pdf).

<sup>57</sup> See Luke & Macleod (n 7 above) 1 10.

<sup>58</sup> See Ajibo (n 3 above) 873.

<sup>59</sup> Ndonga D, Laryea E & Chaponda M 'Assessing the Potential Impact of the African Continental Free Trade Area on Least Developed Countries: A Case Study of Malawi' (2020) 46 (4) *Journal of Southern African Studies* 773–792 779 (analysing questions such as: whether the AfCFTA trade benefits will accrue evenly to Africa's diverse economies and how the agreement's provisions will affect the economies that have a fiscal dependence on trade taxes).

policies, and invest in physical infrastructure that open up new opportunities for Africa. Likewise, extant physical infrastructures, in particular, road and rail routes of trading entrench colonial trading patterns. To a limited extent, the regional development corridor projects that some of the RECs have implemented is aimed at addressing this challenge. However, the geographical spread of the programs requires a wider expansion. Obegon-Odoom, also a sceptic, argues that the AfCFTA lacks the capacity to re-engineer a redistribution of private legal and economic ordering.<sup>60</sup> His scepticism stems from the fact that the AfCFTA shows ‘little concern with staggering inequality and debt crises on the continent, and [despite its attention to economic growth and development, the AfCFTA] ... may contribute to impending ecological crises.’<sup>61</sup>

In other words, in its current form, the AfCFTA does not adequately address how the inequality and distributional effects, particularly as it relates to the informal economy and LDCs, will be addressed. If the gains are perceived as being captured by only a few countries, there may be a backlash for the AfCFTA in the implementation phase. Article 5 of AfCFTA, inter alia, incorporates principles such as variable geometry,<sup>62</sup> flexibility and special and differential treatment (S&DT), and the preservation of the *acquis*.<sup>63</sup> Flexibility, S&DT, and variable geometry are embedded in the AfCFTA.<sup>64</sup> In my view, while these principles are useful and might address some challenges relating to different levels of development, African leaders need to pay far more attention to the plight of the most vulnerable African states. Development-centred projects that will augment and enhance the job security of the women and men that operate in the informal cross-border trade in Africa must be prioritized. More precisely, to drive the implementation of the AfCFTA, it is critical to align national interests with regional objectives. In this context, it is essential to gain the trust and buy-in of the majority of the parties in negotiations on NTBs, rules of origin, investment, cross-border movement of persons, services liberalisation and regulation, and trade remedies. We should not conflate the overwhelming support for the adoption and coming

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<sup>60</sup> Obeng-Odom (n 3 above) 168.

<sup>61</sup> Ibid.

<sup>62</sup> For different takes on the contentious implication of this principle for African economic integration, see Tino E ‘The Variable Geometry in the Experience of Regional Organizations in Developing Countries’ (2013-2014) 18 *Spanish Yearbook of International Law* 141–162; and Gathii (n **Error! Bookmark not defined.** above).

<sup>63</sup> See Gérout G, MacLeod J & Desta M ‘The AfCFTA As Yet Another Experiment Towards Continental Integration: Retrospect and Prospect’ in Luke & MacLeod (n 7 above) 15–34 26; Sommer L & McLeod J ‘How Important is Special and Differential Treatment for an Inclusive AfCFTA’ in Luke & MacLeod (n 7 above) 69–86; and Kuhlmann K & Agutu A ‘The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development’ (2020) 51 (4) *Georgetown Journal of International Law*.

<sup>64</sup> See Art 5 of the AfCFTA.

into force of the AfCFTA with its implementation. The real challenge the promise of a rules-based liberalised trade regime under the AfCFTA will have to surmount is African states' implementation lethargy. As it stands, without addressing this as a preliminary step to the other challenges discussed in this section, the AfCFTA may not transcend the shadow of the RECs.

