



**UNIVERSITY *of the*  
WESTERN CAPE**

**PROMOTING AND FACILITATING DEVELOPMENT THROUGH  
PRIVATE SECTOR INCLUSION UNDER THE AFRICA CONTINENTAL  
FREE TRADE AGREEMENT (AFCFTA) LEGAL AND INSTITUTIONAL  
FRAMEWORK**

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degree of LLM-International trade, business and investment law in the  
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## KEYWORDS

African Continental Free Trade Agreement (AfCFTA)

Regional Economic Communities (REC)

Free Trade Agreements (FTA)

Foreign Direct Investment (FDI)

Intra-regional trade

Private sector inclusiveness

Non-tariff barriers to trade (NTB)

Preferential Trade Areas (PTA)

Common Market



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## DECLARATION

I, Victoria R. Kirunda Kobel, declare that the mini-thesis titled “Promoting and Facilitating Development through Private Sector inclusion under the Africa Continental Free Trade Agreement (AfCFTA) legal and institutional framework” is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, college or other institution of learning for any academic or other awards.

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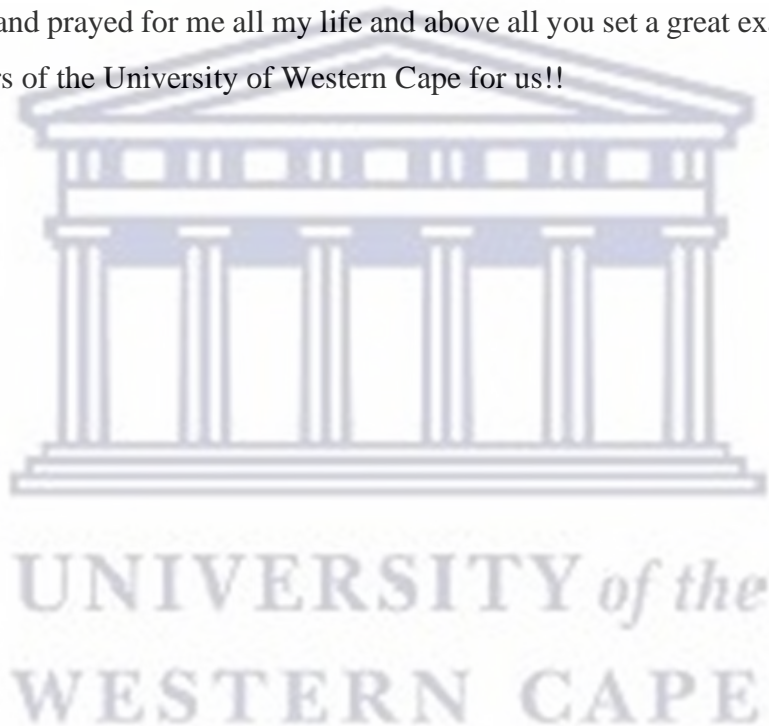
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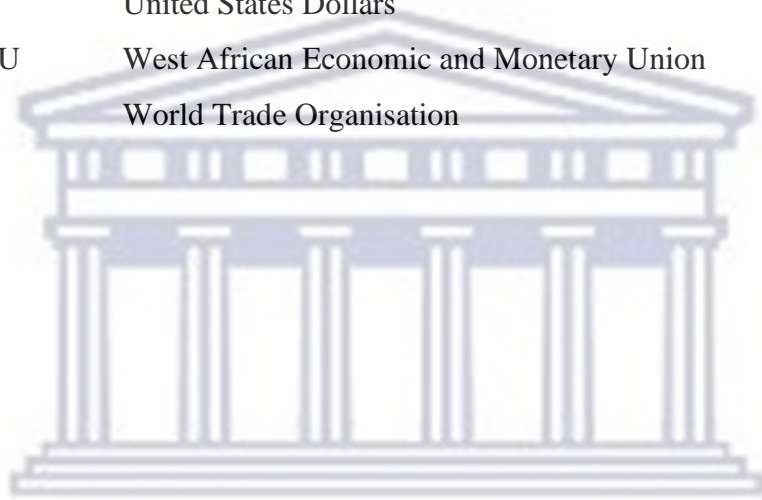
## ACRONYMS AND ABBREVIATIONS

\$	United States Dollars
AB	Appellate Body
ACCMSME	ASEAN Coordinating Committee of Micro Small and Medium Enterprise
ACP	African Caribbean and Pacific States.
ACtHPR	African Court on Human and People's Rights
ACTI	ASEAN Connectivity through Trade and Investment
ADR	Alternative Dispute Resolution
AEC	ASEAN Economic Community
AfCFTA	African Continent Free Trade Agreement
AFIF	Africa Investment Facility
AFREXIM	African Export Import Bank
AIC	Arab Investment Court
AIF	Asian Investment Facility
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ASEAN-BAC	ASEAN Business Advisory Council
ASEM	Asia Europe Meeting
ATO	African Trade Observatory
AU	African Union
AUC	African Union Community
BIAT	Action Plan for Boosting Africa
CBC	COMESA Business Council
CCH	COMESA Clearing House
CCJA	Common Court of Justice and Arbitration
CEMAC	Economic and Monetary Community of Central Africa
CEN-SAD	Community of Sahel-Saharan States
CESL	Common European Sales Law
CFSP	Common Foreign and Security Policy
CIF	Caribbean Investment Facility

CISG	United Nations Convention on Contracts for the International Sale of Goods
COE	Council of Europe
COMESA	Common Market of East and South Africa
COVID-19	Corona Virus Disease of 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DS	Dispute Settlement Protocol
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
EACJ	East African Court of Justice
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEC	European Economic Community
EIB	European Investment Bank
EPC	European Political Co-operation
EPZ	Export Processing Zones
EUR	European currency
EURATOM	European Atomic Energy Community
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GIZ	Gesellschaft für Internationale Zusammenarbeit
GVC	Global Value Chains
IFCA	Investment Facility for Central Asia
IFP	Investment Facility for the Pacific
IGAD	Intergovernmental Authority on Development

IIL	International Investment Law
ISD	Investor State Disputes
ITA	Intra-African Trade
JHA	Justice and Home Affairs
LAIF	Latin America Investment Facility
LDCs	Least Developed Countries
LLM	Master of Laws
MFN	Most Favoured Nation
MSME	Micro, Small and Medium Enterprise
NIF	Neighbourhood Investment Facility
NTB	Non-Trade Barriers
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OEEC	European Economic Cooperation
OHADA	Organisation for the Harmonisation of African Business Laws
PAPSS	Pan-African Payments and Settlements System
PECL	Principles of European Contract Law
PICC	Principle of International Commercial Court
PJCC	Policing and Judicial Cooperation in Criminal Matters
PSD	Private Sector Development
PSDS	Private Sector Development Strategy
PTA	Preferential Trade Area
RCEP	Regional Comprehensive Economic Partnership
REC	Regional Economic Community
REPSS	Regional Payment and Settlement System
SADC	South African Development Community
SAPSMED	Strategic Action Plan for Small and Medium Enterprise Development
SBA	Small Business Act for Europe
SME	Small Medium Enterprise
SMEWG	Small and Medium Enterprise Agencies Working Group
SPS	Sanitary and Phytosanitary Measures

TBT	Technical Barriers to Trade
TPP	Trans-Pacific Partnership
UMA	African Maghreb Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNIDROIT	International Institute for the Unification of Private Law
USAID	United States Agency for International Development
USD	United States Dollars
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organisation



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# CHAPTER ONE

## INTRODUCTION

### 1.1 Research Background

Free Trade Agreements (FTAs) have been fronted as vehicles for economic development by various scholars and economic organisations at large. But what is development? This is an important question which must be answered. Chidede, in his work, states that the term development has no universal definition but, at a more general level, entails a

process, which aims at the constant improvement of the well-being of the entire population and all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom<sup>1</sup>.

This is an acceptable standard by which to judge development, especially in light of what has been termed as “sustainable development goals”<sup>2</sup>. It is against this backdrop that this study aims to investigate the potential of the African Continental Free Trade Agreement (AfCFTA)<sup>3</sup> to bring about not only development, but also inclusive development with a major focus on its ability to promote private sector inclusiveness, a key component to realising its agenda.

FTAs, in essence, are contracts between countries or groups that regulate trade relations, mainly regarding tariffs, taxes and duties on imports and exports<sup>4</sup>. It has

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<sup>1</sup> Chidede, T., 2019. Entrenching the right to regulate in the international investment legal framework: The African experience. Doctoral Thesis.. Western Cape: University of the Western Cape.

United Nations, 1986. United Nations declaration on the right to development. General assembly resolution 55/2. s.l.:United Nations Human Rights.

<sup>2</sup> Woodbridge, M., 2015. From MDGs to SDGs: What are the sustainable development goals?. Bonn: ICLEI World Secretariat.

<sup>3</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission.

<sup>4</sup> Natalia, R., n.d. *Why free trade agreements are important?*. [Online] Available at: <https://cms.law/en/col/publication/why-free-trade-agreements-are-important> [Accessed 14 July 2022].

been argued that FTAs contribute to greater economic activity and job creation, and deliver opportunities for big and small businesses to benefit from greater trade and investment<sup>5</sup>. FTAs have been said to reduce and eliminate tariffs and address behind-the-border barriers that would otherwise impede the flow of goods and services; encourage investment; and improve the rules affecting such issues as intellectual property, e-commerce and government procurement<sup>6</sup>. This is due to the fact that being contractual in nature, they offer avenues for the respective parties involved to make informed bargains for incentives they believe will aid in their country's development through collaborative efforts.

Indeed, studies have been carried out to evaluate the impact of FTAs, and some of these have shown a positive correlation between utilisation of FTAs and development<sup>7</sup>. With such evidence, there is a rationale for fronting FTAs as a tool for economic development. Nevertheless, other studies have shown that these FTAs have pitfalls. They are eschewed to heavily support major companies, mostly through Foreign Direct Investment (FDI). This comes with its negative implications acting as a bar to true development as defined by Chidede, especially in developing states<sup>8</sup>.

Nevertheless, the African continent has had success as far as FTAs are involved<sup>9</sup>. These have been utilised by least developed, developing and even developed

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<sup>5</sup> Australian Government Department of Foreign Affairs and Trade, n.d. *The benefits of free trade agreements*. [Online] Available at: <https://www.dfat.gov.au/trade/about-ftas/Pages/the-benefits-of-free-trade-agreements> [Accessed 14 July 2022].

<sup>6</sup> Australian Government Department of Foreign Affairs and Trade, n.d. *The benefits of free trade agreements*. [Online] Available at: <https://www.dfat.gov.au/trade/about-ftas/Pages/the-benefits-of-free-trade-agreements> [Accessed 14 July 2022].

<sup>7</sup> Stevens, C., Irfan, M., Massa, I. & Kennan, J., 2015. *The impact of trade agreements between developed and developing countries on economic development in developing countries. : A rapid evidence assessment*, London: Overseas Development Institute.

<sup>8</sup> Chidede, T., 2019. *Entrenching the right to regulate in the international investment legal framework: The African experience*. Doctoral Thesis.. Western Cape: University of the Western Cape.

<sup>9</sup> African Union, n.d. *Regional economic communities*. [Online] Available at: <https://au.int/en/organs/recs> [Accessed 6 September 2022]. In Africa FTA were formed with the primary purpose to facilitate regional economic integration between member states and through the wider African Economic Community (AEC). The 1980 Lagos Plan of Action for the Development of Africa and the Abuja Treaty (1991) proposed creating FTAs with a view to regional and eventually continental integration.



countries, as evidenced by the European Union (EU)<sup>10</sup> as vehicles of economic growth in order to compete favourably with highly developed countries on the global market. In Africa, the most prominent FTAs which were in force as of September 2019 included: the Common Market for East and South Africa (COMESA), East African Community (EAC), West African Economic and Monetary Union (WAEMU), Economic Community of West African States (ECOWAS), South African Customs Union (SACU), South African Development Community (SADC), and Economic and Monetary Community of Central Africa (CEMAC)<sup>11</sup>. Many of these FTAs have boosted trade relations between participants therefore serving their purpose as vehicles of economic development in an increasingly highly competitive global economy<sup>12</sup>.

The AfCFTA it is envisioned will seek to build on what the already existing FTAs have accomplished in its pursuit of regional economic integration for the African continent<sup>13</sup>. The AfCFTA framework agreement signed in 2018 by 44 African countries has ambitious long-term goals in deepening integration among African Union member States and building a prosperous and united Africa. As of June 2022, forty-three (43) member states had signed, ratified and deposited the AfCFTA, and thirteen (13) states had only signed it<sup>14</sup>. Among the main objectives of the AfCFTA are the facilitation, harmonisation and better coordination of trade regimes as well as the elimination of challenges associated with multiple and overlapping trade agreements across the continent<sup>15</sup>. African economies anticipate that this agreement will improve resource allocation, realize economies of scale for domestic

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<sup>10</sup> Schmieg, E. S., 2016. Africa's position in global trade - Free trade agreements, WTO and regional integration. Berlin: Unpublished.

<sup>11</sup> World Bank, 2020. The African continental free trade area: Economic and distributional effects, Washington, DC: World Bank.

<sup>12</sup> Stuart, J., 2020. *Do African RECs increase intra-African trade? Some evidence from Uganda*. [Online] Available at: <https://www.tralac.org/blog/article/14784-do-african-recs-increase-intra-african-trade-some-evidence-from-uganda.html> [Accessed 29 June 2022].

<sup>13</sup> Erasmus, G., 2021. *Regional economic communities have unique features and different functions*. [Online] Available at: <https://www.tralac.org/blog/article/15412-regional-economic-communities-have-unique-features-and-different-functions.html> [Accessed 7 September 2022].

<sup>14</sup> UNECA, n.d. Policy Brief. Private sector as the backbone of the AfCFTA implementation. Addis Ababa: Konrad Adenauer Stiftung (KAS) Office.

<sup>15</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission.

producers, boost the competitiveness of their own businesses, and draw foreign direct investment<sup>16</sup>.

The private sector's participation and inclusion in development have been identified as key components to successfully realising the AfCFTA's objectives for economic development on the African continent<sup>17</sup>. Contributing significantly to employment opportunities alongside being responsible for most of the trade traffic within and across African borders makes private sector engagement crucial to the AfCFTA's successful implementation<sup>18</sup>. It is crucial that private sector actors are allowed to affect policies that will directly impact their trade interests. This in turn will have a bearing on Africa's economy which the AfCFTA is designed to uplift.

The AfCFTA is more comprehensive in coverage compared to the other FTAs already operational throughout Africa though it lacks provisions catered for in some of them<sup>19</sup>. There is optimism that with greater cooperation and participation, these gaps will also be covered<sup>20</sup>. It has the potential to significantly rival other FTAs globally, presenting African interests as a unified front that would lend the continent greater economic relevance and bargaining power<sup>21</sup>. Not to mention that FDI associated with FTAs could spur much needed infrastructural development across African economies granting member states more market due to value addition and production of high-quality goods<sup>22</sup>.

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<sup>16</sup> UNCTAD, 2019. *Key statistics and trends in regional trade in Africa*. Geneva: UNCTAD secretariat. [Online] Available at: <https://unctad.org/webflyer/key-statistics-and-trends-regional-trade-africa> [Accessed 17 July 2022].

<sup>17</sup> Karingi, S. & Aidi, W., 2022. *The AfCFTA country business index: Understanding private sector involvement in the AfCFTA*. [Online] Available at: <https://www.brookings.edu/articles/the-afcfta-country-business-index-understanding-private-sector-involvement-in-the-afcfta/> [Accessed 12 August 2022].

<sup>18</sup> Karingi, S. & Aidi, W., 2022. *The AfCFTA country business index: Understanding private sector involvement in the AfCFTA*. [Online] Available at: <https://www.brookings.edu/articles/the-afcfta-country-business-index-understanding-private-sector-involvement-in-the-afcfta/> [Accessed 12 August 2022].

<sup>19</sup> World Bank, 2020. *The African continental free trade area: Economic and distributional effects*, Washington, DC: World Bank.

<sup>20</sup> Ighobor, K., 2022. *One year of free trading in Africa calls for celebration despite teething problems*. [Online] Available at: <https://www.un.org/africarenewal/magazine/january-2022/one-year-free-trading-africa-calls-celebration-despite-teething-problems> [Accessed 20 June 2022].

<sup>21</sup> Meredith, K. L., 2011. The politics and indirect effects of asymmetrical bargaining power in free trade agreements. In: B. Tomer, L. B. Marc & P. Amelia, eds. *The politics of international economic law*. Cambridge: Cambridge University Press, pp. 19-39.

<sup>22</sup> Dadkhah, A. & Ciuriak, D., 2018. *Evaluating the impact of FTAs on FDI: A text-based approach*. s.l.:s.n.

The need for the AfCFTA is underscored by economic superpowers entering into similarly ambitious FTAs like the Trans-Pacific Partnership (TPP). The TPP reduced or eliminated tariffs across the 12 signatories<sup>23</sup>, liberalised the trade of goods and services, and opened foreign investment among its members' markets<sup>24</sup>. With the withdrawal of the United States (US), the other signatories agreed to a revised version of the deal, now known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>25</sup>. More recent is the entry into force of the Regional Comprehensive Economic Partnership (RCEP). This FTA is inclusive of the 10 Association of Southeast Asian Nations (ASEAN) members plus Australia, China, Japan, New Zealand and South Korea. The 15 member RCEP has been touted as the world's largest free-trade agreement despite the absence of the US<sup>26</sup>. The RCEP covers nearly one-third of the world's population and roughly 30% of its GDP, although HSBC predicts that this percentage will increase to 50% by 2030<sup>27</sup>. This might be an external factor but the AfCFTA marks a step in Africa's integration trajectory towards an economic community as seen under Article 6 of the Abuja Treaty and is now at the frontline of Africa's continental integration.

Africa, therefore, can ill afford to fall behind, a position in which it already finds itself on the world economic stage. International Trade is heavily influenced by the

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<sup>23</sup> Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States

<sup>24</sup> McBride, J., Chatzky, A. & Siripurapu, A., 2021. *What's next for the trans-pacific partnership (TPP)?*. [Online] Available at: <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp> [Accessed 20 June 2022].

<sup>25</sup> McBride, J., Chatzky, A. & Siripurapu, A., 2021. *What's next for the trans-pacific partnership (TPP)?*. [Online] Available at: <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp> [Accessed 20 June 2022].

<sup>26</sup> Mullen, A., 2022. *What is RCEP, the world's largest free trade deal that is under way?*. [Online] Available at: <https://www.scmp.com/economy/global-economy/article/3161707/what-rcep-worlds-largest-free-trade-deal-under-way> [Accessed 15 July 2022].

<sup>27</sup> Mullen, A., 2022. *What is RCEP, the world's largest free trade deal that is under way?*. [Online] Available at: <https://www.scmp.com/economy/global-economy/article/3161707/what-rcep-worlds-largest-free-trade-deal-under-way> [Accessed 15 July 2022].

This serves to underline the ambition of the more developed countries to further enhance their standings in the global economy. With increased trade facilitation the respective economies of the member states are expected to undergo even greater growth than they have thus far attained.

bargaining power of the various parties involved<sup>28</sup>. The AfCFTA is envisioned to provide an avenue for the African continent to speak with one voice and exert greater economic pressure on the global market scene<sup>29</sup>. A scene that in recent times and since time immemorial was and still is heavily eschewed against individual African players on the global market<sup>30</sup>.

## 1.2 Statement of the Problem

There has been a proliferation of FTAs<sup>31</sup>. in recent years as more and more states seek to gain competitive economic advantages by aligning themselves with various FTAs coming into being<sup>32</sup>. The AfCFTA being no exception in this category as African states seek to improve intra-African trade which stands at a measly 14.4% of total African exports. The United Nations Conference on Trade and Development (UNCTAD) estimates that the AfCFTA could boost intra-African trade by about 33% and cut the continent's trade deficit by 51%<sup>33</sup>. Nevertheless, Asia and Europe are still the main trade partners of the continent<sup>34</sup>. High dependence on trade in primary goods, high product and market concentration of exports, and weak regional production networks are among the main challenges of African countries<sup>35</sup>. The aforesaid would support the view that “lessons learnt so

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<sup>28</sup> Wagner, R. H., 1988. Economic interdependence, bargaining power, and political influence. *International Organization*, Summer, 42(3), pp. 461-483.

<sup>29</sup> Akinkugbe, O. D., 2019. *Negotiating the AfCFTA in the shadow of international and regional struggle for power: A caution!*. [Online] Available at: <https://www.afronomicslaw.org/2019/01/19/negotiating-the-afcfta-in-the-shadow-of-international-and-regional-struggle-for-power-a-caution> [Accessed 6 September 2022].

<sup>30</sup> Akinkugbe, O. D., 2019. *Negotiating the AfCFTA in the shadow of international and regional struggle for power: A caution!*. [Online] Available at: <https://www.afronomicslaw.org/2019/01/19/negotiating-the-afcfta-in-the-shadow-of-international-and-regional-struggle-for-power-a-caution> [Accessed 6 September 2022].

<sup>31</sup> Kahouli, B. & Maktouf, S., 2013. The proliferation of free trade agreements and their impact on foreign direct investment: An empirical analysis on panel data. *Journal of Current Issues in Globalization*, 6(3), p. 423.

<sup>32</sup> Athukorala, P.-C., 2019. Free trade agreements in the world trade system: Substance and semantics. *Foreign Trade Review*, 55(1).

<sup>33</sup> Grynspan, R., 2021. *New opportunities for accelerating pan-African trade*. [Online] Available at: <https://unctad.org/news/blog-new-opportunities-accelerating-pan-african-trade#> [Accessed 16 July 2022].

<sup>34</sup> Mutambara, T. E., 2013. Africa-Asia trade versus Africa's trade with the North: Trends and trajectories. *African Review of Economics and Finance*, 4(2), pp. 273-299. 2013. Accessed at: (<https://www.ajol.info>) (accessed 7 September, 2022).

<sup>35</sup> UNCTAD, 2019. *Key statistics and trends in regional trade in Africa*. Geneva: UNCTAD secretariat. [Online] Available at: <https://unctad.org/webflyer/key-statistics-and-trends-regional-trade-africa> [Accessed 17 July 2022].

far suggest a considerable gap when it comes to the private sector awareness of the AfCFTA and what it means to them”<sup>36</sup>.

For the AfCFTA to truly realise its potential for spurring economic development in the continent it will need to engage the private sector more and support the growth of the same on the African continent. It is therefore imperative that the legal and institutional framework of the AfCFTA is analysed and evidence gathered to ascertain whether, as it stands, it is capable of realising this goal. Also, recommendations need to be made in order to further improve its operationalisation in order to reflect the realities on the African continent for the “Africa We Want”<sup>37</sup>.

Africa has a large domestic market that possesses significant opportunities<sup>38</sup>. Even though 16.3% of the world's population lives in Africa, the continent only contributes 2.9% of global production and 2.6% of global trade, respectively<sup>39</sup>. There are notable differences in economic development between African and developed nations as well as between countries within the African continent. Poverty remains pervasive in Africa, where 32 of the 48 Least-Developed Countries (LDCs) are found<sup>40</sup>.

This research posits that the key to realising Africa’s economic potential is the private sector. The private sector provides about 90% of jobs in developing countries (including formal and informal jobs), supplies essential goods and

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<sup>36</sup> UNECA, n.d. Policy Brief. Private sector as the backbone of the AfCFTA implementation. Addis Ababa: Konrad Adenauer Stiftung (KAS) Office.

<sup>37</sup> African Union, 2023. African Union handbook 2023: Acceleration of AfCFTA implementation. Addis Ababa and Wellington: African Union Commission and New Zealand Ministry of Foreign Affairs and Trade. The Africa We Want is a coinage emphasising the drive of Agenda 2063 which is Africa’s blueprint and master plan for transforming Africa into the global powerhouse of the future. It’s the continent’s strategic framework that aims to deliver on its goal for inclusive and sustainable development.

<sup>38</sup> UNCTAD, 2019. *Key statistics and trends in regional trade in Africa*. Geneva: UNCTAD secretariat. [Online] Available at: <https://unctad.org/webflyer/key-statistics-and-trends-regional-trade-africa> [Accessed 17 July 2022].

<sup>39</sup> UNCTAD, 2019. *Key statistics and trends in regional trade in Africa*. Geneva: UNCTAD secretariat. [Online] Available at: <https://unctad.org/webflyer/key-statistics-and-trends-regional-trade-africa> [Accessed 17 July 2022].

<sup>40</sup> UNCTAD, 2019. *Key statistics and trends in regional trade in Africa*. Geneva: UNCTAD secretariat. [Online] Available at: <https://unctad.org/webflyer/key-statistics-and-trends-regional-trade-africa> [Accessed 17 July 2022].

services, and contributes to tax revenues and efficient capital flows<sup>41</sup>. However, it has been argued that trade policy alone is unlikely to promote inclusive economic growth on the continent<sup>42</sup>. Other measures needed include cooperation to promote investment and competition policies, accelerate infrastructure financing that facilitates rural-urban connectivity, and augmenting equal access to socio-economic opportunities and productive resources<sup>43</sup>. However, all this can be addressed with enhanced implementation of the AfCFTA. This is because countries tend to invest heavily in measures that generate economic growth within, which ultimately leads to economic growth of the continent.

The private sector stands to play a major role in the AfCFTA achieving its objectives. For one, a wider market base with lesser cross border restrictions will expose traders to increased opportunities for trade. This increase in demand for goods and services in turn will translate into increased production requiring more manpower hence creating more employment opportunities<sup>44</sup>. The private sector has already shown its innovativeness as evidenced by the increase in B2B platforms<sup>45</sup>. E-commerce is ever growing<sup>46</sup>. and this will ensure that Africa is not left behind. Furthermore, the private sector with greater information as to the benefits of the AfCFTA can actively lobby for their respective governments to implement the AfCFTA objectives, a sort of ratification to create uniformity and a more stable business environment in which they can thrive. Through exchange of technologies and taking advantage of competitive advantages the private sector actors are likely

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<sup>41</sup> Avis, W. R., 2016. *Urban governance (topic guide)*. Birmingham, UK: GSDRC, University of Birmingham.

<sup>42</sup> Grynspan, R., 2021. *New opportunities for accelerating pan-African trade*. [Online] Available at: <https://unctad.org/news/blog-new-opportunities-accelerating-pan-african-trade#> [Accessed 16 July 2022].

<sup>43</sup> Grynspan, R., 2021. *New opportunities for accelerating pan-African trade*. [Online] Available at: <https://unctad.org/news/blog-new-opportunities-accelerating-pan-african-trade#> [Accessed 16 July 2022].

<sup>44</sup> UNCTAD, n.d. *Trade, employment and development*. [Online] Available at: <https://unctad.org/topic/trade-agreements/trade-employment-and-development> [Accessed 7 September 2022].

<sup>45</sup> UNECA, n.d. Policy Brief. Private sector as the backbone of the AfCFTA implementation. Addis Ababa: Konrad Adenauer Stiftung (KAS) Office.

<sup>46</sup> DHL, n.d. *E-Commerce is growing – Are you growing with it?*, s.l.: s.n. [Online] Available at: <https://www.dhl.com/us-en/home/supply-chain/insights-and-trends/ecommerce-is-growing-are-you-growing-with-it> [Accessed 7 September 2022].

to produce higher quality goods and services due to higher levels of competition with a wider market base at hand<sup>47</sup>.

### **1.3 Research Objectives**

The primary objective of the research is to determine whether the AfCFTA's legal and institutional framework promotes and provides for private sector participation to facilitate development on the African continent. This will be done with the purpose of highlighting improvements and reforms necessary to align and further strengthen the AfCFTA legal framework to achieve its objective of creating widespread and inclusive economic development on the African continent.

The specific objectives of the research are;

- (i) to review the current legal and institutional framework of the AfCFTA with a focus on private sector inclusion.
- (ii) to highlight the role played by the private sector in economic development across Africa and on the global stage citing challenges faced.
- (iii) to do a comparative study on how private sector participation has promoted and facilitated development in other jurisdictions (FTAs)
- (iv) to highlight appropriate regulatory measures to build the capacity of the AfCFTA to facilitate private sector participation in economic development on the African continent and seek out appropriate solutions to obstacles to achieving this goal.
- (v) to provide recommendations for the AfCFTA's legal and institutional framework in order to realise the private sector's participation in economic development and realise its full potential in this role.

### **1.4 Motivation and Significance of the Study**

The AfCFTA indeed has the potential to promote development, however, there still lies the question of private sector inclusion. It has been argued that to set Africa

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<sup>47</sup> Corporate Finance Institute, n.d. *Free trade area*. [Online] Available at: <https://corporatefinanceinstitute.com/resources/economics/free-trade-area/> [Accessed 7 July 2022].

firmly on the path towards economic and social transformation, private sector engagement is crucial<sup>48</sup>. Over the years, the African Union has collaborated closely with the private sector to identify the important role that the private sector plays in advancing the economic development Agenda of the continent<sup>49</sup>.

In Africa, the private sector accounts for more than 80 per cent of total output, two thirds of total investment, and three-quarters of domestic credit. The sector provides jobs for about 90 per cent of the employed working-age population<sup>50</sup>. In addition, according to the UN Economic Commission for Africa, small and medium-sized enterprise (SMEs) constitute the backbone of the private sector in Africa, accounting for more than 90% of businesses in the continent and providing 63% of jobs in low-income countries while accounting for more than 50% of the Gross Domestic Product (GDP) of the continent<sup>51</sup>.

The private sector increasingly plays an important role as an engine of economic growth and job creation. In addition to offering goods and services, it also generates tax income that is used to fund vital social and economic infrastructure, creates new and creative solutions that assist in addressing development challenges, and it plays a major role in combating climate change. The role that the private sector plays in development is also broadening from the conventional approach of supporting economic development to more inclusive and elaborated public private partnerships. As such, the private sector has become an important strategic partner for the United Nations Development Program (UNDP) in achieving its vision to

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<sup>48</sup> Tralac, n.d. *African continental free trade area (AfCFTA) and the private sector*. [Online] Available at: <https://www.tralac.org/discussions/article/12892-african-continental-free-trade-area-afcfta-and-the-private-sector.html> [Accessed 15 July 2022].

<sup>49</sup> African Union, 2018b. *AfroChampions initiative will work side by side with the African Union to promote the African continental free trade area*. [Online] Available at: <https://au.int/en/pressreleases/20180320/afrochampions-initiative-will-work-side-side-african-union-promote-african> [Accessed 15 July 2022].

<sup>50</sup> African Union, 2021. *Leveraging private sector engagement for the Africa we want*. [Online] Available at: <https://au.int/sites/default/files/pressreleases/41140-pr-Private-Sector-Engagement-for-the-Africa-we-Want.pdf> [Accessed 15 July 2022].

<sup>51</sup> African Union, 2021. *Leveraging private sector engagement for the Africa we want*. [Online] Available at: <https://au.int/sites/default/files/pressreleases/41140-pr-Private-Sector-Engagement-for-the-Africa-we-Want.pdf> [Accessed 15 July 2022].



help countries eradicate poverty and reduce inequalities and exclusion within broader sustainable development<sup>52</sup>.

It is therefore important that moving forward an emphasis is placed on private sector inclusion as far as economic development on the African continent is concerned. And the legal and institutional framework is but the starting point of achieving this goal.

## **1.5 Research Methodology**

The research is primarily based on a desktop study involving critical and textual analytical methods of inquiry of the legal and institutional framework of the AfCFTA alongside other RECs and FTAs on the global economic stage. This has been done in effort to see how other FTAs have engaged the private sector as a medium of economic development and in this way leveraging the capacity of the AfCFTA to do the same.

The research is largely based on library research and internet sources. Primary sources include the AfCFTA agreement and relative protocols. Secondary sources include journal articles, internet sources, research papers and other scholarly material as well as materials that were availed during the coursework phase of the LLM program. The research aims at carrying out a critical analysis of the legal and institutional framework of the AfCFTA with regard to its potential for inclusion of the private sector in order to realise development on the African continent. In doing so, the AfCFTA treaty and related relevant documents are analysed.

The study also conducts a comparative analysis of AfCFTA and other FTAs with an emphasis on the EU; however, it must be emphasised that the study is not comparative in character. The comparative component of this is simply to

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<sup>52</sup> Business for Goals, n.d. *The role of the private sector in development*. [Online] Available at: <https://www.business4goals.org/en/development-challenge/the-role-of-the-private-sector-in-development/> [Accessed 15 July 2022].

strengthen the case for the positive aspects EU has realised by adopting inclusiveness of the private sector. The EU was chosen for the study because it is one of the oldest FTAs with many member states of diverse and different political governments as well as trade commodities linked to different countries of origin as the case is with Africa.

## **1.6 Chapter Outline**

This study will be divided into five chapters covering the following;

### **Chapter one**

This chapter captures the study's background, problem statement, study's objectives and research question. It also presents the motivation and significance of the study, research methodology and an outline of the thesis. Since this chapter serves merely to set the foundation for the substance of the thesis, the arguments will be brief.

### **Chapter two**

This chapter presents an overview of the salient provisions of the AfCFTA objectives and provisions that relate to private sector engagement, inclusive trade growth and investment agenda. Here the research is geared to review the current legal and institutional framework of the AfCFTA with a focus on private sector inclusion.

### **Chapter three**

This chapter investigates the legal and institutional framework limitations and challenges that the private sector will be likely to face in their engagement under the AfCFTA current provisions. Here the research highlights the role played by the private sector in economic development across Africa and on the global stage citing challenges faced. It also highlights appropriate regulatory measures to build the capacity of the AfCFTA to facilitate private sector participation in economic development on the African continent and seek out appropriate solutions to obstacles to achieving this goal.

#### **Chapter four**

This chapter provides a comparative study with other FTAs particularly the EU focusing on how the private sector entities have been successfully amalgamated into the legal and institutional framework leading to development. Here the comparative study is used to show how private sector participation has promoted and facilitated development in other jurisdictions (FTAs).

#### **Chapter five**

This chapter summarises the findings from the study, draws conclusions and makes recommendations.



# CHAPTER TWO

## OVERVIEW OF THE AFRICAN CONTINENTAL FREE TRADE AREA AND ITS OBJECTIVES TOWARDS PRIVATE SECTOR INCLUSION TO FACILITATE DEVELOPMENT

### 2.1 Introduction

The African Continental Free Trade Area (AfCFTA) is a flagship project of the African Union's (AU) Agenda 2063, a blueprint for attaining inclusive and sustainable development across the continent over the next 50 years. It seeks to increase intra-African commerce by offering a comprehensive and advantageous trade agreement among the member nations that addresses trade in products and services, intellectual property rights, investment, and competition regulation.<sup>53</sup>

The flagship projects of Agenda 2063 refer to key programmes and initiatives to accelerate Africa's economic growth and development as well as promoting related objectives.<sup>54</sup> These projects also refer to infrastructure, education, science, technology, arts, and culture as well as initiatives to secure peace on the continent.<sup>55</sup>

The operational phase of AfCFTA was launched during the 12th Extraordinary Session of the Assembly of the African Union in Niamey, Niger on 7 July 2019. The AfCFTA is governed by five operational instruments, namely Rules of Origin; online negotiating forum; monitoring and removal of non-tariff barriers; digital

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<sup>53</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

<sup>54</sup> Erasmus, G., 2022. *Legal aspects of the relationship between the AfCFTA and the African Union*. [Online] Available at: [https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20\(BIAT\)](https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20(BIAT).). [Accessed 22 July 2022].

<sup>55</sup> African Union, n.d. b. *Flagship projects of Agenda 2063*. [Online] Available at: <https://au.int/en/agenda2063/flagship-projects> [Accessed 22 July 2022].

payments system; and the African Trade Observatory.<sup>56</sup> As of January 2022, Rules of Origin have been agreed for 87.7% of all tariff lines and the implementation of the Pan-African Payments and Settlements System (PAPSS) has officially been officially launched.<sup>57</sup>

In order to determine whether the AfCFTA as it stands promotes inclusion of the private sector to facilitate development, it is important to consider firstly, its objectives, secondly the rationale behind its formation and eventually discuss an overview of the AfCFTA agreement. In visiting its objectives what is sought is to gather whether private sector inclusion is even a consideration in its agenda for promoting development on the African continent given that the objectives act as a roadmap for how the AfCFTA will be utilised.

When looking at the rationale for its formation, it is imperative to consider why the AfCFTA was formed in the first place. These underlying considerations will inform whether the private sector's role in development was taken into consideration or whether the AfCFTA was entirely state centric in its formation. A positive answer bodes well for the research question at hand whereas a negative answer points to the hurdles that the private sector will likely face in so far as inclusion is considered under the AfCFTA umbrella in order to realise development on the African continent.

Lastly, an overview of relative provisions is considered, to highlight whether private sector inclusion was considered of any importance by the draftspersons of the AfCFTA. This will inform this study as to whether the AfCFTA legal framework, as it stands, can offer a foundation upon which to build and promote greater inclusion of the private sector stakeholders to realise a fundamental goal of

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<sup>56</sup> UNDP, 2021. Understanding the AfCFTA: Guide for small and medium-sized enterprises in the ECOWAS region, s.l.: UNDP.

<sup>57</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

the AfCFTA which is to promote development on the African continent. Or if the current legal framework as it stands is inadequate and therefore in need of legislative reform to better suit inclusion of the private sector in order to realise the full potential of the AfCFTA to promote development on the African continent.

## **2.2 Objectives of the African Continental Free Trade Area**

The main objectives of the AfCFTA as emphasised by the AU are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union<sup>58</sup>. It will also expand intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation and instruments across Regional Economic Communities (RECs), the Free Trade Areas (FTAs) and across Africa in general<sup>59</sup>. By utilizing chances for scale production, access to continental markets, and improved resource reallocation, the AfCFTA is anticipated to improve competitiveness at the industry and enterprise level as well<sup>60</sup>. These are all valuable steps towards the realisation of economic growth and development on the African continent from which private sector actors stand to benefit. This is an important consideration as far as private sector inclusion is concerned because it provides them with an opportunity to build greater capacity for trade. These private sector actors, through their various trading activities, develop their respective areas of influence through job creation and infrastructure development alongside other corporate social responsibility considerations, which bodes well for the African continent as a whole.

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<sup>58</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

<sup>59</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

<sup>60</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

In a nutshell, the objectives of the Agreement include the following: (i) creating the framework for the creation of a Continental Customs Union; (ii) advancing and achieving sustainable and all-encompassing socio-economic development, structural transformation of the State Parties, and gender equality; (iii) improving the competitiveness of economies of the State Parties in continental and international markets; (iv) advancing industrial development by diversifying and developing regional value chains, agriculture, and food security; and resolving the issues raised by multiple and overlapping memberships and accelerating the processes of regional and continental integration<sup>61</sup>. This is evidenced by the AfCFTA's pledge to give due cognisance of already existing FTAs and RECs and use these as building blocks to a unified African Customs Union through deep and meaningful regional integration. In order to actualise these noble objectives, Article 4 of the Agreement<sup>62</sup> mandates State Parties to:

- Progressively eliminate tariffs and non-tariff barriers to trade in goods;
- Progressively liberalise trade in services;
- Cooperate on investment, intellectual property rights and competition policy;
- Cooperate on all trade-related areas;
- Cooperate on customs matters and the implementation of trade facilitation measures;
- Establish a mechanism for the settlement of disputes concerning their rights and obligations; and
- Establish and maintain an institutional framework for the implementation and administration of the AfCFTA<sup>63</sup>.

From the above, it can be seen that the AfCFTA does not expressly provide for the inclusion of the private sector in order to facilitate development. Nevertheless,

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<sup>61</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 3 of the AfCFTA Agreement.

<sup>62</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 4 of the AfCFTA Agreement.

<sup>63</sup> Nwafuru, P., 2021. *AfCFTA: The underlying principles, objectives and benefits*. [Online] Available at: <https://nairametrics.com/2021/03/03/afcfta-the-underlying-principles-objectives-and-benefits/> [Accessed 22 July 2022].

within its objectives, there is a clear drive to promote development on the African continent to which private sector inclusion is crucial.

The AfCFTA has embarked on a rather ambitious project never before attempted even on the world stage in terms of the sheer magnitude of distinct parties involved. Nevertheless, should the operationalisation of these objectives be realised, Africa will stand to gain tremendous economic benefits across the continent.

This is because as opposed to partnering for individual interests with developed countries, this is an effort to develop Africa at the grassroots level, a sort of “*ubuntu*”<sup>64</sup> as envisioned by the Pan-Africanists both of old and the new school. Ubuntu is a concept that originated in Africa and emphasizes “being self through others.” The Zulu expressions “*ubuntu ngumuntu ngabantu*” – that is, “I am because of who we all are” – represents this type of humanism<sup>65</sup>. In this context, the AfCFTA is fronted as a collective front to realise development on the African continent as a whole. Wherein previous efforts may have been focused towards individualistic growth, sometimes at the expense of other neighbours through trade deals with foreign states. The AfCFTA envisions a united African front commanding greater economic bargaining power than the different African states lack in their individual capacity. A means of increasing intra-African trade wherein countries through increased trade volumes can concentrate on strengthening their competitive advantages and leverage these on the African market in the hopes of greater economic development for all. It is therefore envisioned that each State Party should demonstrate commitment, sincerity, and integrity in dealing with other member States in order to realise the fore-stated objectives.

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<sup>64</sup> Edozie, R. K., 2017. The philosophy of African economic humanism: Ubuntu and afri-capitalism as case studies. In: “*Pan*” *Africa Rising. Contemporary African Political Economy*. New York: Palgrave Macmillan, p. 79–104.

<sup>65</sup> Mugumbate, J. & Nyanguru, A., 2013. Exploring African philosophy: The value of Ubuntu in social work. *African Journal of Social Work*, 3(1), pp. 82-100.

See Also Khomba, J. K. & Kangaude-Ulaya, E. C., 2013. Indigenisation of corporate strategies in Africa: Lessons from the African Ubuntu philosophy. *China-USA Business Review*, 1 July, 12(7), pp. 672-689.



Much like the European Union (EU) has ably demonstrated, a region united has at its disposal greater financial resources, diversification of trade and political influence all of which are greatly relative in any trading environment. The EU for instance has utilised these resources to support its private sector's initiatives in trading partner states to promote development in these states as well as enable its citizens/members realise profit gains and build economic footholds in their areas of influence<sup>66</sup>. A move the AfCFTA should seek to replicate and build upon as far as entrepreneurial endeavours of members are concerned. This would further promote economic growth and development.

What bodes well for the rather ambitious Africa project is the fact that something similar has already been successfully implemented and great development has ensued in many parts of the continent as a result and this is the EU. The success of the EU, being the foremost success story, "BREXIT" and its implications notwithstanding, serves as a prime example of the immense potential regional integration has to spur development even beyond continental borders<sup>67</sup>.

Together with other similar regional trade blocs, it has been shown that with the right political will and commitment from member-states, regional trade deals all in similar fashion and design as the AfCFTA, can and do spur the economic development of the various participating regions/states therein allied. Subsequently, the rationale for the formation of the AfCFTA will be considered.

### **2.3 Rationale behind the African Continental Free Trade Area**

This section looks at the rationale behind the creation of the AfCFTA. Before doing that, it considers the origins of the AfCFTA tracing it back to the Abuja Treaty of 1991 to show that it is the realisation of a long held African dream. Some of these

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<sup>66</sup> Rudischhauser, K., 2013. *Engaging the private sector for development: What role for the EU regional blending facilities?*. [Online] Available at: <https://ecdpm.org/work/private-sector-for-development-volume-1-issue-8-october-2012/engaging-the-private-sector-for-development-what-role-for-the-eu-regional-blending-facilities> [Accessed 22 September 2022].

<sup>67</sup> Paternoster, D. & Dessimirova, D., 2016. *Brexit - possible economic impact for the Euro area and the EU*. s.l.:European Union.

influencing factors are the eradication of poverty, inclusive development and liberalisation of the African continent from economic dependency. These are discussed in more detail below, highlighting the role private sector inclusion can play in realising development on the African continent.

The AfCFTA seeks to create a single market for goods and services in Africa, the largest of its kind in terms of geography and population coverage since the creation of the WTO in January 1995<sup>68</sup>. It is expected to spur significant economic growth and change. By 2030, with the participation of all African countries, the AfCFTA is projected to create a market size of 1.7 billion people with over \$6.7 trillion of cumulative consumer and business spending<sup>69</sup>. More conservative estimates state that it is expected to create a market of approximately 1.2 billion people covering over \$4 trillion in combined consumer and business spending<sup>70</sup> and encompass a combined economic output of \$2.5 trillion as of 2018<sup>71</sup>. The World Bank estimates that the AfCFTA has the potential to lift thirty million Africans out of extreme poverty<sup>72</sup>.

As previously indicated, the AfCFTA is rooted in the Abuja Treaty of 1991, in which Member States of the former Organisation of African Unity, the predecessor of the AU, agreed “for the Creation of an African Common Market”<sup>73</sup>. In January 2012, during the 18th Ordinary Session of the Assembly of Heads of State and

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<sup>68</sup> World Economic Forum, 2018. *Africa has a new free trade area. This is what you need to know*. [Online] Available at: <https://www.weforum.org/agenda/2018/04/why-africa-s-free-trade-area-offers-so-much-promise/> [Accessed 23 July 2022].

<sup>69</sup> Brookings, 2021. *The state of Africa's free trade agreement and strategies for greater integration*. [Online] Available at: <https://www.brookings.edu/events/the-state-of-africas-free-trade-agreement-and-strategies-for-greater-integration/> [Accessed 6 August 2022].

<sup>70</sup> Signé, L., 2018. *Africa's big new free trade agreement, explained*. [Online] Available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/> [Accessed 6 August 2022].

<sup>71</sup> Abrego, L. et al., 2019. *The African continental free trade agreement: Welfare gains estimates from a general equilibrium model*. s.l.:IMF.

<sup>72</sup> Kuwonu, F., 2021. *Africa's free trade area opens for business*. [Online] Available at: <https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business> [Accessed 20 July 2022].

<sup>73</sup> OAU, 1991. *Treaty Establishing the African Economic Community: ratification*. Addis Ababa: OAU Secretariat.