## 5 SYSTEMIC DEFICIENCIES AND THE AfCFTA IN THE POST-PANDEMIC ERA

On 11 March 2020, the World Health Organisation (WHO) declared COVID-19 as a pandemic, formally signalling its threat to every country in the world.<sup>65</sup> COVID-19 has revealed the fragility of African states in the global economic order. The pandemic and the responses to it by states has brought into sharp focus different dimensions of the socio-political and economic realities of regional economic cooperation in Africa and vis-à-vis the multilateral trading system. It has revealed different dimensions of Africa's international economic relations, both in the context of its South-South relations on the one hand, and Global North on the other. Unlike their Global North-Global South partnerships, South-South cooperation on the face of it builds on solidarity, trust, and reciprocity. These underlying principles are not without their own challenges. Economic cooperation between Global South countries also manifest structural inequalities. The COVID-19 pandemic has further exacerbated these structural inequalities and power asymmetry.<sup>66</sup>

Africa was already in a weak and vulnerable position in the international economic regime before the COVID-19 pandemic. The vulnerability status of the marginalised African states in international economic law is not simply a consequence of this pandemic.<sup>67</sup> It was and is a question of the historical inequality, structure of dominance, power asymmetry, and its reproduction in the international economic law regime that is skewed in favour of the Global North. Thus, as Africa

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<sup>65</sup> See World Health Organization 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> ('COVID-19 can be characterized as a pandemic').

<sup>66</sup> See Akinkugbe OD & Gammage C 'COVID-19 and South-South Trade & Investment Cooperation: Three Emerging Narratives' (11 May 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/05/11/covid-19-and-south-south-trade-investment-cooperation-three-emerging-narratives/>, arguing that the COVID-19 pandemic could generate three narratives: 'The first narrative is pessimistic in its outlook – the "worst case" scenario of a post-Covid 19 world that will be characterised by deeper divisions and inequalities among and within countries'; 'the second narrative of South-South cooperation is more optimistic in terms of its outcomes'; and, 'the third narrative navigating murky terrain where the winners and losers of the post-Covid 19 era are difficult to identify.'

<sup>67</sup> See United Nations Conference on Trade and Development 'Trade and Vulnerability' (16 September 2019) *UNCTAD Secretariat* [https://unctad.org/system/files/official-document/cid48\\_en.pdf](https://unctad.org/system/files/official-document/cid48_en.pdf).



has always been at the periphery of the international economic order, the pandemic has ‘brought to the fore and made more realistic, and quite unfortunately, the plight of the marginalized [African states] in our largely unequal multilateral trading regime.’<sup>68</sup> Specifically, the pandemic has led to a slowdown in trade, investment inflows, tourism, and service sectors in Africa’s fragile economies. It has left, in its wake, financial distress and rising debt, a breakdown in social services, erosion of trust, rise of protectionist measures, and deepened inequality and vulnerability. In addition to the challenges caused by a sharp decline in external trade and investment due to the COVID-19 pandemic, many African states plunged into an unforeseen socio-economic crisis resulting from the lockdowns enforced by most African countries.<sup>69</sup>

At the regional level, the pandemic has slowed down the pace of the AfCFTA’s operational phase. It led to the postponement of the commencement of trading from 1 July 2020 to 1 January 2021. The lockdowns affected the on-going negotiations relating to the rules of origin and NTBs that were important for the AfCFTA to commence. The pandemic has thus had a direct effect on formal economic integration and intra-African trade.<sup>70</sup> Likewise, the health-related consequences of the pandemic has economic consequences.<sup>71</sup> Economic measures, particularly border closures, protectionist policies, and a breakdown in the global and regional supply chain, have produced significant setbacks for African economies mainly in terms of lost productivity and trade both within and among countries. To illustrate COVID-19’s impact on trade in Africa, I use the examples of the financial sector-debt burden conundrum and digitalisation. The first constitutes an area where historical and contemporary deep-seated channellings exists and the second an emerging sector that African leaders can capitalise for a better post-pandemic Africa.

Financing Africa’s economy and the problem it has engendered historically is a critical aspect of the problems of economic cooperation that the pandemic has brought to the fore. In the context of the AfCFTA, the debt profile of many African states exposes their weak financial status, as well as their dependency on external loans to finance their economies. The debt profile of many African states is a significant constraint on their liquidity capacity to implement economic

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<sup>68</sup> Akinkugbe & Gammage (n 66 above).

<sup>69</sup> The WTO projected a decline in world trade between 13 per cent and 32 per cent in 2020, see WTO ‘PRESS/855’ (2020) [https://www.wto.org/english/news\\_e/pres20\\_e/pr855\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr855_e.htm).

<sup>70</sup> See Gondwe G ‘Assessing the Impact of COVID-19 on Africa’s Economic Development’ (2020) 3 *UNCTAD/ALDC/MISC/2020/3* [https://unctad.org/system/files/official-document/aldcmisc2020d3\\_en.pdf](https://unctad.org/system/files/official-document/aldcmisc2020d3_en.pdf).