Government of the African Union, AU Member States<sup>74</sup> adopted a decision to establish a Continental Free Trade Area<sup>75</sup>. In June 2015, AU Member States launched negotiations for the establishment of the AfCFTA<sup>76</sup>. On March 21, 2018, 44 African heads of state and government officials met in Kigali, Rwanda, to sign the framework (agreement)<sup>77</sup>, thereby setting the stage for the AfCFTA. Under article 23 of the AfCFTA, the agreement would enter into force thirty days after its ratification by at least twenty-two countries<sup>78</sup>. On May 30, 2019, the AfCFTA entered into force, thirty days after the twenty-second instrument of ratification was deposited with the AU Commission. Twenty-seven Member States had previously approved the agreement when the AfCFTA's operational phase was introduced during the Twelfth Extra-Ordinary AU Summit in Niamey, Niger on July 7, 2019<sup>79</sup>. This marked a diplomatic and political success in light of the short timeframe since the trade negotiations began in 2015, the ambitious liberalisation goals, and the heterogeneity and large number of Member States<sup>80</sup>. As of February 2023, of the 54 countries that are signatories, 46 countries had ratified the AfCFTA.

Having considered the rationale behind the formation of the AfCFTA, five aspects will be discussed as broad subheadings. These have been adopted as a guide to illustrate how the AfCFTA can be utilised to tackle some of the challenges facing

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<sup>74</sup> Member States refers to the states that are party to the African Union ("AU"). See Constitutive Act of the African Union art. 1, July 11, 2000, OAU Doc. CAB/LEG/23.15 (2001).

<sup>75</sup> African Union, n.d. *CFTA - Continental free trade area*. [Online] Available at: <https://au.int/en/ti/cfta/about> [Accessed 9 March 2021].

Tralac, n.d. *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

<sup>76</sup> Signé, L. & van der Ven, C., 2019. *Keys to success for the AfCFTA negotiations*. [Online] Available at: <https://www.brookings.edu/articles/keys-to-success-for-the-afcfta-negotiations/> [Accessed 9 March 2021].

<sup>77</sup> Signé, L., 2018. *Africa's big new free trade agreement, explained*. [Online] Available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/> [Accessed 6 August 2022].

<sup>78</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Art. 23.

<sup>79</sup> Hartzenberg, T., 2019. *The African continental free trade area agreement - what is expected of LDCs in terms of trade liberalisation?*. [Online] Available at: <https://www.un.org/ldcportal/content/african-continental-free-trade-area-agreement-what-expected-ldcs-terms-trade-0>.

<sup>80</sup> Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2022. *The African continental free trade area. Development and more economic resilience through a unified African market*. Bonn and Eschborn: GIZ.

Africa in a development context. These subheadings will highlight ways in which the AfCFTA stands to amongst other considerations; (i) realise regional integration, (ii) reduce poverty levels, (iii) close the gender economic gap, (iv) cushion the negative impacts of Covid-19 and (v) act as a tool against economic dependence.

### **2.3.1 Realising Regional Integration**

Africa as a continent already boasts of various FTAs that have been in existence for an extended period of time. These include the EAC, SADC, COMESA, and ECOWAS, which have made conscious efforts to improve private sector inclusion with a view towards greater economic development. A necessity brought to bear given that the private sector constitutes the majority of trading parties utilising the various FTAs legal frameworks<sup>81</sup>.

With the entry into force of the AfCFTA, Africa has taken a significant step towards meeting the vision of an integrated market. As of 2020, intra-Africa trade stood at 18%, with most of that trade being in agricultural products<sup>82</sup>. Africa's low rate of internal trade is attributable to limited industrial and manufacturing capacity, leading to a lack of specialisation in exports. In general, Africa's economy is characterised by market fragmentation, small national economies, overreliance on the export of primary commodities, a narrow export base, and high regulatory and tariff barriers to intra-Africa trade. The result is a very low percentage of intra-Africa trade and a significant reliance on the export of primary commodities to the traditional markets of the north<sup>83</sup>.

Given this context, the AfCFTA as a legal construct offers Africa the best opportunity to confront the significant trade and economic development challenges

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<sup>81</sup> African Union, 2021. *Leveraging private sector engagement for the Africa we want*. [Online] Available at: [https://au.int/sites/default/files/pressreleases/41140-pr-Private\\_Sector\\_Engagement\\_for\\_the\\_Africa\\_we\\_Want.pdf](https://au.int/sites/default/files/pressreleases/41140-pr-Private_Sector_Engagement_for_the_Africa_we_Want.pdf) [Accessed 15 July 2022].

<sup>82</sup> Wamkele, M., 2020. The African continental free trade area (AfCFTA): Boosting Intra-Africa Trade. *Georgetown Journal of International Law*, Volume 51, pp. 751-752.

<sup>83</sup> Wamkele, M., 2020. The African continental free trade area (AfCFTA): Boosting Intra-Africa Trade. *Georgetown Journal of International Law*, Volume 51, pp. 751-752.

of our time. It has the potential to enable Africa to significantly boost intra-Africa trade, improve economies of scale, and establish an integrated market based on a common legal framework. The AfCFTA could be a catalyst for industrial development, placing Africa on a path to exporting value-added products, and improving Africa's competitiveness both in its markets and globally<sup>84</sup>. Economic growth must be realised from within if the AfCFTA is to realise its goals. Policies with an overreliance on Foreign Direct Investment FDI have shown its shortfalls and the need for a self-reliant economy<sup>85</sup>.

The next section shows how poverty reduction is tied to the private sector.

### **2.3.2 Poverty Reduction on the African Continent**

According to a report by the World Bank, the AfCFTA stands to boost regional income by 7% or \$450 billion, speed up wage growth for women, and lift 30 million people out of extreme poverty by 2035. Wages for both skilled and unskilled workers will also be boosted by 10.3% for unskilled workers and 9.8% for skilled workers<sup>86</sup>. Poverty, though generally viewed in terms of income, covers a much wider scope. The World Bank defines poverty as encompassing not only material deprivation (measured by an appropriate concept of income or consumption) but also low achievements in education and health<sup>87</sup>. Poverty reduction bodes well for the AfCFTA's objective of championing development on the African continent.

Aspiration 1 of Agenda 2063 as posited by the AU sets poverty eradication as a goal that is actively sought on the African continent<sup>88</sup>. The diversification of

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<sup>84</sup> Wamkele, M., 2020. The African continental free trade area (AfCFTA): Boosting Intra-Africa Trade. *Georgetown Journal of International Law*, Volume 51, pp. 751-752.

<sup>85</sup> Wako, A. H., 2021. Foreign direct investment in sub-Saharan Africa: Beyond its growth effect. *Research in Globalization*, December, Volume 3, pp. 1-21.

<sup>86</sup> World Bank, 2020. The African continental free trade area: Economic and distributional effects, Washington, DC: World Bank.

<sup>87</sup> World Bank, 2000. The nature and evolution of poverty. In: *World development report 2000/2001*. Washington, DC: s.n., pp. 15-29.

<sup>88</sup> African Union, 2015. *Agenda 2063: The Africa we want*. Addis Ababa: African Union Commission.

exports, accelerated growth, competitive integration into the global economy, increased FDI, increased employment opportunities and incomes, and broadened economic inclusion which the AfCFTA is envisioned to bring all bode well for this novel goal. Additionally, a population with increased purchasing power translates into greater trade volumes from which the private sector stands to benefit greatly in offering goods and services to the populace at large.

With the private sector making a significant contribution to economic growth and development it is expected that poverty will be greatly reduced on the African continent. A study carried out in Sub-Saharan Africa showed that there is a strong and robust relationship between economic growth and poverty reduction<sup>89</sup>.

### **2.3.3 Closing the Gender Economic Gap**

The AfCFTA provides an avenue for improving the lives of women, a consideration that is important to the AU, that they produced a whole protocol catered to protecting women's rights on the African continent. Structural and systems change are a key component to the aim of a more gender inclusive private sector development, for the gender mainstreaming efforts of the international community, though well-intentioned, are all too often focused on surface level changes while the architecture of inequalities and patriarchal neoliberalism remains intact<sup>90</sup>. With the AfCFTA seeking to ease trading activities across African borders, it provides an avenue to tap into the female labour force<sup>91</sup> with women constituting the majority of workers in the informal economy, and yet only about a third of the women across the continent participate in formal economic activity<sup>92</sup>.

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<sup>89</sup> Moser, G. G. & Ichida, T., 2001. Economic growth and poverty reduction in Sub-Saharan Africa. s.l.:IMF.

<sup>90</sup> United Nations, 2002. *Gender mainstreaming: An overview*. New York: UN Office of the Special Adviser on Gender Issue.

<sup>91</sup> Akyeampong, E. & Fofack, H., 2013. *The contribution of African women to economic growth and development in post-colonial Africa: Historical perspectives and policy implications*. Washington, DC: World Bank.

<sup>92</sup> Reines, R., 2018. *Why women hold the keys to Africa's future*. [Online] Available at: <https://www.weforum.org/agenda/2018/03/why-women-hold-the-keys-to-africas-future/> [Accessed 8 October 2022].

As it was already considered under Chapter One, the informal sector forms a big part of the private sector which is the predominant force in trade activities on the African continent. Therefore, promoting trade efforts of women on the African continent would encourage them to formalise their enterprises in order to benefit from the economic benefits the AfCFTA is envisioned to confer upon participants in trade under its umbrella. This is in line with aspiration 6 of Agenda 2063 which states that all the citizens of Africa will be actively involved in decision making in all aspects. Africa will be an inclusive continent where no man, woman, or child will be left behind or excluded due to their gender, age, place of residence, political affiliation, religion, ethnicity, or any other reason.

#### **2.3.4 Cushioning the Negative Impacts of COVID-19**

The need for a stronger African economy was brought to the fore with the advent of the Covid-19 pandemic that ravaged economies around the world and essentially brought production of goods and facilitation of services plummeting to dangerous levels. COVID-19 caused an unprecedented supply and demand shock to the global economy. Governments, to thwart the spread of virus, preserve the health of their populations and protect their livelihoods, took unilateral measures ranging from restricting travel across land borders to confining populations<sup>93</sup>. Because it frequently took a long time to reach a consensus, most containment measures in the early phases of the virus were implemented unilaterally due to its practically unprecedented nature and rapid spread. The reactions of public authorities through measures to contain the virus led to a slowdown in economic activity<sup>94</sup>.

Economically, the pandemic affected all regions of the world, but with varying intensity. According to Osman the continent of Africa had a real GDP fall of 2.6% in 2020—the first in over thirty years—and a 4.7% decline in GDP per capita as a

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<sup>93</sup> Banque Mondiale, 2020. Évaluation de l'impact économique du COVID-19 et des réponses politiques en Afrique subsaharienne. In Série Africa's Pulse (Vol. 21), Washington, DC: Banque Mondiale, Bureau de l'économiste en chef pour la région Afrique.

<sup>94</sup> Bakouan, P., Dialga, I. & Zidouemba, P. R., 2022. A comparative analysis of the effects of the African continental free trade agreement on the economic impacts of COVID-19 in North and Southern Africa. *Journal of Economic Integration*, March, 37(1), pp. 121-157.

result of border closures, incarceration, and a reliance on extractive commodities<sup>95</sup>. Also, sub-Saharan Africa experienced an economic decline of -2.5% in 2020, but less severe than Europe (-7.6%), Latin America (-7.6%), and South and Southeast Asia (-6.4%), which recorded the largest declines in national income in 2020, while East Asia, which was the first region affected, has managed to stabilise<sup>96</sup>.

African states must therefore seek to use the AfCFTA to increase trade opportunities and improve their respective economic situations, something the World Bank recognised in its research on how regional integration would play a key role in trade recovery endeavours<sup>97</sup>. The AfCFTA, like all other FTAs, is envisioned to breakdown various trade barriers throughout Africa that have affected trade volumes in intra-African trade. As major players in the African economy, the AfCFTA organs should actively seek consultations with private sector stakeholders who stand to provide them with real-time issues affecting their trade and possible solutions. A reduction in trade barriers would translate into increased trade volumes, job creations and many other factors used as indicators of development.<sup>98</sup> And for a continent still recovering from the economic shock of Covid-19 this is a welcome consideration.

Increased involvement of the private sector stakeholders can only serve to enhance the relevance of trade policies formulated under the AfCFTA umbrella. And only through conscious efforts will the African economy truly recover from the Covid-19 shock and possibly go on to be greater than it ever has been in terms of stability and overall strength and this bodes well for development on the African continent.

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<sup>95</sup> Osman, Y., 2021. Les grandes tendances macroéconomiques de l'Afrique et de ses régions. In: *L'économie africaine 2020*. Paris: La Découverte, pp. 7-20.

<sup>96</sup> Bakouan, P., Dialga, I. & Zidouemba, P. R., 2022. A comparative analysis of the effects of the African continental free trade agreement on the economic impacts of COVID-19 in North and Southern Africa. *Journal of Economic Integration*, March, 37(1), pp. 121-157.

<sup>97</sup> World Bank, 2020b. Trading together: Reviving Middle East and North Africa regional integration In the post-Covid era, Washington DC: World Bank.

<sup>98</sup> Jansen, M. & Lee, E., 2007. Trade and employment: Challenges for policy research. A joint study of the International Labour Office and the Secretariat of the World Trade Organization, Geneva and Switzerland: International Labour Organization (ILO) and World Trade Organization (WTO).



### 2.3.5 A Tool Against Economic Dependence

Africa has a combined GDP of USD 2.5 trillion and a population of over a billion people, making it a substantial market from a regional and foreign investment point of view<sup>99</sup>. Post-covid-19, the AfCFTA promises to be Africa's economic recovery plan, with a specific focus on industrial development. The AfCFTA, it must be said, is a positive step in Africa's presumably positively changing fortunes. This becomes more relevant when one considers that the African continent as a whole is still fighting vestiges of colonialism and a dependency model that was put in place from colonial times. This has never fully been dealt with as we simply exchanged slavery and other forms of direct economic exploitation for an indirect form of colonialism commonly referred to as "Neo-Colonialism" which has carved out a space for itself across various fields<sup>100</sup>. The economies of African states or their respective raw materials are being viewed as valuable target areas for their developed counterparts.

The theory of dependency is considered most appropriate here, hence its adoption as the framework of analysis. This theory became popular through the seminal works of scholars like, Baran, Sweezy, Gunder, Prebisch and Samir. These scholars attributed the underdevelopment of the peripheral states to exploitation by advanced capitalist states, through the mechanism of international trade<sup>101</sup>. In international trade the stronger more developed powers bring to bear their economic weight at negotiating stages forcing the developing and low developing countries (LDCs) to enter into trade agreements that are lopsided in that they heavily favour the former with promises of improved trading relations. With the ultimate goal of economic development and self-sufficiency for the latter which is never forthcoming because

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<sup>99</sup> African Development Bank, 2014. *Tracking Africa's Progress in Figures*, Tunis: African Development Bank.

<sup>100</sup> Odijie, E. M., 2022. Unintentional neo-colonialism? Three generations of trade and development relationship between EU and West Africa. *Journal of European Integration*, 44(3), pp. 347-363.

<sup>101</sup> Okafor, C. & Udibe, K. U., 2020. Can the African continental free trade agreement foster a new paradigm of development assistance within Africa?. *Journal of African Foreign Affairs*, December, 7(3), pp. 7-29.

a business environment has already been put in place to ensure that any form of economic development is kept in check, exploited or entirely hampered.

The rationale for the creation of the AfCFTA has been considered above and the central theme running through all of them is that the AfCFTA seeks to realise economic growth and development on the African continent; through realising regional integration, poverty reduction, closing the gender economic gap, Cushioning the negative impacts of Covid-19 and eliminating economic dependence among others through the above five. It has also been shown that the private sector is instrumental to the AfCFTA realising its development goals as posited by the salient points considered above. Africa's development under the AfCFTA is therefore likely to be affected by the level of private sector inclusion in development initiatives undertaken in line with the AfCFTA policy considerations. In the next section, an overview of the AfCFTA legal framework is undertaken with the goal of investigating whether as it stands the AfCFTA legal framework is primed to accommodate private sector inclusion to facilitate development on the African continent. In doing, so shortfalls alongside possible entry points for private sector inclusion shall be highlighted.

#### **2.4 An Overview of the African Continental Free Trade AREA**

In this section an overview of the AfCFTA is done to underline if the current legal framework is suited to/provides for private sector inclusion to facilitate development on the African continent. The AfCFTA in its preamble largely recognises two concerns which are highly relevant to the economic transformation of the African continent as a whole. The first is the recognition of the ambitious AU Agenda 2063, which calls for the creation of a continental market with unrestricted movement of goods, services, capital, and people. These initiatives are essential for advancing industrialization, food security, agricultural development, and structural economic transformation as well as for strengthening economic integration. This is reflected under Article 3 of the AfCFTA. Secondly, the AfCFTA recognises the already existing FTAs and RECs on the African continent as building blocks for its ultimate realisation. This consideration is covered in more depth under a

subheading of its own in an attempt to highlight its great significance to the operationalisation and implementation of the AfCFTA.

An overview here is undertaken of the makeup of the AfCFTA under four subheadings. These are; (i) principles governing the AfCFTA agreement, (ii) FTAs as building blocks for the AfCFTA, (iii) institutional framework under the AfCFTA and (iv) e-commerce under the AfCFTA. Making use of the forestated subheadings, what will be explored is whether the AfCFTA as it stands promotes inclusion of the private sector to facilitate development. Recommendations are also made as to how private sector inclusion can be achieved to realise development on the African continent under the umbrella of the AfCFTA.

#### **2.4.1 Principles Governing the AfCFTA Agreement**

Article 5 of the AfCFTA Agreement lists the principles by which the AfCFTA agreement shall be governed to include; (i) driven by Member States of the African Union; (ii) the existing FTAs as building blocks for the AfCFTA, (iii) variable geometry, (iv) flexibility and special differential treatment, (v) transparency and disclosure of information, (vi) preservation of the *acquis*, (vii) Most Favoured Nation (MFN) Treatment, (viii) National Treatment, (ix) reciprocity, (x) substantial liberalisation, (xi) consensus in decision making and (xii) best practices in the FTAs, in the State Parties and International Conventions binding the African Union<sup>102</sup>.

The principles outlined in Article 5 of the African Continental Free Trade Area (AfCFTA) Agreement are of great relevance when it comes to private sector inclusion in the implementation of the agreement. An in-depth discussion of these negotiating principles is beyond the scope of this mini thesis. However, the discussion herein will focus on a few of them in relation to how they can be impactful in as far as private sector inclusion is concerned. Private sector

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<sup>102</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Article 5.

involvement is critical to the success of the AfCFTA as they are the main drivers of economic growth and job creation which translates into socio-economic development for the African continent<sup>103</sup>.

The principle of Member State-driven approach is relevant as it provides an avenue by which the private sector can be involved in the negotiation and adoption of the agreement. The respective member states would do well to hold stakeholder deliberations with their respective domestic private sector players to deliberate economic policies or stances which they can then use to influence major economic policies under the umbrella of the AfCFTA. This would allow the private sector to contribute their expertise and insights into the process and ensure that their concerns and needs are taken into account.

In the context of private sector inclusion, reciprocity is important as it ensures that the private sector from all member states has equal access to the benefits of the agreement. This means that businesses from less developed countries are not left behind in the development process. MFN treatment, on the other hand, promotes a level playing field for all businesses and ensures fair competition in the market. This principle allows private sector stakeholders to have access to information on trade regulations, tariffs, and other requirements, enabling them to make informed decisions and compete effectively in the market<sup>104</sup>.

The AfCFTA seeks to preserve the acquis of existing FTAs and regional economic communities, promoting the continuity of existing trade regimes while integrating them into the AfCFTA. The principle of preservation of the acquis is important as it ensures that existing trade regimes and rules are not disrupted, allowing the

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<sup>103</sup> African Union, 2021. *Leveraging private sector engagement for the Africa we want*. [Online] Available at: <https://au.int/sites/default/files/pressreleases/41140-pr-Private-Sector-Engagement-for-the-Africa-we-Want.pdf> [Accessed 15 July 2022].

<sup>104</sup> Faster Capital, 2023. *Leveling the playing field: Most favored nation and non discrimination*. [Online] Available at: <https://fastercapital.com/content/Leveling-the-Playing-Field--Most-Favored-Nation-and-Non-discrimination.html> [Accessed 9 November 2023].

private sector to continue operating under established frameworks while integrating into the AfCFTA. Some of the existing FTAs as highlighted under Chapter 3 of this mini thesis already boast of initiatives to promote private sector inclusion. This therefore bodes well for their continued participation in development efforts even under the AfCFTA.

The principle of flexibility and special differential treatment is important as it recognises the different levels of development and economic circumstances of Member States. This ensures that small and medium-sized enterprises (SMEs) and other businesses in less developed countries can benefit from the AfCFTA, thereby promoting private sector development across the continent. These SMEs contribute greatly to the economies of their respective states and thus the African continent as a whole. With the wider market promised under the AfCFTA, they are more likely to realise greater economic growth and contribute even more to the intra-African trade.

The AfCFTA also posits the principle of transparency and disclosure of information. This is relevant as it promotes a level playing field for all businesses. This allows the private sector to have access to information on trade regulations, tariffs, and other requirements, enabling them to make informed decisions and compete effectively in the market. With increased access to information that would ordinarily be dealt with as confidential, the private sector stakeholders are placed in a position where they can contribute to polishing some of the policies being tabled.

The AfCFTA Agreement provides for MFN treatment among the State Parties. The State Parties "shall accord Most-Favoured-Nation Treatment to one another in accordance with Article 18 of the Agreement," according to Article 4(1) of the Protocol on Trade in Goods. According to the latter, State Parties are required to grant each other, on a reciprocal basis, favors that are as favorable to those granted to Third Parties when implementing the AfCFTA Agreement. Third parties are countries such as the EU member states that are not parties to the AfCFTA. An

illustration of a preferential trade agreement for products with a third party is the SADC-EU Economic Partnership Agreement. It implies that the MFN premise of AfCFTA is not a given. Benefits linked to the extension of existing third-party preferences will have to be paid for<sup>105</sup>. This principle is critical in ensuring that private sector inclusion is promoted within the agreement. The MFN principle requires each Member State to treat all other Member States equally, meaning that they must offer the same trade preferences and concessions to all other Member States.

This concept is relevant to private sector inclusion because it creates a level playing field for businesses. By treating all Member States equally, the AfCFTA ensures that no Member State has an unfair advantage over others. This is especially important for small and medium-sized enterprises (SMEs) in less developed countries, which may struggle to compete with larger and more established businesses in other countries.

The objective of the principles stated above are to promote fair competition between trading partners across different borders. These principles are aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development on the African continent. This effectively creates an environment in which the private sector actors can engage more readily in trade activities boosting trade volumes and the economic growth and development that ensues. These principles are therefore relevant, if not central to creating the free trade area envisioned under the AfCFTA under which private sector inclusion can be harnessed to great effect to not only increase trade volumes but also inform policy considerations.

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<sup>105</sup> Erasmus, G., 2022b. *Reciprocity in the AfCFTA Negotiations*. [Online] Available at: <https://www.tralac.org/blog/article/15584-reciprocity-in-the-afcfta-negotiations.html#:~:text=Reciprocity%20is%20a%20key%20element,other%20relevant%20State%20Parties%20reciprocate>. [Accessed 20 July 2022].

#### **2.4.2 FTAs as Building Blocks for the AfCFTA**

Despite being one of the principles as outlined under article 5 of the AfCFTA, FTAs as building blocs are discussed separately because of their relative importance. Arguably, a failure by the respective organs under the AfCFTA to realise this will define the levels of success (integration) that the AfCFTA will be able to achieve.

The AfCFTA strongly recognises these as building blocks towards the realisation of a wholly integrated African economy. The agreement clearly states which FTAs and RECs are recognized by the African Union (AU): the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union (UMA), and the Southern African Development Community (SADC)<sup>106</sup>.

This is important because these FTAs are continental leaders in Intra-African Trade (ITA) and many of the larger more established FTAs are somewhat already at deeper levels of integration. It would therefore serve to use these already established pipelines improving upon their weakness and boosting their strengths to morph into the AfCFTA as opposed to attempting imposition of new wholly foreign systems which would necessitate tedious and prolonged re-negotiations of trade related aspects. Not to mention the logistics of new system designs all in the name of realising the operationalisation of the AfCFTA.

It has taken Africa a great deal of time and development to reach this point spanning back to the Abuja Treaty, therefore the implementation of the AfCFTA should be as free flowing as possible to reduce unnecessary friction between partner states as

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<sup>106</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 1 of AfCFTA Agreement.

the continent seeks to build upon what they already possess which are functioning and to a certain degree really successful FTAs.

Additionally, the existing FTAs have their own measures in place of private sector inclusion in order to realise development in their respective spheres of influence. The AfCFTA framework can be greatly enriched by adopting some of these initiatives to foster inclusive development on the African continent.

### **2.4.3 Institutional Framework under the AfCFTA**

The institutional framework for the implementation of the AfCFTA is provided for under Article 9 of the Agreement wherein the institutions are listed to include; (a) the Assembly, (b) the Council of Ministers, (c) the Committee of Senior Trade Officials and (d) the Secretariat. Their respective roles and possible influences are discussed at length in Part III. They are the bedrock upon which the AfCFTA shall lay. Institutional frameworks are vital for establishing the roles and responsibilities of the various players involved in designing, administering, delivering, and enforcing protection systems. As a result, it is crucial to the efficient operation of the system and helps to prevent gaps, duplications, overlaps and multiplications<sup>107</sup>. Ensuring ease and efficiency of administration. Here it is important to note a telling absence of any institutions in place to champion inclusion of the private sector stakeholders under the AfCFTA. This points to a lack of representation despite the private sector playing a large role in trade activities as laid out in Part I, which is an area of concern<sup>108</sup>.

Article 12 of the AfCFTA which provides for the composition of the Committee of Senior Trade Officials provides an avenue by which governments can be proactive and name leading entrepreneurs from the private sector to actively participate and implement in policy considerations which inevitably affect them. Many of these

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<sup>107</sup> Social Protection and Human Rights, 2015. *Legal and Institutional frameworks*. [Online] Available at: <https://socialprotection-humanrights.org/key-issues/governance-accountability-and-democracy/legal-and-institutional-frameworks/> [Accessed 6 August 2022].

<sup>108</sup> See section 2 of Chapter 1.



private sector stakeholders are vastly experienced in matters of international trade and would be assets in developing and lobbying for favourable positions for their respective states and the private sector players as a whole. This would be a dimension of inclusivity hard to rival. African states should not miss this opportunity to make use of a favourable pathway for participation of the private sector.

That decisions of the AfCFTA institutions on substantive issues shall be taken by consensus<sup>109</sup>, is key to ensuring that the twin principles of transparency and accountability upon which the AfCFTA seeks to run are inherently observed<sup>110</sup>. As earlier on noted that this agreement is centred around members/state parties and their active involvement alongside their willingness to implement the decisions therein made will be key to the successful implementation of the AfCFTA stipulations. And thus, bring Africa that much closer to realising the continent's development goals as set out in Agenda 2063. Article 14(2) goes on to provide a hierarchy in as far decision-making powers are concerned. Wherein it is stated that notwithstanding paragraph 1, the Committee of Senior Trade officials shall refer, for consideration by the Council of Ministers, matters on which it has failed to reach consensus. The Council of Ministers shall refer matters to the Assembly where consensus could not be reached.

It is therefore a point of concern, or at the very least should be for the private sector actors who contribute greatly to trade activities on the African continent that they have no representation at the institutional level under the AfCFTA. Decisions made by these bodies will inevitably affect their trading activities. This makes it important that they are involved in policy formation at the very least. Not only that, many of the private sector accord are seasoned international traders and therefore can leverage their vast years of experience and expertise even in functional or policing

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<sup>109</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 14.

<sup>110</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 5.

roles beyond policy formation. It is imperative that this issue is addressed to avoid losing out on such valuable human resource that would greatly aid the successful implementation of the AfCFTA to promote development on the African continent.

#### **2.4.4 E-Commerce**

E-commerce has carved up a place for itself on the world economy with the new developments in technology over the years and it can no longer be ignored as it's a viable source of income for various entities on the global stage. Many states even going as far as investing heavily in these ventures take for example the advent of e-Estonia which refers to a movement by the government of Estonia to facilitate citizen interactions with the state through the use of electronic solutions<sup>111</sup>. The AfCFTA has not let this escape its vast and relevant coverage. E-commerce has been included in the AfCFTA through a decision of the AU Heads of State and Government Assembly in February 2020<sup>112</sup> and will be integrated through a third phase of negotiations. This decision could potentially lead to expanded market space for e-commerce players on the continent. In 2017, there were more than 260 African e-commerce start-ups, and by 2020, the International Trade Centre had counted 630 B2C e-commerce platforms functioning within the continent. These players would also include businesses and institutions which use e-commerce channels<sup>113</sup>.

The AfCFTA e-commerce negotiations have been called for, and for good reason, in the wake of the COVID-19 epidemic and the growing reliance on e-commerce channels across several sectors. This would enhance the continent's ability to actively promote and embrace e-commerce through which the private sector actors

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<sup>111</sup> Center for Public Impact, 2019. *e-Estonia, the information society since 1997*. [Online] Available at: <https://www.centreforpublicimpact.org/case-study/e-estonia-information-society-since-1997> [Accessed 22 July 2022].

<sup>112</sup> African Union, 2020. Decision on the African continental free trade area (AfCFTA). Doc. Assembly/AU/4(XXXIII). 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Ababa, Ethiopia, Addis Ababa: African Union.

<sup>113</sup> Ogo, I., 2020. *An agenda for the AfCFTA protocol on E-Commerce*. [Online] Available at: <https://www.tralac.org/blog/article/14692-an-agenda-for-the-afcfta-protocol-on-e-commerce.html> [Accessed 22 July 2022].

and states can all earn by way of profits and taxation respectively. Both where properly applied, are considerable factors in as far as development of any society is concerned.

The private sector already dominates the e-commerce space in Africa's context and e-commerce on the continent is growing at a rapid rate<sup>114</sup>. Therefore, AfCFTA policy makers should seek to involve them where policy considerations to do with e-commerce regulations are concerned. This inclusive consideration would ensure that policies formulated are relevant and readily acceptable by stakeholders in the e-commerce industry. And where formulated with promoting trade in mind, will stand to increase trade volumes across e-commerce platforms from which profits and taxes can be used to promote development in the different spheres of influence of these private sector stakeholders.

In conclusion, an overview of the legal framework of the AfCFTA shows that it was not designed with private sector inclusion as a consideration, at the very least not primarily. Nevertheless, the discussion above shows that there still exist avenues by which private sector inclusion can be improved upon to realise development on the African continent as a result of increased economic growth. It has also been shown that some of the considerations under the legal framework inadvertently stand to strengthen private sector inclusion which is a welcome consideration considering the private sector's contribution to Africa's economy.

## **2.5 Other Considerations**

In undertaking an overview of the AfCFTA, consideration has been given to other innovations that have risen as a means by which the AfCFTA's operationalisation and implementation is to be made that much more effective. This is in the form of the PAPSS payment system and the African Private Sector Forum Initiative. For

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<sup>114</sup> Masekesa, F., 2020. *Nigeria, South Africa and Kenya dominate the e-commerce industry in Sub-Saharan Africa*. [Online] Available at: <https://www.theasianbanker.com/updates-and-articles/nigeria-south-africa-and-kenya-dominate-the-e-commerce-industry-in-sub-saharan-africa> [Accessed 10 March 2023].

purposes of this mini thesis, these are worthwhile deliberations as they will endeavour to highlight below showing them to be avenues that will improve trade for the private sector under the AfCFTA umbrella with an aim towards the realisation of greater socio-economic development on the African continent.

### **2.5.1 The Pan-African Payment and Settlement System (PAPSS)**

An effective payments system is crucial for any trade undertaking to ensure the success of such endeavours. This facilitates payments between manufacturers/service providers, suppliers and the final consumers/customers. In this vein, the AfCFTA came up with a very encouraging development for investment and trade promotion in the form of the PAPSS by the African Export-Import Bank (Afrexim bank) and the AfCFTA Secretariat on 13 January 2022<sup>115</sup>. This ground-breaking platform will save Africa more than \$5 billion annually in payment transaction costs, while it will play an increasingly significant role in accelerating the continent's transactions underpinning the operationalisation of the AfCFTA<sup>116</sup>. In order to achieve the long-desired acceleration of intra-continental trade and investment, the PAPSS represents a significant step in releasing the continent from an excessive reliance on foreign players and forces. Access to funds which has been shown to be a major constraint to the private sector participation in trade extends beyond seed capital to also include payment collections. With PAPSS, the private sector has a fast and secure means by which to engage in trade activities with confidence that monies owing and monies owed can easily be transferred and collected.

Modern financial market infrastructure is made possible by the PAPSS, which links African markets and allows for immediate cross-border transfers in the national currencies of each country for cross-border trade. In collaboration with the member

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<sup>115</sup> World Bank, n.d. *Payment Systems*. [Online] Available at: <https://www.worldbank.org/en/topic/paymentsystemsremittances> [Accessed 6 August 2022]

<sup>116</sup> Afreximbank, 2022. *Pan-African Payment and Settlement System Launched by President Akufo-Addo Foreseeing \$5 billion Annual Savings for Africa*. [Online] Available at: <https://www.afreximbank.com/pan-african-payment-and-settlement-system-launched-by-president-akufo-addo-foreseeing-5-billion-annual-savings-for-africa/> [Accessed 6 August 2022].

central banks in Africa, Afrexim Bank, the primary Settlement Agent for PAPSS, offers overdraft facilities and settlement guarantees for the payment system to all Settlement Agents. PAPSS will essentially remove financial boundaries of Africa, formalize and integrate the continent's payment systems and significantly contribute to the acceleration of the massive intra-African trade growth curve brought about by the AfCFTA.

### **2.5.2 African Private Sector Forum Initiative**

An interesting development in as far as the AU's recognition of the key role played by the private sector in regards to development is the African Private Sector Forum initiative. This forum is a demonstration of the AU's commitment towards realising the goals of Africa's development as set out under the Agenda 2063 and its drive towards becoming a part of the global value chain for inclusive and sustainable growth in Africa. It's an annual initiative that has over the years expanded its participation and remains one of the strategic platforms organised by the African Union Commission to engage policymakers, representatives from the private sector, development organizations, civil society, and academia, among other key stakeholders<sup>117</sup>. It has been fronted by the AU as a key instrument of dialogue and partnership between the African Union policy makers and the private actors. The Forum also serves as a platform for advocating for and exchanging business and market knowledge and expertise, thereby empowering the African private sector<sup>118</sup>. The private sector can leverage their participation in this to lobby for favourable policy changes that will greatly boost their capacity to engage in further trading activities. Alongside voicing their desire for inclusion in order to influence policy considerations at the grassroots level as part of the AfCFTA's institutional framework setting. This would give them a platform to influence development

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<sup>117</sup> African Union, 2022. 13th African private sector forum. The role of private sector towards increasing investment in energy and agribusiness to upscale productive capacities and industrialization drive in Africa. [Online] Available at: <https://au.int/en/newsevents/20220723/13th-african-private-sector-forum-role-private-sector-towards-increasing> [Accessed 5 August 2022].

<sup>118</sup> African Union, 2021b. 12th African private sector forum: Strengthening African private sector's capacity to respond to disrupted markets and ensure economic resilience in the face of COVID-19 pandemic. [Online] Available at: <https://au.int/en/12th-african-union-private-sector-forum> [Accessed 22 July 2022].

policy from a point of higher influence than is currently afforded to private sector actors on the African continent under the AfCFTA umbrella.

## **2.6 Conclusion**

This chapter considered an overview of the AfCFTA and its objectives towards private sector inclusion to facilitate development. In doing so, it studied the objectives of the AfCFTA through which a golden thread of economic growth and development clearly ran through. The rationale for the formation of the AfCFTA was undertaken showcasing the role the private sector is set to play in achieving some of the considerations that birthed it. Here the origins of the AfCFTA were also shown to have a longstanding history on the African continent going as far back as the Abuja Treaty of 1991 that had envisioned an even earlier formation of an African Customs union. This just shows how important this is considered to the economic growth and development of the African continent. It is also a call to urgency in as far as implementation is concerned especially with integration efforts across the globe at the highest levels they have ever been. An overview of the AfCFTA legal framework uncovered that there is an existent need for greater measures to be undertaken before it can be said that there is private sector inclusion to facilitate development under the AfCFTA despite the private sector's widely recognised central role in trading activities on the African continent. That said, however, all hope is not lost as there are considerations already in place that can be used to promote private sector inclusion. The next chapter considers the legal and institutional limitations that the private sector is likely to face in its bid to facilitate development on the African continent under the umbrella of the AfCFTA.

# CHAPTER THREE

## LEGAL AND INSTITUTIONAL FRAMEWORK

### LIMITATIONS TO THE PRIVATE SECTOR

### ENGAGEMENT UNDER THE AFRICAN

### CONTINENTAL FREE TRADE AREA

#### 3.1 Introduction

Institutions are essential in Free Trade Areas (FTAs) to supervise, promote and monitor State Parties regarding the fulfilment of their obligations. In addition to the numerous technical bodies that are covered by the various Protocols, four major institutions are established under the African Continental Free Trade Agreement (AfCFTA). These institutions will be responsible for ensuring that this ambitious undertaking succeeds<sup>119</sup>.

Together with technical aid and guidance, the new AfCFTA institutions will also be responsible for political monitoring and policy direction. This will entail a new challenge for the structures of the African Union (AU); when it moves into the world of international trade regulation and ensuring compliance with multilateral trade rules. Only five of the 55 AU members do not belong to the WTO<sup>120</sup>. Considerations would therefore have to be made as these have no obligation to abide by WTO trade rules whereas the majority are signatory and therefore are bound to trade accordingly. Keeping in mind that the AfCFTA is heavily influenced by the WTO in its design this may not pose much of an issue as the said states will be expected to comply with their obligations under the AfCFTA.

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<sup>119</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission.

<sup>120</sup> Tralac, 2019. *The institutions of the African continental free trade area*. [Online] Available at: <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> [Accessed 23 July 2022].

It remains to be seen how the AfCFTA institutions examined in this chapter are primed to promote private sector engagement because this is crucial to achieving its goals inclusive of which is a greater economic environment for African states only possible with growth of local industries. This can only be answered once the AfCFTA is fully operational and substantial trade has been carried out under its umbrella. The private sector is responsible for approximately 90% of employment in the developing world and this includes both formal and informal jobs<sup>121</sup>. Whether they are huge multinational corporations, medium-sized and small-scale local businesses, or unregistered farmers, private entrepreneurs and their profit-making endeavors provide essential goods and services that enhance people's lives, produce domestic tax revenues, and are essential to promoting economic progress. In many developing countries the private sector plays a vital role in producing goods and services for export markets, thereby generating foreign exchange which is crucial for macroeconomic stability and enabling firms to expand their production frontiers, achieve economies of scale and enhance their competitiveness<sup>122</sup>.

In the previous chapter, what was considered was an overview of the AfCFTA and its objectives towards private sector inclusion to facilitate development. To achieve this, the agreement establishing the AfCFTA was investigated and avenues that support private sector inclusion to facilitate development were highlighted and discussed alongside certain shortcomings mentioned therein. This chapter will investigate the legal and institutional framework limitations and challenges that the private sector will face in their engagement under the AfCFTA current provisions. Here the research will highlight the role played by the private sector in economic development across Africa and on the global stage citing challenges faced. In doing this it will also highlight appropriate regulatory measures to build the capacity of the AfCFTA to facilitate private sector participation in economic development on the African continent and seek out appropriate solutions to obstacles to achieving

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<sup>121</sup> Avis, W. R., 2016. *Urban governance (topic guide)*. Birmingham, UK: GSDRC, University of Birmingham.

<sup>122</sup> Avis, W. R., 2016. *Urban governance (topic guide)*. Birmingham, UK: GSDRC, University of Birmingham.



this goal. However, the latter consideration is covered in greater depth in Chapter Five, after a comparative study in Chapter Four.

This chapter will consider the legal institutions under the AfCFTA and examine whether their makeup promotes private sector inclusion. Where it does not, proposals will be made for possible avenues to improve this. Then gravitate to the limitations to private sector engagement under the AfCFTA. In the same vein, conflict of laws as a limitation is given greater attention wherein the AfCFTA is expected to integrate the already existing legal frameworks under the different FTA regimes prominently utilised on the African continent. In exploring these challenges, proposals are made for inroads to improve engagement for the private sector under the AfCFTA. Conclusions will then be gathered from the undertakings as highlighted above.

### **3.2 Legal Institutions under the African Continental Free Trade Area**

From the onset, it's important to note that the AfCFTA Agreement does not provide for the establishment of a new international organisation. There is no institution with the explicit power to litigate on behalf of the AfCFTA and to ensure that the State Parties comply with their obligations. Under the Dispute Settlement Protocol of the AfCFTA, only the State Parties have standing. Therefore, the AfCFTA is a State-centred arrangement<sup>123</sup>. There is no institution in place under the AfCFTA Agreement that explicitly provides for representation of the private sector to speak towards inclusion with a view to facilitate development on the African continent. Article 9 of the AfCFTA agreement provides for the institutional framework for the implementation of the AfCFTA and it is imperative that the institutions and their roles are considered as below;

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<sup>123</sup> Erasmus, G., 2022. *Legal aspects of the relationship between the AfCFTA and the African Union*. [Online] Available at: [https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20\(BIAT\).](https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20(BIAT).) [Accessed 22 July 2022].

The main institutions under the AfCFTA that will be considered here are; (i) the Assembly of the AU (ii) the Council of Ministers, (iii) the Committee of Senior Trade Officials, (iv) the Secretariat and (v) the African Trade Observatory which does not form part of the officially recognised bodies as expressly stipulated under the AfCFTA Agreement but is nevertheless worth looking into. These will be discussed to investigate and where possible highlight their relevance in as far as private sector inclusion under the AfCFTA to promote development on the African continent is concerned.

### **3.2.1 Assembly of the AU**

The Assembly of the AU is Composed of Heads of State and Governments or their duly accredited representatives. The highest authority inside the African Union is the Assembly of Heads of State and Government. The Assembly, a flagship initiative of the AU, is the highest decision-making body of the AfCFTA and is tasked with overseeing and strategically guiding the AfCFTA, which includes the Action Plan for Boosting Intra-African Trade (BIAT).<sup>124</sup> Additionally, it is the only body with the power to interpret this Agreement in accordance with the recommendations of the Council of Ministers. Consensus must be reached before an interpretation is adopted.<sup>125</sup> From the foregoing, it is evident that this organ does not envision private sector inclusion.

It therefore bodes well for the private sector's inclusion under the AfCFTA that increased recognition is being accorded to its importance by the AU wherein efforts towards economic development are involved. An example of this is where the African Union Commission (AUC) adopted the 2016-2020 private sector development strategy (PSDS) with the aim of reinforcing private sector roles in

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<sup>124</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 10.

<sup>125</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 10.

fostering structural changes that create employment opportunities for the continent's population<sup>126</sup>.

### 3.2.2 The Council of Ministers

The Council of Ministers, that is to say, those Ministers of the State Parties responsible for trade, must ensure the effective implementation and enforcement of the Agreement and must take all measures necessary for promoting the AfCFTA objectives. The Council of Ministers shall report to the Assembly through the Executive Council of the AU<sup>127</sup>. The Council of Ministers is a temporary body. It meets twice a year in ordinary sessions and may meet as and when necessary, in extraordinary sessions.

Decisions taken by the Council of Ministers, while acting within its mandate, shall be binding on the State Parties, and those that have legal, structural, or financial implications shall be binding on State Parties upon their adoption by the AU Assembly<sup>128</sup>. The State Parties shall take such measures as are necessary to implement the decisions of the Council of Ministers. They are not self-executing<sup>129</sup>. This council, as per the agreement, is envisioned to have the widest mandate as expressly provided for within the agreement<sup>130</sup>. Ministers in this capacity would stand to gain valuable insights and recommendations through dialogue with stakeholders in the private sector across various states on the African continent. These issues can be raised/addressed at these sittings to improve

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<sup>126</sup> Olomo, P. N., 2021. *The African Union private sector development strategy: A catalyzer of socio-economic transformation in Africa*. [Online] Available at: <https://gjia.georgetown.edu/2021/07/15/the-african-union-private-sector-development-strategy-a-catalyzer-of-socio-economic-transformation-in-africa/> [Accessed 20 September 2022].

<sup>127</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 11.

<sup>128</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 11.

<sup>129</sup> Erasmus, G., 2022. *Legal aspects of the relationship between the AfCFTA and the African Union*. [Online] Available at: [https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20\(BIAT\).](https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20(BIAT).) [Accessed 22 July 2022].

<sup>130</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 11(3).

implementation of considerations under the umbrella of the AfCFTA in order to realise greater development. Consultation with leading private sector stakeholders across various states could more effectively inform economic policies that will, once assented to, govern trade under the AfCFTA, thereby improving on involvement of the private sector in decision making, since the decisions made ultimately affect their trade operations as they represent the vast majority of players in Africa's economy and should as such be ably represented in economic policy deliberations.

### **3.2.3 The Committee of Senior Trade Officials**

The Committee of Senior Trade Officials will be composed of Permanent or Principal Secretaries designated by each State Party and who must implement the decisions of the Council of Ministers. A common thread is herein seen where despite their enormous contribution to Africa's trade volumes, the private sector was overlooked as a contributor to policy formation. The leading bodies charged with implementation and policy formation under the AfCFTA are not inclusive in as far as private sector participation is concerned.

The committees or working groups to oversee the implementation of the Agreement, may request a Technical Committee to investigate any particular matter, direct the Secretariat to undertake specific assignments, work in collaboration with the relevant organs and institutions of the AU, promote the harmonisation of appropriate policies, consider reports and activities of the Secretariat and take appropriate actions. It can also make regulations, issue directives and make recommendations<sup>131</sup>. Subject to directions by the Council of Ministers, the Committee shall meet at least twice a year. It reports to the Council of Ministers<sup>132</sup>. How it exercises its powers to request a Technical Committee may be an interesting issue to take note of. We have seen UN Special Rapporteurs and

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<sup>131</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 12.