<sup>71</sup> See Sirleaf M ‘Africa, COVID-19 and Responsibility’ (12 May 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/05/12/africa-covid-19-and-responsibility/>.

measures with a direct impact on trade. From 2011 to 2019, the average debt-to-GDP ratio of African states increased from 39.5 per cent to 61.3 per cent.<sup>72</sup> However, African states remained highly indebted. The rise in debt has limited the fiscal space to respond adequately to the pandemic due to a series of factors that include but are not limited to ‘low domestic saving rates; low levels of domestic resource mobilisation; high illicit financial outflows; capital flight; volatile commodity prices; high fiscal deficits and stagnating official development assistance.’<sup>73</sup> Proposals to deal with the attendant debt burden for low-income countries include the International Monetary Fund’s Catastrophe Containment and Relief Trust<sup>74</sup> and the Debt Service Suspension Initiative<sup>75</sup>.<sup>76</sup> The proposals are, however, a stop gap that does not address the broader systemic issues of inequality and structural asymmetries that created the initial problem. Bradlow has warned that the current debt arrangement has the potential to encourage vultures who may capitalise on this moment for profit and therefore entrench the debt problems of African states.<sup>77</sup> The point here is that Africa’s debt profile amplifies urgency for the economic diversification and eventual transformation. Whilst debt issues linger and are being addressed, the AfCFTA as a vehicle for economic transformation must be implemented in a manner that diversifies Africa’s mostly monolithic economies. Hence, while, in a post-pandemic world African states will require a reasonable level of flexibility in capital to ensure that they have the necessary finance to stabilise their economies, the AfCFTA must be instrumentalised in innovative ways to galvanise and reposition these economies for a better future.

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<sup>72</sup> See UNCTAD Press Release ‘Secretary-General Says Tackling “Crushing Debt” Central to COVID-19 Responses, at Joint Meeting of Global Financial Bodies’ (17 April 2020) Doc SG/SM/20049 <https://www.un.org/press/en/2020/sgsm20049.doc.htm>.

<sup>73</sup> UNECA, AU & African Development Bank *Bringing the Continental Free Trade Area About: Assessing Regional Integration in Africa VIII* (2020) 17 <https://repository.uneca.org/ds2/stream/?#/documents/6eecec71-b7f3-5f3f-b853-5e9bfae14955/page/1>.

<sup>74</sup> See International Monetary Fund ‘Catastrophe Containment and Relief Trust’ (15 April 2020) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/49/Catastrophe-Containment-and-Relief-Trust>.

<sup>75</sup> See The World Bank ‘COVID 19: Debt Service Suspension Initiative’ (21 December 2020) <https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative>.

<sup>76</sup> See Connelly S et al ‘Staying Claims: Debt Moratoria Beyond the Debt Service Suspension Initiative’ (6 August 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/08/06/staying-claims-debt-moratoria-beyond-the-debt-service-suspension-initiative/>.

<sup>77</sup> See Bradlow D ‘Dove, Vultures and African Debt in the Time of COVID-19’ (22 May 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/05/22/doves-vultures-and-african-debt-in-the-time-of-covid-19/>.

Another consideration is that the pandemic has accelerated the absorption of digital solutions, tools and services, and their adaptation for the purposes of trade.<sup>78</sup> E-commerce is on the rise in Africa, and with it have come new opportunities for market expansion and investment in the digital economy. Digital economies hold the promise of transformation of trade and services in Africa in unique ways that complement and innovatively expand trade in Africa. An increasing amount of e-commerce in Africa involves cross-border sales and therefore contributes to international trade. Many African countries have actively deployed digital technologies to shift to cashless transactions. Likely, digital solutions have been used to manage the spread of the pandemic in Africa. According to the United Nations Economic Commission for Africa, the use of mobile money in East Africa has helped reduce the risk of the spread while in Ethiopia and Senegal, tech start-ups are using 3D printing to develop face shields and ventilator valves.<sup>79</sup> The point here is that financial inclusion driven by the digital revolution to foster market integration and production activities may be achieved at a much lower transaction cost. Similarly, the widespread availability of mobile telephone internet portends well for a greater number of participants in the digital economy. In particular, farmers have found digital platforms useful in boosting agricultural productivity through prompt payments for produce, information sharing, and agro-industrial activities.<sup>80</sup> In the COVID-19 era, the use of technology has become not only increasingly important but also the primary means by which smallholder farmers exchange information and access to resources.<sup>81</sup> Further, the AU has adopted digitisation to drive the negotiation of the AfCFTA through the African Virtual Trade-Diplomacy Platform (AVDP) as part of the wider African Virtual Resilient Integration for a Vibrant Africa (AVRIVA).<sup>82</sup> To effectively harness digital platforms for the AfCFTA, among other emerging digital solutions, the AU identifies the