<sup>132</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 12.

their immensely impactful work affecting state policies and international law considerations in so far as human rights considerations are concerned<sup>133</sup>. In similar fashion, these Technical Committees, composed of leading private sector entrepreneurs with vast experience in intra-regional trade, could play a similar role in the commercial sense and promote the development, respect for and furtherance of international investment law on the African continent under the AfCFTA flagship. This is an avenue for inclusion of the private sector towards realisation of economic development on the continent that should be utilised.

Building on the AfCFTA's commitment to viewing the already existing FTAs on record as building blocks towards the realisation of a uniform Customs Union, the FTAs shall be represented in the Committee of Senior Trade Officials, be it in an advisory capacity<sup>134</sup>. This is a key consideration given that members actively managing FTAs already in existence bring to bear their experience and expertise on the functionality and trade considerations within their various spheres of influence. This tactful consideration may prove to be pivotal where properly utilised to serve the interests for a unified Customs Union. Keep in mind that some of these FTAs already have projects in place catering for deeper private sector inclusion like COMESA, EAC and SADC. These initiatives are highly relevant and are looked at in further detail in Chapter Four. An adoption of the policies under the fore stated FTAs in as far as they give rise to greater private sector inclusion will greatly aid in development of economic policies informed by active players in Africa's economic landscape which will make them that much more relevant and acceptable by the respective governments and other participants in intra-African trade.

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<sup>133</sup> Subedi, S. P., Wheatley, S., Mukherjee, A. & Ngane, S., 2011. The role of the special rapporteurs of the United Nations Human Rights Council in the development and promotion of international human rights norms. *The International Journal of Human Rights*, 15(2), pp. 155-161.

<sup>134</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 12(5).

### 3.2.4 The Secretariat

The Secretariat, which is the only bespoke AfCFTA institution, was inaugurated in 2020 by the AU Commission, which also decided its nature and approved its structure. The Secretariat shall be a functionally autonomous body within the AU system and will have an independent legal personality; autonomous of the AU Commission<sup>135</sup>. Its funds shall come from the overall annual budgets of the AU. It shall be headquartered in Accra, Ghana. The roles and responsibilities of the Secretariat shall be determined by the Council of Ministers of Trade.<sup>136</sup> It will have many monitoring and support functions with regard to remedies, Non-Trade barriers (NTBs), Dispute Settlement etc.<sup>137</sup> The Niamey Extraordinary African Union Assembly session of July 2019 directed<sup>138</sup> the AU Commission to have the structure of the AfCFTA Secretariat, its work program and budget approved by the appropriate AU Policy Organs by February 2020<sup>139</sup>.

With these powers, it is envisioned that it will be responsible for monitoring and evaluating the implementation process of the AfCFTA and other duties assigned to it by the AU Assembly of Heads of State, in a sort of executive capacity to ensure that regulations and directives adopted under the AfCFTA are properly implemented, and providing strategic recommendations to bolster trade under the umbrella of the AfCFTA. In this way, it also does not envision the involvement of the private sector either, given its highly technical role that would require appointment of experts, notably in legal affairs, economic policymaking, research, and communications, to help the Member States ensure that the negotiations

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<sup>135</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 13(3).

<sup>136</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 13.

<sup>137</sup> African Union, 2021c. Secretariat of the African Continental Free Trade Area (AfCFTA): Organisational structure - final. Addis Ababa: African Union.

<sup>138</sup> African Union, 2019. Assembly of the African Union. Twelfth extraordinary session, 7 July 2019, Niamey, Niger. Decisions and Declaration. Addis Ababa: African Union.

<sup>139</sup> Tralac, 2019. *The institutions of the African continental free trade area*. [Online] Available at: <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> [Accessed 23 July 2022].

proceed smoothly, and that the rules outlined in the Agreement are correctly applied and enforced, among others things.

Nevertheless, there presents itself an opportunity to organise for dialogue with private sector stakeholders who will form the bulk of traders under the AfCFTA. They will be better placed to share challenges faced alongside possible recommendations for effective implementation of the AfCFTA. This would greatly inform the Secretariat in its policing role of the AfCFTA's progress amongst other considerations.

### **3.2.5 The African Trade Observatory (ATO)**

There will also be an African Trade Observatory (ATO), which will provide reliable and timely information on trade statistics, opportunities for regional value chains, market conditions and applicable legislation, registered exporters and importers as well as authorised economic operators. An AfCFTA web-based and mobile application for business should be developed<sup>140</sup>.

One of the noteworthy aspects of the AfCFTA's institutional scheme of things is that the FTAs shall be represented in the Committee of Senior Trade Officials, in an advisory capacity<sup>141</sup>. Given their important function as building blocks of the AfCFTA, much more will be required in terms of institutional integration of the FTAs and their Member States into the operations and structures of the AfCFTA. Some of the new Protocols will be focused on cooperation among the State Parties in respect of matters also covered by the existing FTA instruments<sup>142</sup>.

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<sup>140</sup> Tralac, 2019. *The institutions of the African continental free trade area*. [Online] Available at: <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> [Accessed 23 July 2022].

<sup>141</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 12 (5).

<sup>142</sup> Erasmus, G., 2022. *Legal aspects of the relationship between the AfCFTA and the African Union*. [Online] Available at: [https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20\(BIAT\).](https://www.tralac.org/blog/article/15670-legal-aspects-of-the-relationship-between-the-afcfta-and-the-african-union.html#:~:text=The%20AfCFTA%20is%20a%20State,%2DAfrican%20Trade%20(BIAT).) [Accessed 22 July 2022].

Having looked at the institutional framework of the AfCFTA under this section, it has been shown that certain avenues can be considered to improve upon a framework that by itself doesn't provide for the inclusion of the private sector with an aim towards economic development on the African continent. The different institutions, that is to say: (i) the Assembly of the AU, (ii) the Council of Ministers, (iii) the Committee of Senior Trade Officials, (iv) the Secretariat and (v) the African Trade Observatory have been considered and it's been shown that the AfCFTA's institutional framework was designed without due consideration for private sector inclusion. Nevertheless, this can be achieved in ways some of which have been highlighted. It is therefore necessary to consider other limitations to inclusion of the private sector to promote economic development on the African continent under the umbrella of the AfCFTA.

### **3.3 Limitations to the Private Sector Engagement under the African Continental Free Trade Area**

In a bid to underscore the importance of inclusion of the private sector in development efforts under the AfCFTA, it is important to consider some of the challenges likely to be faced. These challenges include geographic, institutional, capital inadequacy, infrastructure and political fragmentation embodied by thick borders defined by a complex maze of both tariff and nontariff restrictions that slow trade<sup>143</sup>. All these challenges increase the per unit cost of moving goods across borders on the African continent. Strengthening the integration required for the success of the AfCFTA will inevitably call for efforts to resolve the challenges discussed herein below. These efforts must accompany the harmonisation of rules and regulations through regulatory cooperation, as well as inclusion of the private sector, in order to facilitate development on the African continent<sup>144</sup>. These

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<sup>143</sup> East African Community, 2023. *Vibrant private sector crucial to economic growth in Africa*. [Online] Available at: <https://www.eac.int/press-releases/152-investment-promotion-private-sector-development/2843-vibrant-private-sector-crucial-to-economic-growth-in-africa> [Accessed 9 November 2023].

<sup>144</sup> Kassa, W., Edjigu, H. T. & Zeufack, A. G., 2022. The promise and challenge of the African continental free trade area. In: S. Coulibaly, W. Kassa & A. G. Zeufack, eds. *Africa in the new trade environment: Market access in troubled times*. Washington DC: World Bank, pp. 241-282.



limitations are considered in greater detail below highlighting how they serve to limit private sector inclusion in order to realise development on the African continent as they negatively impact on trade flow at various stages of production. The successful implementation of the AfCFTA will greatly depend on how these are overcome/addressed. Without addressing these hindrances, the AfCFTA cannot hope to aid in the development of a robust and diverse private sector. The removal of hindrances to trade will only serve to make this more tenable wherein there is increased trade volumes and greater incentive to trade under the umbrella of the AfCFTA due to ease of trade moreover at reduced costs.

The previous chapters have emphasised the major role the private sector stands to play in development on the African continent as it boasts of the lion's share of trade volumes. Having considered the institutional limitations to private sector engagement in the preceding deliberations. It is also pertinent to consider other limitations to private sector engagement under the AfCFTA umbrella. Subsequently, incumbent hindrances to trade such as trade protectionism, overlapping memberships across FTAs, lack of a dispute settlement mechanism for private sector actors, poor infrastructure development, lack of awareness, political instability and the aspect of conflict of laws are regarded. These are reflected upon in the context of the AfCFTA and highlight ways in which they stand to impede trade flows that the AfCFTA seeks to improve upon in furtherance of its objective to promote development on the African continent.

### **3.3.1 Trade Protectionism as a Barrier to Trade**

Trade protection (protectionism) is not a new phenomenon and neither is it unique to the African context. It is something that is practised worldwide for varying reasons<sup>145</sup>. Trade barriers decrease trade flows by making it more expensive or challenging for domestic enterprises and consumers to purchase goods from abroad.

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<sup>145</sup> Bank of England, 2019. *In focus - Trade protectionism and the global outlook. Section 3 of the monetary policy report - November 2019*. [Online] Available at: <https://www.bankofengland.co.uk/monetary-policy-report/2019/november-2019/in-focus-trade-protectionism-and-the-global-outlook> [Accessed 2 August 2022].

These barriers often take the form of tariffs. However, there are also non-tariff trade barriers (NTBs) that have just as harmful an effect on trade practice across borders. It is reported that African countries import more than 90 percent of their goods from outside the continent despite the availability of these goods within the continent<sup>146</sup>. This is mostly due to the existence of NTBs in the form of administrative bottlenecks and trade restrictions that make African borders “thick” and impede intra-African trade<sup>147</sup>.

NTBs remain a serious threat to the liberalisation of trade in Africa and must be addressed by a comprehensive legal framework suitable to addressing challenges faced in eliminating NTBs<sup>148</sup>. At the outset, it should be noted that the AfCFTA has considered elimination of NTBs as an important consideration going on to establish various bodies for this purpose. At the national level, Article 6(2) (a) Annex 5 on Non-Tariff Barriers, requires each state party to establish a National Monitoring Committee and a National Focal Point<sup>149</sup>. At the regional FTA level, the AfCFTA requires FTAs to establish or strengthen their NTBs monitoring mechanisms responsible for tracking and monitoring NTBs<sup>150</sup>.

Significant progress can be made to boost intra-Africa trade by reducing the number of obstacles traders confront as goods move across borders if the AfCFTA is successful in removing these obstacles<sup>151</sup>. The obstacles confronting intra-Africa trade are mostly regulatory in nature and comprise border documentation

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<sup>146</sup> Hartzenberg, T., 2011. *Regional integration in Africa. WTO Staff Working Paper, No. ERSD-2011-14*, Geneva: World Trade Organization (WTO), Economic Research and Statistics Division.

<sup>147</sup> Mold, A., 2005. Non-tariff barriers: Their prevalence and relevance for African countries. ATPC work in progress, No.25, 38p.. Addis Ababa: United Nations. Economic Commission for Africa. African Trade Policy Centre.

<sup>148</sup> Penda, N. C., 2021. Eliminating ‘Thick’ Borders: Analysing the legal framework on non-tariff barriers in the Africa continental free trade area agreement. *Strathmore Law Review*, 6(1), pp. 167-194.

<sup>149</sup> African Union, 2018c. *Agreement establishing the african continental free trade area. Kigali draft text*, Addis Ababa: African Union Commission. Article 6 (2) (a) Annex 5 on Non-Tariff Barriers, Annexes to the AfCFTA.

<sup>150</sup> African Union, 2018c. *Agreement establishing the african continental free trade area. Kigali draft text*, Addis Ababa: African Union Commission. Article 10(1) (a) Annex 5 on Non-Tariff Barriers, Annexes to the AfCFTA.

<sup>151</sup> Viljoen, W., n.d. *The African continental free trade area (AfCFTA) and non-tariff barriers (NTBs)*. [Online] Available at: <https://www.tralac.org/discussions/article/12866-the-african-continental-free-trade-area-afcfta-and-non-tariff-barriers-ntbs.html> [Accessed 4 August 2022].

requirements, rules of origin documentation, customs operations, sanitary and phytosanitary measures (SPS), pre-shipment inspections, and Technical Barriers to Trade (TBTs). Although the negative impact of these measures on intra-regional trade have been recognised, thus far, the existing FTAs have achieved limited success in addressing them<sup>152</sup>. Increased trade flows will ensure that the private sector has more capital readily available to engage in more economic endeavours leading to greater levels of employment, infrastructural development and research and development all of which are welcome indicators of economic development which the AfCFTA seeks to facilitate on the African continent.

### 3.3.2 Overlapping Memberships

Another limitation to the private sector's engagement under the umbrella of the AfCFTA is the overlapping membership of signatories within the different FTAs across Africa. Overlapping memberships involves an activity where countries belonging to one regional trade agreement simultaneously engage in memberships with other FTAs<sup>153</sup>. Many countries in Africa are trying to reap the benefits from preferential integration by entering into several agreements as these may seemingly offer them flexibility and adaptability since the member countries retain their sovereignty and accrue benefits from multiple membership regimes otherwise not available through sole membership<sup>154</sup>. However, it is important to note that as the rules of the agreement overlap, coupled with the lack of harmonisation produced by the inconsistent rules of origin, the multiple memberships are likely to limit the implementation of preferential integration, increase transaction costs in trade and hamper trade flows<sup>155</sup>.

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<sup>152</sup> Viljoen, W., n.d. *The African continental free trade area (AfCFTA) and non-tariff barriers (NTBs)*. [Online] Available at: <https://www.tralac.org/discussions/article/12866-the-african-continental-free-trade-area-afcfta-and-non-tariff-barriers-ntbs.html> [Accessed 4 August 2022].

<sup>153</sup> Fanta, H., 2021. *Overlapping memberships and its impact on regional trade*. Masters Thesis, Lund: School of Economics and Management.

<sup>154</sup> Sukuta, T., 2014. *Challenges of multiple membership to sub-regional trading blocs: The case of Zimbabwe*. Harare: Unpublished master's thesis.

<sup>155</sup> Sukuta, T., 2014. *Challenges of multiple membership to sub-regional trading blocs: The case of Zimbabwe*. Harare: Unpublished master's thesis.

Fanta found that multiple rules of origin instituted due to overlapping memberships can negatively affect the trade creating function of FTAs. The unintended effect on intra-regional trade flow being that it adversely impacts the impetus of regional integration, which is vital to the region and the continent in general. Alongside other structural challenges that the region and Africa are facing, overlapping memberships continue to burden states from achieving the necessary cooperation and the desired integration<sup>156</sup>. Underlyingly, overlapping memberships also create divided loyalties, which is a contradiction to one of the fundamental prerequisites for deep regional integration. This can explain the very shallow nature of most FTAs in the region and in Africa, as the required level of commitment from member states is deficient, which exacerbates the already reached depth in integration. As trade involves at least two entities, a form of etiquette ensues where one follows the other and thus makes the region severely susceptible to the lack of commitment shown by each member state<sup>157</sup>.

It must be remembered that countries come into these negotiations with their own selfish agendas and international law has sometimes been criticised for not being law in the sense that enforceability is a tricky subject<sup>158</sup>. Many of the international treaties and agreements are respected due to trust and reciprocity<sup>159</sup>. Therefore, a multiplicity of allegiances wherein each agreement requires its own special set of considerations begs the question of where one's priorities or for that matter allegiances lie?

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<sup>156</sup> Fanta, H., 2021. Overlapping memberships and its impact on regional trade. Masters Thesis, Lund: School of Economics and Management.

<sup>157</sup> Fanta, H., 2021. Overlapping memberships and its impact on regional trade. Masters Thesis, Lund: School of Economics and Management.

<sup>158</sup> Proukaki, E. K., 2010. *The problem of enforcement in international law: Countermeasures, the non-injured state and the idea of international community*. London and New York: Routledge.

<sup>159</sup> Duszka-Jakimko, H., 2021. The importance of trust at the level of public international law: A contribution to theoretical considerations. *Wroclaw Review of Law Administration & Economics*, November, 11(1), pp. 1-16.

### 3.3.3 Lack of Direct Access to a Dispute Settlement Mechanism

Majority of the international investment treaties in place are focused majorly on Investor State Disputes (ISDs) which have been shown to be highly complex and expensive to litigate. This has in essence side-lined many private sector actors from having access to justice within the international trade legal framework of these international investment treaties.

One of the objectives in the AfCFTA Agreement is indeed to establish a mechanism for the settlement of disputes concerning rights and obligations<sup>160</sup>. On March 21, 2018, the AfCFTA was inaugurated, and with it came the adoption and signing of the Protocol on Dispute Settlement (DS Protocol) in Kigali. It proclaims dispute settlement to be a central element in providing security and predictability to the regional trading system<sup>161</sup>. Though quite similar in structure to the Dispute Settlement Body (DSB) of the WTO, the AfCFTA's DSB carries the potential to account for the economic realities of Intra-African trade and provide inclusion of the private sector actors in as far as dispute resolution is considered. Chidede in his research highlights how these ISDs are heavily eschewed in favour of FDI players to protect their investment interest even at the cost of state economies and inevitably private sector actors<sup>162</sup>.

A special Protocol, the Protocol on Rules and Procedures for the Settlement of Disputes (henceforth referred to as the Dispute Settlement Protocol of the AfCFTA), governs the application of the AfCFTA. It establishes the Appellate Body (AB), Panels, and the Dispute Settlement Body (DSB) as organs of the Mechanism. The AfCFTA Secretariat, which is one of the main AfCFTA

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<sup>160</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Art 4.

<sup>161</sup> Erasmus, G., 2019. *Dispute Settlement in the African Continental Free Trade Area*. [Online] Available at: <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> [Accessed 20 July 2022].

<sup>162</sup> Chidede, T., 2019. Entrenching the right to regulate in the international investment legal framework: The African experience. Doctoral Thesis.. Western Cape: University of the Western Cape.

institutions<sup>163</sup>, will play an important role in terms of providing logistical and practical support services, including to AfCFTA State Parties when required. This structure suggests that the AfCFTA's own Dispute Settlement Mechanism (DSM) was modelled after the Dispute Settlement Understanding (DSU) of the World Trade Organization<sup>164</sup>.

Disputes settlement under this Protocol will commence when a Complaining Party invokes Article 7 of the Protocol and requests consultations to be held with another State Party, to reach an amicable resolution of a dispute. The Complaining Party may take the matter to the DSB, which shall constitute a Panel, if they are unable to resolve the dispute through talks<sup>165</sup>. This is an important nod in favour of Alternative Dispute Resolution (ADR) which in this day and age is a preferable means of dispute resolution compared to litigation which is way more expensive and time consuming<sup>166</sup>.

In a business environment, efficiency and efficacy of service delivery is key. In this way, the AfCFTA would greatly aid business transactions. Disputes in business arrangements are inevitable. The concern here is that the AfCFTA fails to expressly cater for dispute settlement between private sector actors as against each other or as against the various state parties with whom they may opt to trade. Yet they happen to be involved in greater volumes of trade as opposed to state parties for whom provision is herein made under the AfCFTA DSB. The AfCFTA through a protocol or further annex should actively seek to address this issue to improve private sector inclusion in its development efforts at both the legal and institutional levels.

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<sup>163</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 13.

<sup>164</sup> Erasmus, G., 2021b. *The institutions of the dispute settlement mechanism of the AfCFTA*. [Online] Available at: <https://www.tralac.org/blog/article/15377-the-institutions-of-the-dispute-settlement-mechanism-of-the-afcfta.html> [Accessed 22 July 2022].

<sup>165</sup> Erasmus, G., 2021b. *The institutions of the dispute settlement mechanism of the AfCFTA*. [Online] Available at: <https://www.tralac.org/blog/article/15377-the-institutions-of-the-dispute-settlement-mechanism-of-the-afcfta.html> [Accessed 22 July 2022].

<sup>166</sup> Onyema, E., 2020. Reimagining the framework for resolving intra-African commercial disputes in the context of the African continental free trade area agreement. *World Trade Review*, 19(3), pp. 446-468.

Efficient dispute settlement procedures can have a positive impact on economic growth and therefore the private sector on the African continent should be provided with an avenue by which efficient dispute settlement can be achieved. It has been stated that the predictable, consistent, and coherent actual exercise of basic political, civil and economic rights are the sources of economic development and growth<sup>167</sup>. This is because not only basic human rights but also property and socio-economic rights are protected where there are efficient dispute resolution mechanisms. And the fore stated are indicators of economic development which is what the AfCFTA seeks to accomplish.

### **3.3.4 Poor Infrastructure Development**

The private sector also faces the issue of poor infrastructure across the African continent. Much as there are various issues the AfCFTA seeks to implement and introduce, infrastructure as it stands will be a major hindrance to improving intra-African trade as it already does. Inadequate infrastructure still poses a significant obstacle to trade and significantly impedes the integration and development of the region. This especially affects shippers who rely on road transport to get goods distributed across the African continent<sup>168</sup>. Poor infrastructure increases dwell time on the road which means higher costs, making goods to compete unfairly with imports from around the world. Additionally, some of the roads are not in great condition which heightens chances of road accidents which result in business losses<sup>169</sup>.

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<sup>167</sup> Buscaglia, E., 2020. Poverty, efficiency of dispute resolution systems, and access to justice in developing countries. *World Trade Review*, July, 19(3), pp. 446-468.

<sup>168</sup> Trade Mark Africa, 2021. *Poor infrastructure among major trade barriers in EAC*. [Online] Available at: <https://www.trademarka.com/news/poor-infrastructure-among-major-trade-barriers-in-eac/> [Accessed 29 July 2022].

<sup>169</sup> Berhanu, Y., Alemayehu, E. & Schröder, D., 2023. Examining car accident prediction techniques and road traffic congestion: A comparative analysis of road safety and prevention of world challenges in low-income and high-income countries. *Journal of Advanced Transportation*, 25 July, Volume 2023, pp. 1-18.

According to a report by the United Nations Conference on Trade and Development (UNCTAD)'s Review of Maritime Transport in 2020, restrictions affecting inland transportation have created some challenges to cross-border crossings. For instance, in several African nations, it took longer to pick up cargo in 2020 than it did in 2019 following customs release. Because of the restrictions put in place to contain the epidemic, trucks took longer than expected to return to their starting points. Such disruptions also led to delays in the return of empty containers to the ports which often led to retention charges set by shipping lines.<sup>170</sup>

The creation of regional and global value chains, which would significantly increase the ability of African private sector participants to engage in global value chains, offers another reason to invest in infrastructure development (GVC)<sup>171</sup>. The concept value chain more appropriately refers to the entire chain of activities of a business performed in the creation of a good or service, from the first receipt of materials to the product's delivery to the market and everything in between<sup>172</sup>.

Africa's regional value chains hold the key to unlocking its productivity, deepening its economic integration, and strengthening its resilience to shocks<sup>173</sup>. Yet according to Africa's Development Dynamics, a joint report by the African Union Commission and the OECD Development Centre, regional value chains accounted for just 2.7% of Africa's total value chain participation in 2019, compared to 26.4% in Latin America and the Caribbean and 42.9% in developing Asia<sup>174</sup>.

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<sup>170</sup> UNCTAD, 2020. *Review of maritime transport 2020. Shipping in times of the Covid-19 pandemic*. [Online] Available at: <https://unctad.org/webflyer/review-maritime-transport-2020> [Accessed 20 July 2022].

<sup>171</sup> Qiang, C. Z., Liu, Y. & Steenbergen, V., 2021. Using investment policies to stimulate global value chain participation. In: C. Z. Qiang, Y. Liu & V. Steenbergen, eds. *An investment perspective on global value chains*. Washington, DC: World Bank, p. 140–187.

<sup>172</sup> Chai, W., 2021. *Value chain*. [Online] Available at: <https://www.techtarget.com/searchcio/definition/value-chain> [Accessed 17 September 2022].

<sup>173</sup> Dossina, Y., Minsat, A. & Deiana, R., 2022. *Why stronger regional value chains can help Africa rebound from economic shocks. 21st international economic forum on Africa*. [Online] Available at: <https://oecd-development-matters.org/2022/06/09/why-stronger-regional-value-chains-can-help-africa-rebound-from-economic-shocks/> [Accessed 18 September 2022].

<sup>174</sup> African Union Commission and OECD, 2022. *Africa's development dynamics 2022: Regional value chains for a sustainable recovery*. Paris: OECD Publishing, Paris.



Industrialisation has long been posited as being a venture for development for low developing countries, however it came with its own set of hardships. In this light, African states seeking to fit themselves into GVCs have in their palms a lower cost solution as it involves high levels of specialisation usually informed by geographical or resource advantages already present in respective states.

The nations that purchase raw materials or partially beneficiated commodities and turn them into completed goods stand to gain the most from global value chains. These nations have a high degree of "backward participation," as value chain analysts refer to them, in international value chains. African nations, on the other hand, presently exhibit a high degree of "forward participation" in global value chains; they sell intermediary products to other nations, which significantly increase the value of the raw materials beyond their initial cost<sup>175</sup>. The process by which countries advance from being mostly forward-participants to mostly backward-participants, is called "upgrading", and it is the goal of manufacturing-driven development with one of the best examples being China with the development of Export Processing Zones (EPZs)<sup>176</sup>.

With the necessary investment in infrastructural development, the private sector will be able to engage in the creation of regional value chains that will likely strengthen their participation in international value chains as a result. This increase in trade flows would carry with it greater development for the AU and her respective member states trading under the umbrella of the AfCFTA.

### **3.3.5 Lack of Awareness**

The old adage goes that knowledge is power and the same can be said of awareness in regards to what the AfCFTA is all about, its purpose and usefulness. Much as it

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<sup>175</sup> Stuart, J., 2022. *How Africa can move up the value-chain*. [Online] Available at: <https://oecd-development-matters.org/2022/03/10/how-africa-can-move-up-the-value-chain/> [Accessed 17 September 2022].

<sup>176</sup> Dollar, D., 2017. *Global value chains provide new opportunities to developing countries*. [Online] Available at: <https://www.brookings.edu/articles/global-value-chains-provide-new-opportunities-to-developing-countries/> [Accessed 17 September 2022].

has been tabled as far back as 2013 or even arguably the Abuja convention. Or that it came into trade operationalisation as recently as 2021, not much is known about the AfCFTA let alone the benefits it potentially confers upon the private sector stakeholders at large<sup>177</sup>. This is something that has been overlooked and needs to be put into serious consideration.

The private sector, it must be stated, is constituted of both the formal and informal sector. And across both there is simply not enough sensitisation being done to empower the private sector players to take full advantage of the opportunities the AfCFTA offers. Concerning “awareness and use of the FTAs”, a survey was carried out and it was found that most firms were highly aware of their country’s participation in different regional economic communities, but less informed of their country’s participation in the AfCFTA<sup>178</sup>. Knowledge is only relevant to those who have it and without awareness about the opportunities offered by the AfCFTA the private sector stands the risk of underutilising or totally missing out on the full range of economic benefits it could realise by embracing and utilising the AfCFTA. In this regard, more should be done by governments to formulate strategies which they can then share with their local populace in order to maximise benefits that are likely to accrue from taking advantage of what the AfCFTA has to offer<sup>179</sup>. Ministers of trade, as so ably represented under the agreement, should be put to task to ensure that all member states carry out capacity building of the private sector to position them to fully benefit from the AfCFTA. As it is elsewhere, major corporations that invest heavily in research and development by now have already taken steps to position themselves to benefit from the AfCFTA. However, for purposes of an

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<sup>177</sup> Karingi, S. & Aidi, W., 2022. *The AfCFTA country business index: Understanding private sector involvement in the AfCFTA*. [Online] Available at: <https://www.brookings.edu/articles/the-afcfta-country-business-index-understanding-private-sector-involvement-in-the-afcfta/> [Accessed 12 August 2022].

<sup>178</sup> Karingi, S. & Aidi, W., 2022. *The AfCFTA country business index: Understanding private sector involvement in the AfCFTA*. [Online] Available at: <https://www.brookings.edu/articles/the-afcfta-country-business-index-understanding-private-sector-involvement-in-the-afcfta/> [Accessed 12 August 2022].

<sup>179</sup> African Business, 2022. *Raising awareness of AfCFTA benefits is critical to its success*. [Online] Available at: <https://african.business/2022/06/economy/raising-awareness-of-afcfta-benefits-is-critical-to-its-success/> [Accessed 16 August 2022].

equitable distribution of resources and opportunities even MSMEs should be positioned to favourably compete for and realise economic gains from the operationalisation of the AfCFTA given that they represent a great deal of the private sector stakeholders across the African economy<sup>180</sup>.

### 3.3.6 Political Instability

The private sector also faces a hindrance to its active engagement in the AfCFTA in the form of political stability in Africa. The uncertainty bred by political instability makes destinations unfavourable for economic activity to take place. This is because investors would want to have a form of insurance on their investments. In Nigeria there was a fall in foreign direct investment with the advent of Boko Haram and Niger Delta Avengers who caused significant unrest stifling economic activity in the region<sup>181</sup>.

Prolonged political tensions in Burundi and South Sudan, which have resulted in a refugee crisis, threaten prospects of peace and stability in East Africa where the EAC is widely recognised as a model REC in Africa<sup>182</sup>. More recently the AU held a summit within the context of five coups in Africa since 2021, and Islamist insurgencies in Cameroon, Central African Republic, Mozambique, Somalia, and the Sahel, as well as widespread impunity for human rights violations by government security forces<sup>183</sup>. This is an indicator that political instability is still an issue across the African continent and will serve to hamper intra-African trade measures. Not to mention, it could stand to affect FDI inflows which many African states, private sector stakeholders inclusive, rely on for their economic development strategies. Political instability hinders growth and therefore the quality of the

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<sup>180</sup> Offei, D., Asare-Nuamah, P. & Masinde, W., 2020. Local private sector awareness and participation in the African continental free trade area prior to accession by the Government of Ghana. The case of small and medium size enterprises (SMEs) in Ghana. *Africa Insight*, 50(1).

<sup>181</sup> Wook, J. J., 2017. The impact of political instability on trade agreements in Africa. s.l.:s.n.

<sup>182</sup> Rwigema, P.-C., 2020. Economic growth and political stability in East African countries. Theoretical perspective. *The Strategic Journal of Business & Change Management*, 7(1), p. 977 – 988.

<sup>183</sup> Human Rights Watch, 2022. *AU: Focus on root causes of conflict, political instability*. [Online] Available at: <https://www.hrw.org/news/2022/05/24/au-focus-root-causes-conflict-political-instability> [Accessed 17 August 2022].

political climate across African states must be improved. This is one of the conditions necessary for a country's economy, in this case a continent's, to benefit from foreign direct investment<sup>184</sup>.

This subchapter has considered some of the challenges that stand in the way of the private sector to engage in trading activities under the umbrella of the AfCFTA that has been designed to aid and promote international trade within the African continent and also with other trade partners the world over. These challenges are relevant to this study because they portray the challenges to be faced in the pursuit of successful implementation of the AfCFTA. Without these being adequately addressed, efforts of inclusion of the private sector within the legal and institutional framework would amount to naught. Next, the aspect of conflict of laws is considered because the AfCFTA is set to use the already existing FTAs as building blocks for its implementation. It is therefore worthwhile to consider the inevitable conflict of laws that will arise.

### **3.4 Conflict of Laws as a Limitation to Private Sector Engagement under the AfCFTA**

When the laws of two or more countries diverge and are relevant to a case, it is referred to as a conflict of laws. This means that the decision of which jurisdiction's law will be applied to settle each matter in dispute will determine the case's conclusion<sup>185</sup>. From this description it can already be seen that in situations of conflict of laws, there is unwanted uncertainty involved. And the phenomena of conflict of laws presents a great challenge in as far as private international law is concerned given the wide scope of conflicts therein involved due to various majorly contractual disputes.

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<sup>184</sup> Gakpa, L. L., 2020. Political instability, FDI and economic growth in sub-saharan African countries: Evidence from modelling dynamic simultaneous equations. Nairobi: African Economic Research Consortium.

<sup>185</sup> Cornell Law School, 2022. *Conflict of Laws*. [Online] Available at: [https://www.law.cornell.edu/wex/conflict\\_of\\_laws](https://www.law.cornell.edu/wex/conflict_of_laws) [Accessed 4 August 2022].

A defining characteristic of private international law in Africa is the unsettled nature of many issues. Among them are choice of law in tort and contract, jurisdiction over activities on the Internet, and private international law problems arising from trusts and intellectual property<sup>186</sup>. These issues remain unresolved mostly because African scholars have not taken the time to pre-shape the jurisprudence by promoting certain positions, legislators have not taken the initiative to legislate on them, and the judiciary has not been called upon to address them<sup>187</sup>. It is safe to assume that, should these concerns come up in a dispute before the courts, they will probably follow English verdicts if prior jurisprudence of the courts and judicial style are any indication. The unsettled nature of the law on some private international law issues in Africa is illustrated by the concept of party autonomy evidenced under contracts stipulating applicable laws within their texts<sup>188</sup>.

The resolution of conflicts of law concerns has always rested on the fragmented efforts of individual national courts and legislatures, despite their inherent international nature. While nations occasionally attempt to unify the conflict of law rules through international treaties, this area of the law remains fragmented<sup>189</sup>. On the African continent, regional courts have predominantly sought to deal with human rights concerns alongside treaty interpretation<sup>190</sup> without much in the way of resolving commercial disputes as between private individuals<sup>191</sup>. Such considerations are usually being left within the purview of contractual undertakings/stipulations as to dispute resolution. These usually speak to agreed upon jurisdictions wherein any disputes arising under the contract shall be settled.

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<sup>186</sup> Oppong, R. F., 2007. Private international law in Africa: The past, present, and future. *The American Journal of Comparative Law*, 55(4), pp. 677-720.

<sup>187</sup> Oppong, R. F., 2007. Private international law in Africa: The past, present, and future. *The American Journal of Comparative Law*, 55(4), pp. 677-720.

<sup>188</sup> Oppong, R. F., 2007. Private international law in Africa: The past, present, and future. *The American Journal of Comparative Law*, 55(4), pp. 677-720.

<sup>189</sup> Parisi, F. & O'Hara, E. A., 2017. Conflict of laws. In: P. Newman, ed. *The New Palgrave Dictionary of Economics and the Law*. London: Palgrave Macmillan, pp. 387-96.

<sup>190</sup> Alter, J. K., Gathii, T. J. & Helfer, R. L., 2016. Backlash against international courts in West, East and Southern Africa: Causes and consequences. *The European Journal of International Law*, 27(2), pp. 293-328.

<sup>191</sup> Fahner, H. J., 2020. The judicial power of Africa's supranational courts: Introduction. *African Journal of International and Comparative Law*, Volume 28, 28(Supplement), pp. 1-9.

The danger therein lies that municipal courts across the different states may operate under different legal systems, for example, civil vis-à-vis common law systems. These legal decisions, it must be remembered, will not be binding upon other stakeholders which would be different where sub-regional courts were resolving disputes and their decisions had the force of law creating certainty across all relative boards.

### **3.4.1 Dispute Resolution under the African Continental Free Trade Area**

One of the objectives in the AfCFTA Agreement is indeed to establish a mechanism for the settlement of disputes concerning rights and obligations<sup>192</sup>. On March 21, 2018, the AfCFTA was introduced, and along with it came the adoption and signing of the Protocol on Dispute Settlement (DS Protocol) in Kigali. It proclaims dispute settlement to be a central element in providing security and predictability to the regional trading system<sup>193</sup>. A dispute refers to a disagreement between State Parties over how to interpret and/or apply the Agreement in respect to their respective rights and obligations<sup>194</sup>. The Agreement comprises the Protocols, Annexes, and Appendices that form an essential component of the Agreement Establishing the African Continental Free Trade Area<sup>195</sup>. Under this Protocol, dispute settlement is only available to State Parties<sup>196</sup>. However, most trade transactions will involve private entities. Protecting their rights is necessary to guarantee predictability and certainty. The approach adopted here means that private parties will only be protected if a State Party, able to show that its rights have been violated, would bring a claim. Governments of WTO members frequently do so. It remains to be seen if African governments will follow suit. They do not sue each other under the

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<sup>192</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Article 4.

<sup>193</sup> Erasmus, G., 2019. *Dispute Settlement in the African Continental Free Trade Area*. [Online] Available at: <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> [Accessed 20 July 2022].

<sup>194</sup> Laws Africa, 2018. *Protocol on rules and procedures on the settlement of disputes*. s.l.:Laws Africa Legislation Commons. Article 1.

<sup>195</sup> African Union, 2018. Agreement establishing the African continental free trade area. Addis Ababa: African Union Commission. Article 1.

<sup>196</sup> Laws Africa, 2018. *Protocol on rules and procedures on the settlement of disputes*. s.l.:Laws Africa Legislation Commons. Article 1.

legal instruments of the existing FTAs<sup>197</sup>. Furthermore, some disputes in trade are time sensitive and will require expeditious resolution. Without a proper functioning and efficient system in place many private actors are set to face a great challenge in resolving trade disputes.

Africa's international courts already form part of a most complex network of regional cooperation mechanisms<sup>198</sup>, with partly overlapping jurisdiction and membership<sup>199</sup>. The Oxford Handbook on International Adjudication lists the following operative international judicial bodies in Africa:<sup>200</sup> the African Court on Human and Peoples' Rights (ACtHPR)<sup>201</sup>, the Arab Investment Court (AIC)<sup>202</sup>, the ECOWAS Court of Justice<sup>203</sup>, the East African Community Court of Justice (EACJ)<sup>204</sup>, the Court of Justice of the Central African Monetary Community, the Southern Africa Development Community Tribunal (meanwhile suspended)<sup>205</sup>, the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA Court)<sup>206</sup>, the Common Court of Justice and Arbitration (CCJA) of the Organisation for the Harmonisation of African Business Laws (OHADA)<sup>207</sup>, and the Court of

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<sup>197</sup> Erasmus, G., 2019. *Dispute Settlement in the African Continental Free Trade Area*. [Online] Available at: <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> [Accessed 20 July 2022].

<sup>198</sup> Fahner, H. J., 2020. The judicial power of Africa's supranational courts: Introduction. *African Journal of International and Comparative Law*, Volume 28, 28(Supplement), pp. 1-9.

<sup>199</sup> Oppong, R. F., 2010. The African Union, the African economic community and Africa's regional economic communities: Untangling a complex web. *African Journal of International and Comparative Law*, 18(1), p. 92–103.

<sup>200</sup> Romano, P. C., Alter, J. K. & Shany, Y., 2013. *The Oxford handbook of international adjudication*. Oxford: Oxford University Press.

<sup>201</sup> Viljoen, F., 2012. *International human rights law in Africa*. 2nd ed. Oxford: Oxford University Press.

<sup>202</sup> Hamida, B. W., 2006. The first Arab investment court decision. *Journal of World Investment and Trade*, January, 7(5), p. 699–721.

<sup>203</sup> Ebobrah, S. T., 2018. The ECOWAS community court of justice: A dual mandate with skewed authority. In: K. J. Alter, L. R. Helfer & M. R. Madsen, eds. *International court authority*. Oxford: Oxford University Press, p. 82–102.

<sup>204</sup> Ruhangisa, J. E., 2017. Judicial protection under EAC Law: Direct actions. In: J. E. Ruhangisa, E. Ugirashebuja, T. Ottervanger & A. Cuyvers, eds. *East African community law: Institutional, substantive and comparative EU aspects*. s.l.:Brill, pp. 229-253.

<sup>205</sup> Achiume, E. T., 2018. The SADC tribunal. Sociopolitical dissonance and the authority of international courts. In: K. J. Alter, L. R. Helfer & M. R. Madsen, eds. *International court authority*. Oxford: Oxford University Press, p. 124–146.

<sup>206</sup> Gathii, J. T., 2018. The COMESA court of justice. In: R. Howse, H. Ruiz-Fabri, G. Ulfstein & Q. M. Zang, eds. *The legitimacy of international trade courts and tribunals*. s.l.:Cambridge University Press, p. 314-48.

<sup>207</sup> Dickerson, C. M., 2018. The OHADA common court of justice and arbitration. Its authority in the formal and informal economy. In: K. J. Alter, L. R. Helfer & M. R. Madsen, eds. *International court authority*. Oxford: Oxford University Press, p. 103–123.

Justice of the West African Economic and Monetary Union (WAEMU Court)<sup>208</sup>. This exacerbates the already existent crisis of conflict of laws prevalent on the African continent. Given the AfCFTA's objectives of using RECs as building blocks it remains to be seen how the issue on conflict of laws will be resolved. It will be key to the smooth operationalisation of the AfCFTA as an instrument of economic development on the African continent.

As earlier stated, the private sector will play a great part in enabling the AfCFTA to realise its stated goals and objectives. This is due to the increase in trade volumes the AfCFTA is forecasted to bring about. This will therefore translate into greater cross-border disputes and a corresponding need for a system by which these disputes can be ably dealt with. The AfCFTA falls short in this regard wherein it provides that its dispute settlement mechanism is restricted to country participation and provides no avenue for private investors<sup>209</sup>. This is contrary to most African regional economic community courts, which take their cues from the Court of Justice of the European Union<sup>210</sup>.

In this light, calls have been made for Africa to develop rules that are not only outward-looking and flexible enough to attract the much-needed international trade and investment (to include FDI), but also inward-looking in a bid to protect Africans engaging in intra-African commercial transactions as emphasised by Chidede<sup>211</sup>. Emphasis must be put on the need for the regime to be inward-looking because of the imbalances in bargaining power between the big economies and the small ones which are likely to be disadvantaged in the negotiations<sup>212</sup>.

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<sup>208</sup> Illy, O., 2018. The WAEMU court of justice. In: R. Howse, H. Ruiz-Fabri, G. Ulfstein & Q. M. Zang, eds. *The legitimacy of international trade courts and tribunals*. Cambridge: Cambridge University Press, pp. 349 - 364.

<sup>209</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission. Article 20.

<sup>210</sup> Akinkugbe, D. O., 2020. Dispute settlement under the African continental free trade area Agreement: A preliminary assessment. *African Journal of International and Comparative Law*, 28(Supplement), pp. 138-158.

<sup>211</sup> Chidede, T., 2019. Entrenching the right to regulate in the international investment legal framework: The African experience. Doctoral Thesis. Western Cape: University of the Western Cape.

<sup>212</sup> Akinyi, J. E., 2021. Conflict of laws and intra-African commercial disputes: To what extent does (lack of) a harmonized Pan-African conflict of laws regime support the AfCFTA liberalization agenda?. [Online]



### 3.4.2 Resolving the Issue of Conflict of Laws under the African Continental Free Trade Area

In an attempt to address the issues that arise due to the advent of conflict of laws, Oppong has suggested a four-pronged approach to resolve this standing problem the AfCFTA is bound to face<sup>213</sup>. First, he suggests that member states should be encouraged to reform their national laws through legislation and case law to better facilitate the needs of businesses. To this end, he states that there should be respect for jurisdiction agreements, arbitration agreements, and choice of law agreements. There should also be greater willingness to enforce judgments from other member states<sup>214</sup>.

Second, at the continental level, he opines that there is a need for harmonisation of private international law rules especially regarding jurisdiction and the enforcement of foreign judgments. For instance, he cites the work of OHADA (Organization for the Harmonization of Business Laws in Africa) as evidence that it is possible to harmonise laws at regional level in Africa if there is the necessary political will and dedication<sup>215</sup>. In this regard, the AfCFTA should be geared towards addressing this issue building upon what OHADA has already demonstrated. The AfCFTA can draw upon already existent international treaties and tailor them to suit the needs of the African populace. A form of “Africanisation” of international private investment law so to speak.

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Available at: <https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack> [Accessed 18 August 2022].

<sup>213</sup> Oppong, R. F., 2021. *AfCFTA and international commercial dispute resolution – A private international law (conflict of laws) perspective*. [Online] Available at: <https://www.afronomicslaw.org/index.php/category/analysis/afcfta-and-international-commercial-dispute-resolution-private-international-law> [Accessed 19 August 2022].

<sup>214</sup> Oppong, R. F., 2021. *AfCFTA and international commercial dispute resolution – A private international law (conflict of laws) perspective*. [Online] Available at: <https://www.afronomicslaw.org/index.php/category/analysis/afcfta-and-international-commercial-dispute-resolution-private-international-law> [Accessed 19 August 2022].

<sup>215</sup> Oppong, R. F., 2021. *AfCFTA and international commercial dispute resolution – A private international law (conflict of laws) perspective*. [Online] Available at: <https://www.afronomicslaw.org/index.php/category/analysis/afcfta-and-international-commercial-dispute-resolution-private-international-law> [Accessed 19 August 2022].

Third, he states that the AfCFTA Secretariat should encourage member states to ratify or adopt relevant international conventions adopted under the auspices of The Hague Conference on Private International Law. These include The Hague Convention on the Enforcement of Foreign Judgments, The Hague Convention on Choice of Court Agreement, and The Hague Principles on Choice of Law in International Commercial Contracts. Even for countries that do not ratify or adopt these international conventions, specific provisions of the conventions could be used as models for domestic law reform. This approach, he opines, has the advantage of reforming and advancing domestic law without the international commitments that come with ratification of international treaties<sup>216</sup>.

Fourth, he points out the need to strengthen arbitration to provide an alternative means of dispute settlement for businesses that do not wish to litigate. Existing arbitration centres on the continent should be studied and strengthened so that they can become an alternative forum for dispute resolution<sup>217</sup>. Alternative dispute resolution (ADR) will serve to facilitate commerce and expedite the disposition of lawsuits which are valuable services and worthwhile undertakings<sup>218</sup>. ADR arguably expands access to justice too which is an important consideration as far as MSMEs are concerned. Litigation is not only time consuming but also quite expensive and this would serve to ensure that commercial disputes are settled in lesser time and at a reduced cost where accommodated<sup>219</sup>.

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<sup>216</sup> Oppong, R. F., 2021. *AfCFTA and international commercial dispute resolution – A private international law (conflict of laws) perspective*. [Online] Available at: <https://www.afronomicslaw.org/index.php/category/analysis/afcfta-and-international-commercial-dispute-resolution-private-international-law> [Accessed 19 August 2022].

<sup>217</sup> Oppong, R. F., 2021. *AfCFTA and international commercial dispute resolution – A private international law (conflict of laws) perspective*. [Online] Available at: <https://www.afronomicslaw.org/index.php/category/analysis/afcfta-and-international-commercial-dispute-resolution-private-international-law> [Accessed 19 August 2022].