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<sup>78</sup> See UNECA 'Impact of COVID-19 in Africa' (20 May 2020) *UNECA Policy Brief* [https://www.uneca.org/archive/sites/default/files/PublicationFiles/sg\\_policy\\_brief\\_on\\_covid-19\\_impact\\_on\\_africa\\_may\\_2020.pdf](https://www.uneca.org/archive/sites/default/files/PublicationFiles/sg_policy_brief_on_covid-19_impact_on_africa_may_2020.pdf).

<sup>79</sup> Ibid 8.

<sup>80</sup> See Abdulai A, Duncan E & Fraser E 'How Digital Technologies Can Help Africa's Smallholder Farmers' (29 July 2019) *Food and Agriculture Organization of the United Nations* <http://www.fao.org/e-agriculture/blog/how-digital-technologies-can-help-africa's-smallholder-farmers>. In relation to farming, digitisation refers to 'everything from delivering farming advice via text messaging to interactive voice response. It also includes smart phone applications that link farmers to multimedia advisory context, farm inputs, and buyers. And it covers the use of drones and satellite systems to inform farmer activities, such as crops and times to plant; and types and amounts of inputs to use.' (ibid).

<sup>81</sup> See Browner M 'How Technology Powers Smallholder Farmers During COVID-19' (25 September 2020) *Global Citizen* <https://www.globalcitizen.org/en/content/how-technology-powers-smallholder-farmers/>.

<sup>82</sup> See AU 'In Wake of COVID-19, African Union to Keep AfCFTA on Track with Digital Technology' (14 August 2020) <https://au.int/en/pressreleases/20200814/covid-19-african-union-keep-afcfta-track-digital-technology>.

following three key interventions: (i) the establishment of a Pan-African technology platform and digitisation of the bio-surveillance and bio-screening protocols of the Africa Centres for Disease Control and Prevention; (ii) design and deployment of a technology framework for aligning e-commerce and e-trading platforms; and (iii) a broad initiative to enhance cybersecurity in multilateral affairs in Africa.<sup>83</sup>

Digitisation is, however, not value neutral. Digital solutions are adopted and applied in an already stratified economy.<sup>84</sup> Maximising the full potential of the digital revolution requires an acknowledgement of the challenges and taking appropriate steps to address them. Digitalisation in service of trade and integration must be implemented in a way that reflects equitable, inclusive, and sustainable economic expansion in Africa. In the context of the AfCFTA, Sucker argues that the potential to harness the benefits of the digital sector would only be realised if ‘an additional AfCFTA-protocol with specific provisions on cross border e-commerce are expanded to focus more broadly on cross border digital trade.’ Such an approach, Sucker contends, ‘would not only capture the sale of consumer products via the Internet and digitally supplied services ... but also data flows that enable global value chains, services that enable smart manufacturing, digital content not stored on a physical carriers ... and numerous other platforms and applications.’<sup>85</sup>

While the pandemic may have shown deep and systemic deficiencies and vulnerabilities for many African countries, there are also policy lessons that can inform future pathways to strengthen the trade regime in Africa. With the promise of opportunities for new trade exports, jobs, investments in infrastructure and financing for Africa’s development, the AfCFTA has a crucial role to play in diversifying African economies and protecting them against future harm or volatilities that shape the global commodity prices that constitute the majority of Africa’s foreign trade. In other words, the pause in the negotiations for the phase II of the AfCFTA presents an opportunity for African countries to re-assess the potential impact of a prolonged delay and revisit the areas that COVID-19 has revealed as Africa’s strength and weaknesses. It is imperative that African leaders embrace an unwavering commitment to re-engineer African economies through

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<sup>83</sup> Ibid.

<sup>84</sup> See Sucker F ‘COVID-19 Pushes Digital Solutions and Deepens Digital Divides: What Role for African Digital Trade Law?’ (9 May 2020) *Afronomicslaw* <https://www.afronomicslaw.org/2020/05/09/covid-19-pushes-digital-solutions-and-deepens-digital-divides-what-role-for-african-digital-trade-law/>.

<sup>85</sup> Ibid.

the AfCFTA for a sustainable and relevant industrial future.<sup>86</sup> COVID-19 has reminded us that, in the face of emergencies, national autonomy will be reasserted against regional integration objectives. African countries are not alone in this realisation.<sup>87</sup> We are reminded that international trade is not a silver bullet to prosperity and that in the context of the AfCFTA, the journey to realising its objectives depends on several layers of socio-political, economic cultural, and institutional factors.

## 6 CONTENDING VISIONS OF PAN-AFRICANISM AND THE FUTURE OF THE AfCFTA

The AfCFTA has been touted as a pan-African trade agreement. However, it remains unclear what this assertion means. Abrahamsen's analysis of the contending visions of the ideology of pan-Africanism offers a compelling fluid, overlapping, and morphological understanding of pan-Africanism, which is instructive to understanding the future of the AfCFTA in the implementation phase.<sup>88</sup> As such, my aim is not to examine the concept in its historical evolution. The majority of scholars describe the attitude of African states towards non-implementation as the lack of political will. In my view, this oversimplifies the movements that occur in the implementation phase.<sup>89</sup>

In signalling a pan-Africanist underpinning, the AfCFTA gives an idea that a pan-African trade agreement is unifying and perhaps monolithic.<sup>90</sup> Pan-Africanism, Abrahamsen argues 'contains internal tensions and fissures, multiple variations and inflections, all adapting and mutating in interaction with global events.'<sup>91</sup> In other words, not only is pan-Africanism not value neutral, its meaning at any point in time is constituted by interactions with prevailing ideologues

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<sup>86</sup> See Desta M 'Covid-19 and Export Restrictions: The Limits of International Trade Law and Lessons for the AfCFTA' (May 2020) *Africa Trade Policy Centre, UNECA* <https://repository.uneca.org/ds2/stream/?#/documents/cadd8f0c-cc81-4887-b98a-5e6b6975b91c/page/1>.

<sup>87</sup> See *ibid*.

<sup>88</sup> See Abrahamsen R 'Internationalists, Sovereignities, Nativists: Contending Visions of World Order in Pan-Africanism' (2020) 46 (1) *Review of International Studies* 56–74 57.

<sup>89</sup> See eg Kufuor K 'When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of 1994' (2013) 6 (1) *African Journal of Legal Studies* 1–16 (Analysing the problems that arise in 'reconciling ECOWAS' supranationalism with the domestic interests of its members that is played out in the on-going bout of protectionism currently existing in Ghana, related primarily to the right of Nigerian citizens to establish themselves in Ghana's markets and engage in what is known as petty trading.' (*ibid* 2).

<sup>90</sup> See Nanga J 'The African Continental Free Trade Area: Free Trade and pan-Africanism' (1 January 2019) *Bilaterals* <https://www.bilaterals.org/?the-african-continental-free-trade>.

<sup>91</sup> Abrahamsen (n 88 above) 57

in the international economic order. Abrahamsen identifies overlapping ideas and building blocks for her analysis of

contending and evolving visions of world order within Pan-Africanism: a world of racially defined units; a world of continental unity and transnational solidarity; and a world of national sovereignty.

...

morphological perspective that recognises Pan-Africanism as capable of multiple conceptual combinations and nuanced variations, offering different and varied decontestations of unity – depending on how it is conjugated in relation to the desire and demand for other political ends, most notably sovereignty and equality, and correlated with world events and historical circumstances.<sup>92</sup>

My argument here is a simple one: African regional trade regimes in general, and the AfCFTA project in particular, have paid insufficient attention to the mutability and fluidity of pan-Africanism in the discourses of economic cooperation in Africa, especially in the implementation phase of the trade agreements. A reasonable body of literature that analyses the AfCFTA as a pan-African project tend to equate this loosely with a convergence with national economic policies or objectives. To be sure, Pan-Africanism is useful and ‘contains valuable intellectual and political resources for the defence, reinvigoration, and invention of a more just, rule-bound multilateral world order, but that this cannot be taken for granted.’<sup>93</sup>

Nigeria’s stop and start relationship offers a good example to illustrate the argument that pan-Africanism is fluid and mutable and evolving vis-à-vis each state party as opposed to a united African states’ position about the ideology. In the context of the AfCFTA, having been at the forefront of negotiating the AfCFTA, Nigeria’s initial delay in signing the agreement took many by surprise. However, at the heart of the decision were national concerns championed mostly by the Manufacturers Association of Nigeria (MAN).<sup>94</sup> The non-competitiveness of small and medium-sized Nigerian companies vis-a-vis the transnational companies, MAN argues, will inevitably be a factor of bankruptcy of these companies, consequently, job losses and the growth

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<sup>92</sup> Abrahamsen (n 88 above) 57, 58. ‘Pan-Africanism today relates and responds to the ideas and forces that give rise to widespread anxieties over a vanishing liberal internationalism, including the spread of nationalism, the withdrawal from multilateralism, and the emergence of illiberal powers like China and Russia.’ 61.