<sup>218</sup> Michel, J., 2010. *Alternative dispute resolution and the rule of law in international development cooperation*. Justice and development working paper series; no. 12. Washington, DC: World Bank.

<sup>219</sup> Buehler, M., Nardin, M., Piazza, A. & Buffet, P. P., 2017. *It costs trillions of dollars to settle commercial conflicts. It's time for Alternative Dispute Resolution*. [Online] Available at: <https://www.weforum.org/agenda/2017/12/commercial-disputes-conflicts-costs-trillions-dollars-alternative-dispute-resolution/> [Accessed 19 August 2022].

In addition to the fore stated, the AfCFTA could stand to benefit from UN Convention on Contracts for the International Sale of Goods (CISG) which is a breakthrough effort by the United Nations Commission on International Trade Law (UNCITRAL) to unify the laws pertaining to contracts for the international sale of goods<sup>220</sup>. It endeavours to increase international trade through the creation of a uniform law of international sales.

As of 26 November 2020, only 13 African countries have ratified the CISG: Benin, Burundi, Cameroon, Congo, Egypt, Gabon, Guinea, Lesotho, Liberia, Madagascar, Mauritania, Uganda and Zambia<sup>221</sup>. It has been posited that a likely reason is that African countries might not see uniform laws drafted by international bodies as tailored towards their particular interests and needs. Another reason is the lack of political will<sup>222</sup>. On the African continent the Organisation for the Harmonisation of Business Law in Africa (OHADA) is thus far the only illustration of a thorough regional unification and legal harmonisation of commercial laws in African. It utilized the CISG to create a regional uniform sales law that was applicable to each of its member states. Yet even here, out of the 17 member states of the OHADA, only five (Benin, Cameroon, Congo, Gabon and Guinea) of them have ratified the CISG<sup>223</sup>.

The CISG already has a track record of being used as a tool for creating consistency and predictability in some jurisdictions which is what legitimate harmonisation seeks to achieve. Harmonisation of laws such as the Principles of European

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<sup>220</sup> Tsorme, R. M., 2021. Ratification of the CISG: A way forward to ensure success of the African continental free trade area (AfCFTA). *Journal of Law, Policy and Globalization*, Volume 107, pp. 1-8.

<sup>221</sup> Gitau, M., 2021. *The convention on contracts for the international sale of goods: Slow ratification by African countries*. [Online] Available at: <https://www.tralac.org/blog/article/15061-the-convention-on-contracts-for-the-international-sale-of-goods-slow-ratification-by-african-countries> [Accessed 17 September 2022].

<sup>222</sup> Gitau, M., 2021. *The convention on contracts for the international sale of goods: Slow ratification by African countries*. [Online] Available at: <https://www.tralac.org/blog/article/15061-the-convention-on-contracts-for-the-international-sale-of-goods-slow-ratification-by-african-countries> [Accessed 17 September 2022].

<sup>223</sup> Gitau, M., 2021. *The convention on contracts for the international sale of goods: Slow ratification by African countries*. [Online] Available at: <https://www.tralac.org/blog/article/15061-the-convention-on-contracts-for-the-international-sale-of-goods-slow-ratification-by-african-countries> [Accessed 17 September 2022].

Contract Law (PECL), the Africa OHADA uniform Act of General Commercial Law, the UNIDROIT Principle of International Commercial Contract (PICC) and the Common European Sales Law (CESL) which have all been influenced by the CISG<sup>224</sup>.

Broadly speaking, harmonisation of commercial law takes place either by internationally agreed instrument or transplantation of foreign law. A third route which could be termed a hybrid is by adoption of an internationally agreed model law. The CISG in this sense is significant for the harmonisation of international commercial law as it was arrived at after in-depth comparative studies and consultations. For the first time vastly, different legal systems technically agreed on a common pool of considerations affecting international commercial law<sup>225</sup>. Furthermore, African states may decide that the CISG has aspects missing that they deem necessary to the smooth running of commercial transactions. But whatever path they choose the CISG is undeniably a necessary tool whether employed as an agreed model law or simply ratified across the different African states. It is in essence a readymade solution to the AfCFTA's issues of a lack of uniformity in as far as commercial international law is concerned.

Conflict of laws is an issue that will have to be resolved under the umbrella of the AfCFTA if its operationalisation and implementation is to be realised. As has been shown, its effects are far reaching though an emphasis here has been given to conflict resolution. For the sole reason that conflicts are bound to arise in any given trading activity. That the AfCFTA does not provide for private sector dispute resolution is troublesome in its own right, however, this issue is exacerbated where even the legislation on conflict of resolution is in itself not harmonised. A state of affairs that could greatly discourage investors from engaging in trade under the

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<sup>224</sup> Tsorme, R. M., 2021. Ratification of the CISG: A way forward to ensure success of the African continental free trade area (AfCFTA). *Journal of Law, Policy and Globalization*, Volume 107, pp. 1-8.

<sup>225</sup> Zeller, B., 2002. The significance of the CISG for the harmonisation and transplantation of international commercial law. s.l.:Unpublished.

umbrella of the AfCFTA which is an objective the AfCFTA seeks to encourage in order to realise development of the African continent.

### **3.5 Conclusion**

In this chapter the AfCFTA's institutional framework has been explored showing that even though there is no express provision for private sector inclusion under the AfCFTA agreement, there nevertheless exist avenues through which inclusion of the private sector in order to realise greater economic development on the African continent can be achieved. This is similar to the lack of express legal provisions in support of private sector inclusion explored under Chapter Two. Both considerations present considerable limitations to private sector inclusion to promote development on the African continent under the umbrella of the AfCFTA agreement.

Additionally, other trade-related limitations have been discussed showing how they stand to present hindrances to the involvement of the private sector in economic development efforts on the African continent. These will need to be addressed in order to facilitate trade on the African continent and with its neighbours. Most of these barriers to trade have been shown to inhibit trade flow, increasing costs and logistics concerns, to mention but a few.

In the next chapter policy considerations will be discussed and analysed in a comparative setting looking at what other FTAs have done to promote private sector inclusion to facilitate development in their respective spheres of influence. With a view to making recommendations as to how the AfCFTA can be better positioned to promote inclusion of the private sector in order to realise economic development on the African continent.

# CHAPTER FOUR

## A COMPARATIVE CASE STUDY OF OTHER REGIONAL FREE TRADE AGREEMENTS.

### 4.1 Introduction

This chapter will serve as a comparative study with other regional trade agreements. Different FTAs have tried to come up with unique solutions to the various issues surrounding private sector development (PSD) and it is therefore relevant to consider some examples upon which the AfCFTA's legal and institutional framework can be informed to ensure it attains its objectives in regards to PSD and inclusion to facilitate development. The private sector is the engine of wealth creation and economic growth in all market economies, generating 90 % of jobs and income in developing countries. More so, the United Nations (UN) estimates that 84 % of GDP in developing countries comes from the private sector. The sector can provide a sustainable foundation for mobilising domestic resources, reducing reliance on aid, provided it is properly regulated, complies with environmental and human rights standards, and is connected to tangible long-term improvements in the domestic economy, sustainable development and inequality reduction<sup>226</sup>. Efforts to bolster its operations are therefore a worthwhile undertaking in light of seeking to realise economic growth in any setting.

There are several regional blocs that could be considered for a comparative study with the African Continental Free Trade Area (AfCFTA). One such bloc is the European Union (EU). The EU is a well-established regional bloc with 27 member countries that aims to promote economic and political integration among its members<sup>227</sup>.

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<sup>226</sup> European Parliament, 2016. *Report on the private sector and development*. [Online] Available at: [https://www.europarl.europa.eu/doceo/document/A-8-2016-0043\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2016-0043_EN.html) [Accessed 14 September 2022].

<sup>227</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

A comparative study between the AfCFTA and the EU would be relevant for several reasons. Firstly, both blocs represent regions with diverse economic, political, and social contexts. The EU includes countries with varying levels of economic development, from highly industrialised Germany to less developed economies such as Bulgaria and Romania<sup>228</sup>. Similarly, the AfCFTA includes countries with diverse economic structures, from resource-rich South Africa to service-dominated Mauritius<sup>229</sup>.

Moreover, both blocs have pursued ambitious integration strategies. The EU has established a single market for goods and services, free movement of people, and a common currency among its member countries<sup>230</sup>. Similarly, the AfCFTA aims to create a single market for goods and services, free movement of people, and a common currency among member countries<sup>231</sup>.

Another such bloc is the Association of Southeast Asian Nations (ASEAN). ASEAN is a regional organisation comprising ten Southeast Asian countries that aims to promote economic cooperation, political security, and social progress among member states<sup>232</sup>.

A comparative study between the AfCFTA and ASEAN would be relevant for several reasons. Firstly, both blocs are comprised of many member countries (ASEAN has 10 members while the AfCFTA has 55 members). Secondly, both blocs represent regions with diverse economic, political, and social contexts. ASEAN is also composed of countries with varying levels of economic development, from highly industrialised Singapore to less developed economies

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<sup>228</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

<sup>229</sup> UNECA, n.d. Policy Brief. Private sector as the backbone of the AfCFTA implementation. Addis Ababa: Konrad Adenauer Stiftung (KAS) Office.

<sup>230</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

<sup>231</sup> Tralac, n.d. b *African continental free trade area (AfCFTA) legal texts and policy documents*. [Online] Available at: <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#> [Accessed 22 July 2022].

<sup>232</sup> Association of Southeast Asian Nations, n.d. *About ASEAN*. [Online] Available at: <https://asean.org/about-asean> [Accessed 11 March 2023].

such as Laos and Cambodia. Similarly, the AfCFTA includes countries with diverse economic structures, from oil-rich Nigeria to agriculture-dominated Malawi.

Moreover, both blocs have adopted different approaches to regional integration. ASEAN has pursued a gradual approach to economic integration through a series of free trade agreements (FTAs) and the establishment of the ASEAN Economic Community (AEC)<sup>233</sup>. In contrast, the AfCFTA aims to create a single market for goods and services, free movement of people, and a common currency among member countries. Seeking to bypass the process undertaken by the ASEAN using its solution of exploiting the already existing FTAs on the African continent as building blocs for a unified African FTA in the form of the AfCFTA<sup>234</sup>.

Lastly, the Common Market for Eastern and Southern Africa (COMESA) is another regional bloc that would provide a relevant comparative study for the African Continental Free Trade Area (AfCFTA), particularly from an African perspective. COMESA is a regional economic community composed of 21 African countries located in Eastern and Southern Africa<sup>235</sup>.

A comparative study between the AfCFTA and COMESA would be important for several reasons. Firstly, both blocs share a common African identity, and the comparison would provide insights into how African countries can collaborate and enhance regional integration. Secondly, the two blocs have similar goals of promoting economic integration, enhancing trade, and boosting investment in member countries. Thirdly, being an African FTA, there can be drawn lessons from its operation that would serve to inform the AfCFTA's policies going forward, a roadmap of sorts.

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<sup>233</sup> Medina, A. F., 2021. *ASEAN's free trade agreements: An overview*. [Online] Available at: <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/> [Accessed 12 September 2022].

<sup>234</sup> African Union, 2018. *Agreement establishing the African continental free trade area*. Addis Ababa: African Union Commission.

<sup>235</sup> COMESA, n.d. *Common Market for Eastern and Southern Africa*. [Online] Available at: <https://www.minaffet.gov.rw/eac-1> [Accessed 9 November 2023].



However, for purposes of this mini thesis, focus will be given to how these blocs have encouraged private sector inclusion in order to realise development in their respective spheres of influence. This is done with the hopes of ensuring that policymakers and stakeholders to identify best practices and lessons learned from the more established blocs to improve regional integration efforts in Africa as we seek to pursue trade under the umbrella of the AfCFTA. Therefore, the subsequent comparative discussion is imperative.

## **4.2 The Historical Development of the European Union**

The first serious attempts at institutional cooperation in Europe were made after World War II with the Organisation for European Economic Cooperation (OEEC) in 1948 and the first comprehensive political institution established in post-war Europe, the Council of Europe (COE) in 1949. However, neither the COE nor the OEEC was a supranational organisation that enjoyed complete independence from its member states. Both were of an intergovernmental character and did not result in increased collaboration<sup>236</sup>.

The European Union (EU) as established by the Maastricht Treaty<sup>237</sup> has often been described as a three-pillar structure<sup>238</sup>. The first pillar consisted of the European (Economic) Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (Euratom). The EEC was officially renamed the European Community (EC), as the Maastricht Treaty allocated to it new competencies reaching beyond entirely economic affairs<sup>239</sup>. The second pillar consisted of the Common Foreign and Security Policy (CFSP), which essentially was a somewhat revised European Political Co-operation (EPC) with a new name. The distinctive intergovernmental mode of collaboration of the EPC was

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<sup>236</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

<sup>237</sup> European Parliament, 1992. Treaty on European Union (TEU) / Maastricht Treaty. *Official Journal of the European Communities*, 29 July.pp. No C191/1-C191/112.

<sup>238</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

<sup>239</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

maintained. The rules on cooperation in Justice and Home Affairs (JHA), which were subsequently renamed Policing and Judicial Cooperation in Criminal Matters (PJCC), constituted the third pillar. In order to realize free movement of people within the EU, it was necessary for the third pillar to grant collaboration in issues of asylum, crime, migration policy, and customs investigation<sup>240</sup>.

Integration, such as the AfCFTA seeks to achieve can ordinarily be characterised in four stages drawn from the experience of the EU:

- (1) Free-trade agreements involve the reciprocal opening of markets for “substantially” all trade, generally going beyond tariffs and quotas and increasingly covering standards (including mutual recognition agreements) and regulation, trade facilitation, services, investment and competition and in some instances public procurement. Countries maintain sovereignty over their tariff and trade policy with regard to third parties. Fiscal frontiers and rules of origin also remain.
- (2) Tariff unions imply a free-trade agreement plus a common external tariff, though with no common trade policy beyond the common external tariff and no customs pool.
- (3) A customs union implies a common external tariff, a customs pool and generally a common trade policy. If all trade arrangements with third parties are harmonised then rules of origin no longer apply. Fiscal borders remain, as well as border controls, for instance, for goods for which safety standards differ.
- (4) A single market allows for the free circulation of goods. It requires a common trade policy, harmonisation of standards and common policies on competition, as well as on trade and in areas where there is substantial intervention in the market<sup>241</sup>.

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<sup>240</sup> Mayer, C. F. & Thies, P. S., 2019. *European union, historical evolution*. Oxford: Oxford University Press.

<sup>241</sup> Charalambides, N., 2005. The private sector's perspective, priorities and role in regional integration and implications for regional trade arrangements. ECDPM Discussion Paper No. 66. Maastricht: European Centre for Development Policy Management (ECDPM).

An important reason for forming a customs union is to do away with the transaction costs involved in border formalities, including rules of origin. Addressing customs procedures and red tape have also been identified as a priority<sup>242</sup>. However, in terms of reducing red tape at borders, the impact of a common external tariff may be limited unless a customs pool system is developed, fiscal frontiers removed, technical regulations harmonised and individual customs authorities given sufficient confidence in the institutional capacity of other member states to implement<sup>243</sup>.

### **4.3 The European Union (EU) as a comparator regarding Private Sector Inclusion to Promote Development**

From the onset it should be noted that the private sector is not explicitly provided for under the Treaty Establishing the EU<sup>244</sup>. A possible consideration here is that at the formation of the EU at its initial stage, we find countries that are already relatively developed and whose main objective is trade facilitation as gathered from a reading of the Maastricht Treaty (1992)<sup>245</sup>. Nevertheless, the EU has recognised the essential role played by the private sector in economic development. In this light, there are different programs and policies that the EU undertakes to promote inclusion of the private sector and in this way promote economic development.

The EU recognises that private sector actors do provide decent jobs and generate prosperity for all, which is an essential component of a successful sustainable development strategy<sup>246</sup>. One of the initiatives undertaken in this regard is the Small Business Act for Europe (SBA) which is an overarching framework for the EU

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<sup>242</sup> Charalambides, N., 2005. The private sector's perspective, priorities and role in regional integration and implications for regional trade arrangements. ECDPM Discussion Paper No. 66. Maastricht: European Centre for Development Policy Management (ECDPM).

<sup>243</sup> Charalambides, N., 2005. The private sector's perspective, priorities and role in regional integration and implications for regional trade arrangements. ECDPM Discussion Paper No. 66. Maastricht: European Centre for Development Policy Management (ECDPM).

<sup>244</sup> European Union, 2002. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992. *Official Journal of the European Communities* C325/5, 24 December 2002, pp. C325/5 - C325/181.

<sup>245</sup> European Parliament, 1992. Treaty on European Union (TEU) / Maastricht Treaty. *Official Journal of the European Communities*, 29 July. pp. No C191/1-C191/112.

<sup>246</sup> DFID, 2008. *Private Sector Development Strategy Prosperity for all: making markets work*. London: DFID.

policy on Small and Medium Enterprises (MSMEs). It aims at improving the approach to entrepreneurship in Europe, simplifying the regulatory and policy environment for SMEs, and removing the remaining barriers to their development<sup>247</sup>. Based on this policy framework, the Organisation for Economic Co-operation and Development (OECD) together with the European Commission (EC) and the European Bank for Reconstruction and Development (EBRD) has developed the Small and Medium-Sized Enterprises (SME) Policy Index. The SME Policy Index is a benchmarking tool for assessing and monitoring progress in the design and implementation of policies for SMEs against EU and international good practice. This program has registered tangible success<sup>248</sup> and is an avenue for the private sector to capitalise on policy considerations which has resulted into increased economic development.

However, most of their efforts with a focus on involving the private sector in development efforts are directed outwardly such as the ACP-EU Private Sector Development (PSD) support programme, the Euro-Mediterranean Investment Partnership SME Guarantee Facility and the EU blending model. All of which are discussed in more detail later in this chapter. The EU has various programs aimed at programs aimed at utilising private sector inclusion in policy considerations to promote development.

The EU is a significant player in providing support to PSD in the context of its external aid programs. This support covers a wide range of activities including regulatory reforms, providing business development services and capacity building. On average, the EU has provided EUR 350 million annually. Over the period 2004–2010, the EU provided substantial grant funding for PSD at EUR 2.4 billion<sup>249</sup>.

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<sup>247</sup> European Commission, 2008 . *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. "Think Small First". A "Small Business Act" for Europe. {SEC(2008) 2101} {SEC(2008) 2102}*. Brussels: Commission of the European Communities.

<sup>248</sup> OECD et al., 2020. *SME policy index: Eastern partner countries 2020. Assessing the implementation of the Small Business Act for europe*. Paris and Brussels: OECD Publishing.

<sup>249</sup> European Commission, 2014. *Communication from the commission to the european parliament, the council, the European economic & social Committee and committee of the regions. A stronger role of the private*

PSD encompasses a wide variety of grant-funded technical support, that is, non-investment and financial investment interventions and activities. In May 2014, the Commission adopted the communication of a stronger role of the private sector in achieving inclusive and sustainable growth in developing countries<sup>250</sup>, outlining a renewed EU strategic framework for strengthening the role of the private sector in achieving inclusive and sustainable growth as called for in the Agenda for Change<sup>251</sup> and this position still stands.

The EU private sector is also expected to help deliver on the objectives of the Global Gateway strategy, based on a Team Europe approach<sup>252</sup>. It is a move that is set to not only realise the EU's policy objectives but also serve to strengthen, The Global Gateway is a new European initiative aimed at strengthening health, education and research systems globally as well as fostering smart, clean and secure linkages in energy, digital, and transport sectors.

With significant global investments in infrastructure development, the EU is increasing its offer to its partners. Between 2021 and 2027, Team Europe, meaning the EU institutions and EU Member States jointly, will mobilise up to €300 billion of investments in: (i) digital, (ii) climate and energy, (iii) transport, (iv) health and (v) education and research<sup>253</sup>.

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*sector in achieving inclusive and sustainable growth in developing countries.* Brussels: European Commission.

<sup>250</sup> European Commission, 2014. *Communication from the commission to the european parliament, the council, the European economic & social Committee and committee of the regions. A stronger role of the private sector in achieving inclusive and sustainable growth in developing countries.* Brussels: European Commission.

<sup>251</sup> Cooperatives Europe and the Fair Trade Advocacy Office, 2013. *Cooperatives & fair trade: Making supply chains work for small producers. Joint contribution to the future EU strategy on "Strengthening the Role of the Private Sector in Achieving Inclusive and Sustainable Development"*. Brussels: Cooperatives Europe and the Fair Trade Advocacy Office.

<sup>252</sup> European Commission, 2022. *Joint communication to the european parliament, the council, the european economic and social committee and the committee of the regions. EU external energy engagement in a changing world. JOIN/2022/23 final*, Brussels: European Commission, Directorate-General for Energy.

<sup>253</sup> European Commission, 2022. *Joint communication to the european parliament, the council, the european economic and social committee and the committee of the regions. EU external energy engagement in a changing world. JOIN/2022/23 final*, Brussels: European Commission, Directorate-General for Energy.

This serves as another marker of the EU's recognition that private sector engagement in development is now a strategic priority, recognising the role it can play in development, and acknowledging that governments' budget and capabilities will not be sufficient to achieve the set development goals on their own.

#### **4.3.1 European Union Programmes Focusing on Utilisation of the Private Sector to Promote Development**

The EU has various programmes in place geared towards achieving development with different partners around the world. However here focus will be given to three programmes: ACP-EU Private Sector Development (PSD) support programme, the Euro-Mediterranean Investment Partnership SME Guarantee Facility and the EU blending model. This is due to their emphasis on utilising private sector inclusion in development efforts which serves as the focus of this mini thesis and therefore makes these programmes a worthwhile consideration.

These are considered in the hopes that similar models, or wholly new models could be designed using these as case studies with a view towards improving private sector inclusion under the AfCFTA to realise its development goals.

An example of such a program is the ACP-EU Private Sector Development (PSD) support program termed the "Business ACP" as formulated between the Organisation of African, Caribbean and Pacific States (ACP) and the EU<sup>254</sup>. Within the framework of the 11th EDF Intra-ACP Private Sector Development Strategy, the Business ACP platform will thus offer administrative and technical assistance to the ACP Secretariat. As far back as 2019, the Business ACP was providing technical and administrative support during the programming process of the 11th EDF intra-ACP envelope dedicated to ACP private sector development<sup>255</sup>. These

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<sup>254</sup> ACP, 2018. *ACP-EU Private Sector Development (PSD) support Programme: "Business ACP" is now on track*. [Online] Available at: <https://www.oacps.org/uncategorized/acp-eu-private-sector-development-psd-support-programme-business-acp-is-now-on-track/> [Accessed 12 September 2022].

<sup>255</sup> ACP, 2022. *Newsletter 11: "ACP private sector development"*. [Online] Available at: <https://businessacp.com/wp-content/uploads/2019/12/Newsletter-BACP-EN-N11.pdf> [Accessed 12 September 2022].

initiatives being carried out in line with the objective of the Lomé IV Convention<sup>256</sup> and its precursors as designed to improve the trade performance of countries that make up the African, Caribbean and Pacific (ACP) region, with the ultimate goal of fostering their economic development. For that purpose, the European Community offered non-reciprocal trade preferences to products originating in ACP countries<sup>257</sup>.