<sup>93</sup> Ibid 73.

<sup>94</sup> See Adekoya F ‘MAN Kicks as Nigeria’s Priority Products are Omitted from AfCFTA’s Sensitive, Exclusive Lists’ (24 February 2020) *The Guardian* <https://guardian.ng/business-services/man-kicks-as-nigerias-priority-products-are-omitted-from-afcfas-sensitive-exclusive-lists/>.

of unemployment.<sup>95</sup> As such, it was wise to delay the decision to address the national contestations regarding the AfCFTA.

Pan-Africanist ideologies do not abate after the agreement becomes operational. Its effect in one form or a combination of the three visions described above inform the behaviour of African states in the implementation of the AfCFTA. The future of the AfCFTA and its implementation will do well recognising that what appears as a lack of political will, in the context of an economic objective, may be a manifestation of the underlying contending national, sub-regional, and regional visions. Perhaps working with such a nuanced and critical understanding would engender new attitudes towards the underlying challenges for the members. Such an approach, in fact, complements the flexibilities that are codified in the AfCFTA.

## 7 CONCLUSION

The project of trade liberalisation in the context of African societies and economic integration cannot be disentangled from the broader question of economic development. The implementation of successful trade agreements, particularly those with economic development projects embedded in them, entail an understanding of the complex socio-political, economic, legal, and institutional factors at play.<sup>96</sup> With trade wars raging in some regions<sup>97</sup> and the rise of populist and anti-free trade agendas in erstwhile pro-trade countries,<sup>98</sup> confidence in the multilateral trading regime and the architecture of economic order it promises has experienced significant fracture.

The case has been made extensively for the AfCFTA and its potential to restructure international economic law in Africa. To the extent that African leaders sought with minimal success for a continental regional integration scheme, the AfCFTA already ticks an important box.<sup>99</sup> The recognition of flexible regimes via S&DT provisions in acknowledgement of the

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<sup>95</sup> See Okwumbu R 'AfCFTA: Nigeria not Ready for Restrictive Rule of Origin' (30 July 2020) *Nairametrics* <https://nairametrics.com/2020/07/30/afcfta-nigeria-is-not-ready-for-restrictive-rule-of-origin/>.

<sup>96</sup> See generally Herbst J 'Crafting regional cooperation in Africa' in Acharya A & Johnston A *Crafting Cooperation: Regional International Institutions in Comparative perspective* (2009) 129–144.

<sup>97</sup> See generally van Aaken A, Bown C & Lang A 'Introduction to the Special Issue on "Trade Wars"' (2019) 22 (4) *Journal of International Economic Law* 529–533.

<sup>98</sup> See generally Lester S & Manak I 'The Rise of Populist Nationalism and the Renegotiation of NAFTA' (2018) 21 *Journal of International Economic Law* 151–169.

<sup>99</sup> On this, see Luke & MacLeod (n 7 above) 2: 'AfCFTA negotiators surpassed expectations with the pace with which the negotiations were accomplished ... the texts of the AfCFTA Agreement and its Protocols on Trade in Goods, Trade in Services and on Rules and Procedures on the Settlement of Disputes, were concluded in less than three years'.

unequal economic position of African states bodes well for an inclusive AfCFTA. Yet, challenges remain.

An important factor that the policy experts, academics, and negotiators of the AfCFTA must bear in mind is that, its implementation must not be severed from the historical, social, economic, political, and cultural realities of the continent. Even as it aims to construct a new continental economic order, it must not only capture the socio-political system that has aided the dominant economic actors, but also, extend to the informal economy – consisting mostly of women and traders routinely trading across the borders – that strongly underpins African societies. The regulation of the formal and informal economies, when joined with the potential of the continent in information technology, holds the promise of an unprecedented leveraging of capital and resources that bode well for the future of the continent. Lessons and experiences from the RECs will be indispensable in this process.