Also in place is the Euro-Mediterranean Investment Partnership SME Guarantee Facility whose overall objective is an increase in local banks' lending to SMEs, improving access to finance for SMEs on a sustainable basis and ultimately, job creation. The facility targets Jordan, Lebanon, Egypt, Tunisia and Morocco. It is designed as a EUR 320 million unfunded risk-sharing facility<sup>258</sup>. The EU identified a lack of access to funding as major handicap for the private sector development especially in developing countries and this program is geared towards addressing these shortcomings<sup>259</sup>.

Such a policy would be greatly beneficial to the AfCFTA once fully operational with adequate funding allocated. It is not enough to simply design blanket development initiatives but rather necessary to tailor-make such programs to address specific areas of need. Much like the Mediterranean region, across Africa, SMEs, as has already been alluded to within the mini thesis, carry with them great economic growth potential when given the financial aid they will inevitably need and an enabling environment, in this case favourable policy considerations.

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<sup>256</sup> UNCTAD, 1991. *Handbook on the Lomé IV Convention*. Geneva: UN.

<sup>257</sup> European Commission, 2015. *Blending and support to private sector development*. Brussels: Directorate-General for International Cooperation and Development, Publications Office.

<sup>258</sup> European Commission, 2015. *Blending and support to private sector development*. Brussels: Directorate-General for International Cooperation and Development, Publications Office.

<sup>259</sup> European Parliament, 2016. *Report on the private sector and development*. [Online] Available at: [https://www.europarl.europa.eu/doceo/document/A-8-2016-0043\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2016-0043_EN.html) [Accessed 14 September 2022].

The EU has also influenced PSD across partner countries through blending<sup>260</sup>. Blending is where grants from the EU are combined with loans or equity from private and public sources. In addition, to other aid modalities, blending is a tool for accomplishing EU foreign policy objectives and advancing pertinent national, regional and overarching priority policy interests. The idea behind the instrument is that the EU grant element can be used in a strategic way to attract additional financing for important investments in EU partner countries<sup>261</sup>. It should be noted that blending has been targeted to advance certain sectors including energy, transport, water and sanitation and private sector development. These are all areas in which the African continent area is attempting to heavily invest in and this makes them prime destinations for blended economic assistance/blending.

Nearly all the nations in the area of external cooperation of the European Union are currently served by the seven EU Regional Blending Facilities, which were established by the European Commission in collaboration with EU Member States<sup>262</sup>. These blending facilities include: the Neighbourhood Investment Facility (NIF), the Investment Facility for Central Asia (IFCA), the Investment Facility for the Pacific (IFP), the Asian Investment Facility (AIF), the Caribbean Investment Facility (CIF), the Latin America Investment Facility (LAIF) and the Africa Investment Facility (AFIF)<sup>263</sup>.

These facilities come with guarantees where the EU shares the risk associated with investing and lending in developing countries, so that private investors and

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<sup>260</sup> European Union, 2015. EU blending: European Union aid to catalyse investments. Brussels: Publications Office.

<sup>261</sup> European Commission, n.d. *Guarantees and blending*. [Online] Available at: [https://international-partnerships.ec.europa.eu/funding-and-technical-assistance/funding-instruments/guarantees-and-blending\\_en](https://international-partnerships.ec.europa.eu/funding-and-technical-assistance/funding-instruments/guarantees-and-blending_en) [Accessed 12 March 2023].

<sup>262</sup> Rudischhauser, K., 2013. *Engaging the private sector for development: What role for the EU regional blending facilities?*. [Online] Available at: <https://ecdpm.org/work/private-sector-for-development-volume-1-issue-8-october-2012/engaging-the-private-sector-for-development-what-role-for-the-eu-regional-blending-facilities> [Accessed 22 September 2022].

<sup>263</sup> Rudischhauser, K., 2013. *Engaging the private sector for development: What role for the EU regional blending facilities?*. [Online] Available at: <https://ecdpm.org/work/private-sector-for-development-volume-1-issue-8-october-2012/engaging-the-private-sector-for-development-what-role-for-the-eu-regional-blending-facilities> [Accessed 22 September 2022].



development banks will finance entrepreneurs or development projects. This implies that in the improbable event of a loss, the EU will cover a portion of it<sup>264</sup>.

Some of the projects under these facilities serve as a source of capital, a necessary conduit for development to the private sector entrepreneurs especially the micro, small and medium enterprises (MSMEs) which constitute the bulk of private sector players on the African continent as alluded to earlier in chapter one<sup>265</sup>.

They aim at equipping small business owners and entrepreneurs with the financing and enabling environment they need to thrive. Financial services are typically inaccessible to small businesses, which might range from manufacturing firms to small firms and craft shops. By working with local financial intermediaries to better serve this target group and build the wider ecosystem for financial inclusion in the various economies<sup>266</sup>. In an effort to increase funding and therefore increase chances of project success, the EU has identified opportunities where the profit-seeking private sector can be encouraged to act towards achieving developmental objectives thus acting as a balancing act. To make this equation more effective, blending with the engagement of the private sector has followed a project-by-project approach, in which attention is paid to the details and a number of checks are built-in. The EU Regional Blending Facilities in this light provide the basis for such an approach and contribute to further extending the instruments available to the EU for delivering its development aid effectively, tailored to the needs of specific partner countries with an aim towards achieving sustainable economic development. These initiatives have targeted key areas like infrastructural

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<sup>264</sup> Rudischhauser, K., 2013. *Engaging the private sector for development: What role for the EU regional blending facilities?*. [Online] Available at: <https://ecdpm.org/work/private-sector-for-development-volume-1-issue-8-october-2012/engaging-the-private-sector-for-development-what-role-for-the-eu-regional-blending-facilities> [Accessed 22 September 2022].

<sup>265</sup> African Development Bank, 2011. The role of the private sector in Africa's economic development. In: *African development report 2011. Private sector development as an engine of Africa's economic development*. Tunis: African Development Bank, Development Research Department, pp. 12-35.

<sup>266</sup> European Fund for Southeast Europe, n.d. *Pushing the impact frontier*. [Online] Available at: <https://www.efse.lu/impact-sustainability> [Accessed 12 March 2023].

development, energy resources and financing for MSMEs all of which could greatly facilitate trade thus benefiting private sector actors across different partner states<sup>267</sup>.

In this way a proposal is herein stated that the AfCFTA, through its relevant bodies, could adopt a blended approach to tackling development projects it will inevitably have to make in the future. This will not only enable the AfCFTA realise its objectives but at the same time give chance to the private sector to make contributions to the continent and still earn the profits necessary to continue valuable trade activities. In turn creating employment opportunities and encouraging innovation along the way. Not to mention various governments will also benefit by way of taxation as levied on projects therein undertaken or generally in issues like infrastructural development and employment opportunities where these projects are carried out. Whatever scenario plays out as envisioned above affects the economy of a state positively.

Having looked at the various programmes that support engagement of the private sector to promote development including: the ACP-EU Private Sector Development (PSD) support programme, the Euro-Mediterranean Investment Partnership SME Guarantee Facility and the EU blending model, it is hereby reiterated that the AfCFTA should seek to use these as a blueprint to design similar programs, tailored to meet growth and sustainability needs of the African private sector. In ensuring the development of a robust and diverse private sector through facilitating trade, the AfCFTA ensures that these players with greater development will likewise be better able to realise likewise development of their spheres of influence. Through increased job creation, provision of quality goods and services as well as increasing the tax base for their relative states.

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<sup>267</sup> Oxfam International, 2017. *Private-finance blending for development. Risks and opportunities*. Oxford: Oxfam GB.

#### **4.4 The Historical Development of the Common Market for Eastern and Southern Africa**

Twenty-one (21) African countries have united to form the Common Market for Eastern and Southern Africa (COMESA), with the shared goal of fostering regional integration via commerce and the development of human and natural resources for the benefit of all residents in the member states.

COMESA was initially established in 1981 as the Preferential Trade Area for Eastern and Southern Africa (PTA), within the framework of the Organisation of African Unity's (OAU) Lagos Plan of Action and the Final Act of Lagos. The PTA transformed into COMESA in 1994. The PTA was formed in order to exploit benefits of a bigger market, to share their mutual heritage and future, and to promote greater social and economic co-operation. COMESA is one of the eight Regional Economic Communities (RECs) recognised by the African Union.

According to its treaty, COMESA was founded as a group of free sovereign states, which agreed to collaborate in developing their human and natural assets for the welfare of all their people. As such, it has a wide-range of objectives, which inevitably include in its priorities the promotion of peace and security in the region.

Nevertheless, because of its economic roots and history, COMESA is primarily focused on creating a sizable trading and economic bloc that can get past some of the obstacles that individual member states face. This means that the present COMESA strategy can be summed up as “economic prosperity through regional integration”. COMESA is a significant hub for both domestic and international; external trade because of its 21 Member States, with a combined population of over 583 million, GDP of \$805 billion, and global export/import trade in goods valued at US\$ 324 billion. Geographically, COMESA is almost two thirds of the African Continent with an area of 12 million (sq. km)<sup>268</sup>.

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<sup>268</sup> COMESA, n.d. *Common Market for Eastern and Southern Africa*. [Online] Available at: <https://www.minaffet.gov.rw/eac-1> [Accessed 9 November 2023].

#### **4.5 The Common Market for Eastern and Southern Africa as a comparator regarding Private Sector Inclusion to Promote Development**

Common market for eastern and southern Africa (COMESA)<sup>269</sup> on the African continent has great examples of how private sector inclusion can and is being readily enhanced in order to realise development on the African continent. Under Article 100 of the COMESA treaty, we see that there is an intent to promote a member-centric development model with an aim towards sustainable development. Here reference is made to the private sector's role in achieving development<sup>270</sup>.

We also trace mentions of the inclusion of the private sector as explicitly stated under Article 128 of the COMESA treaty wherein it is stated that member states work towards realising conducive environment for the development of science and technology inclusive of technology transfer considerations. With increased innovation around the world and the advent of e-commerce, this is a valuable undertaking.

Perhaps most importantly is the COMESA Business Council (CBC) which is established as one of the eight organs of COMESA<sup>271</sup>. To provide a link and facilitate dialogue between the business community and other interest groups and other organs of the Common Market. CBC was established as a private sector institution of COMESA, a voice of sorts through which meaningful engagement could be undertaken and private sector inclusion extended/realised in as far as policy considerations are concerned.

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<sup>269</sup> COMESA, 1993. *Treaty establishing the common market for eastern and southern Africa*. [Online] Available at: <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012-with-zaire-final.pdf> [Accessed 10 September 2022].

<sup>270</sup> COMESA, 1993. *Treaty establishing the common market for eastern and southern Africa*. [Online] Available at: <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012-with-zaire-final.pdf> [Accessed 10 September 2022]. Article 100 (j).

<sup>271</sup> COMESA Business Council, n.d. *COMESA Business Council*. [Online] Available at: <https://comesabusinesscouncil.org/about/> [Accessed 12 September 2022].

Under the Treaty, the CBC is defined as a consultative committee for the business community at the policy organs level. CBC is the recognised regional apex body of the Private Sector and Business Community in the COMESA region. Nine members of the Board of Directors who are Presidents of their respective National Apex Business Associations in COMESA Member States constitutionally manage CBC<sup>272</sup>. In 2010, the CBC commenced functions as a Secretariat. Its structure is centred around two main areas of focus: first, is the development of the private sector in growth sectors that enhance the overall competitiveness of businesses in regional and international markets. Second, representation of the private sector by facilitating business interests from membership in apex and sectorial business associations to all levels of policy formulation and decision making in the region<sup>273</sup>.

The COMESA treaty impressively also contains considerations as to the development of comprehensive information systems. As was earlier noted, one of the challenges affecting private sector inclusion under the AfCFTA is a lack of knowledge about not only the FTA itself but also its benefits to the private sector. This is considered under Article 138 of the COMESA treaty, which states that the Secretariat shall take the appropriate steps to make sure that businesses in the public and private sectors are fully aware and informed about the trade and investment opportunities that are currently and potentially available in the Member States. The COMESA treaty also notably has a whole chapter (chapter 23)<sup>274</sup> dedicated to considerations for the development of the private sector. Under this chapter there is a call for member states to create an enabling environment through trade facilitation and co-operation among chambers of commerce and other business organisations. These factors taken into consideration and implemented under the flagship of the

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<sup>272</sup> COMESA Court of Justice, n.d. *COMESA Business Council*. [Online] Available at: <https://comesacourt.org/comesa-business-council/> [Accessed 12 March 2023].

<sup>273</sup> COMESA Court of Justice, n.d. *COMESA Business Council*. [Online] Available at: <https://comesacourt.org/comesa-business-council/> [Accessed 12 March 2023].

<sup>274</sup> COMESA, 1993. *Treaty establishing the common market for eastern and southern Africa*. [Online] Available at: <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012-with-zaire-final.pdf> [Accessed 10 September 2022]. Chapter 23.

AfCFTA will greatly enhance private sector inclusion which studies have shown can lead to development of economies<sup>275</sup>.

Amongst other things, the CBC's mandate includes; (i) responsibility for ensuring that the interests of the business community and other interest groups in the Common Market are taken into consideration by the organs of the Common Market, (ii) responsibility for monitoring the implementation of the provisions of chapter 23 (Development of Private Sector) and 24 of the Treaty (Women in Development and Business) and make recommendations to the Intergovernmental Committee, (iii) carrying out consultations and receipt of reports from other interest groups and (iv) taking part in the meetings of the Technical Committees and it can make recommendations to the Intergovernmental Committee (COMESA Treaty Article 7 and 18)<sup>276</sup>.

Mention has been made of the PAPPS system associated with the AfCFTA as a means of facilitating payments to improve on trade volumes across the African continent. In this regard, COMESA established the COMESA Clearing House (CCH) in order to expedite the settlement of trade and services payments amongst member nations in accordance with Article 73 of the COMESA Treaty. The CCH made possible for Member States to transact within the COMESA using local currencies.

However, it is currently undergoing restructuring in order to facilitate real-time gross payments in a liberalised market environment. Consequently, the CCH launched the Regional Payment and Settlement System (REPSS), which was created to enable Member States to transfer money more effectively and efficiently within the region. The goal of the payment system is to spur economic growth by

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<sup>275</sup> Analysis for Economic Decisions, 2013. *Evaluation of the European Union's support to private sector development in third countries. Final report, Volume II, Annexes 1 & 2*, Louvain-la-Neuve: European Commission.

<sup>276</sup> COMESA Business Council, n.d. *COMESA Business Council*. [Online] Available at: <https://comesabusinesscouncil.org/about/> [Accessed 12 September 2022].

facilitating greater intra-regional trade and enabling importers and exporters to settle and receive payment for goods and services through an efficient and cost-effective platform.

Access to working capital is always key to realisation of development projects across various sectors. Such innovations provide the private sector players with greater access to working capital that translates into greater trade volumes which in turn spurs development in their various sectors of influence.

The AfCFTA should draw from the fore-stated innovations to improve private sector inclusion which could lead to greater economic growth. The AfCFTA institutional and legal framework is lacking in that it doesn't cater for some private sector concerns. By increasing the representation of the private sector at institutional level there is envisioned a correlating presentation of their interests in the AfCFTA's legal framework wherein the private sector actors will then be able to directly influence policy considerations. The AfCFTA explicitly recognises the existing FTAs on the African continent as building blocks, it should in this regard seek to incorporate relevant legal and institutional frameworks like that provided by COMESA in regards to PSD and harmonise the same to make its very own legal and institutional framework that much more inclusive for private sector participation to realise its economic development goals.

#### **4.6 The Historical Development of the Association of Southeast Asian Nations**

The founding fathers of ASEAN (Association of Southeast Asian Nations)—Indonesia, Malaysia, Philippines, Singapore and Thailand—signed the ASEAN Declaration (Bangkok Declaration), establishing ASEAN, on August 8, 1967, in Bangkok, Thailand. As of today, there are ten member states of ASEAN: Brunei

Darussalam joined on January 7, 1984; Viet Nam joined on July 28, 1995; Lao PDR and Myanmar joined on July 23, 1997; and Cambodia joined on April 30, 1999<sup>277</sup>.

The creation of the Association of Southeast Asian Nations (ASEAN), commonly referred to as the ASEAN Free Trade Area (AFTA) was agreed at the 1992 ASEAN Summit in Singapore. The main objectives of the AFTA are to: (i) create a single market and an international production base, (ii) attract foreign direct investments and (iii) expand intra-ASEAN trade and investments<sup>278</sup>.

The Asia Pacific is forecast to be the world's fastest growing economic region over the next decade. A remarkable rise that has largely been attributed to the rapid growth of its private sector. Businesses like AirAsia, Tata Group, Samsung, LG Electronics, and Alibaba have been revolutionizing markets, introducing new innovations and technology, and generating jobs and opportunities that have lifted millions out of poverty<sup>279</sup>.

#### **4.7 The Association of Southeast Asian Nations as a comparator regarding Private Sector Inclusion to Promote Development**

In an effort to further support PSD amongst ASEAN members, different initiatives have been implemented. One of these is the ASEAN Business Advisory Council (ASEAN BAC). Established during the 7th ASEAN Summit in Bandar Seri Begawan, Brunei Darussalam, in 2003, ASEAN-BAC is a regional council under the ASEAN economic pillar. Top business leaders and CEOs from every ASEAN member state, some nominated by their respective heads of state and others by the ASEAN Economic Ministers, make up the ASEAN-BAC members. Its purpose is to highlight priority topics for ASEAN leaders to consider and solicit feedback from

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<sup>277</sup> Association of Southeast Asian Nations, n.d. *About ASEAN*. [Online] Available at: <https://asean.org/about-asean> [Accessed 11 March 2023].

<sup>278</sup> United Nations Economic and Social Commission for Western Asia, 2011. *Association of southeast asian nations free trade area*. [Online] Available at: <https://archive.unescwa.org/association-southeast-asian-nations-free-trade-area> [Accessed 12 September 2022].

<sup>279</sup> Mulakala, A. & Surie, M. D., 2016. *Asia's private sector driving region's social and economic development*. [Online] Available at: <https://asiafoundation.org/2016/10/05/asias-private-sector-driving-regions-social-economic-development/> [Accessed 12 September 2022].



the private sector regarding the implementation of ASEAN economic cooperation. This is similar to efforts considered under Article 12 of the AfCFTA wherein it's stated that the Committee of Senior Trade Officials shall consist of Permanent or Principal Secretaries or other officials designated by each State Party. In this way, African states can maximise the opportunity to promote inclusion of the private sector by appointing high level competent private sector players to participate in economic policy formulation and considerations.

Additionally, in considerations for achieving increased economic development in the ASEAN territory, SME development became one of priorities for ASEAN. In this regard, the purpose of the ASEAN SME Agencies Working Group (SMEWG), is to develop policies, activities, and programs for the progress of SMEs. SMEWG acts as a platform for coordination and consultation in order to guarantee that the growth of SMEs keeps up with the ASEAN integration process and to aid the creation of the ASEAN Economic Community (AEC). On 21 January 2016, the ASEAN SMEWG was upgraded to the ASEAN Coordinating Committee of Micro, Small and Medium Enterprises (ACCMSME) to reflect the scope of work which includes micro enterprises as well as the need to extend committee membership including from other fields.

The ACCMSME has been touted as a platform to; (i) Formulate policies, programs and activities for the implementation of the ASEAN Strategic Action Plan for SME Development – SAP SMED 2025; (ii) Coordinate and discuss issues of cooperation on SMEs among ASEAN countries with dialogue partners such as Japan, Korea and China; as well as with development partners such as the United States Agency for International Development (USAID) through ASEAN Connectivity through Trade and Investment (ACTI), Organisation for Economic Co-operation and Development (OECD) and Gesellschaft für Internationale Zusammenarbeit (GIZ), Germany; and (iii) Coordinate ASEAN participation in activities related to development of SMEs internationally such as Asia-Europe Meeting (ASEM), Asia Pacific Economic Cooperation (APEC) and others. Given the prevalence of MSMEs throughout Africa's economy the AfCFTA could stand to benefit from

building similar models to promote economic development even at the lowest levels of goods and service production by emulating such initiatives.

In as much as implementation determines the levels of success in any given enterprise pursuit, planning is just as and if not more crucial. Here possible challenges, current and expected deficiencies can all be catered for and policies carefully designed to address the shortcomings in the African business environment to ensure PSD on the African continent<sup>280</sup>.

ASEAN could become the world's fourth-largest economy by 2030, comprising of a consumer market valued at over \$4 trillion<sup>281</sup>. Much like the EU, ASEAN has signed multiple FTAs further strengthening the bloc's continued growth trajectory through its various FTAs some of which are the world's largest<sup>282</sup>. These FTA offers numerous opportunities for foreign investors, ranging from capitalising on Singapore as the region's financial services hub or moving manufacturing operations to low-cost regions in Vietnam, Indonesia, and Malaysia<sup>283</sup>. Going forward, this will be an important consideration if the AfCFTA is to successfully compete on the world stage.

Africa cannot afford to simply stop at unity. At the world stage African states ought to also look to bolster their own newly realised economic standing and entice other states into considering partnerships in the form of FTAs for further growth.

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<sup>280</sup> African Development Bank, 2013. *Private sector development policy of the AfDB group*. Abidjan: ORVP Department.

<sup>281</sup> Medina, A. F., 2021. *ASEAN's free trade agreements: An overview*. [Online] Available at: <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/> [Accessed 12 September 2022].

<sup>282</sup> Medina, A. F., 2021. *ASEAN's free trade agreements: An overview*. [Online] Available at: <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/> [Accessed 12 September 2022].

See Also, ASEAN-Australia-New Zealand Free Trade Area, ASEAN-China Free Trade Area, ASEAN-India Free Trade Area, ASEAN-Republic of Korea Free Trade Area, ASEAN-Japan Comprehensive Economic Partnership and more recently ASEAN-Japan Comprehensive Economic Partnership. These are all FTAs with strong economic linkages.

<sup>283</sup> Medina, A. F., 2021. *ASEAN's free trade agreements: An overview*. [Online] Available at: <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/> [Accessed 12 September 2022].

However, these “partnerships” should be carefully considered to avoid situations where African countries will be exploited without realising any form of economic growth.

#### **4.8 A Comparative Analysis of the Free Trade Agreements in Promoting Development Through Private Sector Inclusion**

The EU, COMESA, ASEAN are all regional economic blocs that have prioritised private sector inclusion in their development policies. A comparative analysis of the three blocs can offer insights into best practices that can inform a more inclusive AfCFTA policy.

Having considered the EU, COMESA and ASEAN on an individual basis, it is worthwhile to underline certain similarities or differences inherent in their constitution or policy considerations as far as private sector inclusion to achieve development is concerned.

The EU for one has no express provisions pointing towards avenues wherein private sector inclusion is made a part of its constitution. This is different from the case of COMESA and ASEAN as has been highlighted above wherein the latter FTAs have gone as far as constituting organisations as part of their legal framework whose purpose is to serve private sector interests and provide representation during policy considerations. This is something worth considering for the AfCFTA to fully utilise the potential of the private sector to spur development on the African continent.

As has been mentioned earlier, the EU’s efforts are outwardly directed towards supporting PSD in neighbouring and partnership states. A possible explanation for this is the existence of a thriving economy with an already robust and diverse private sector within the EU. This is unlike the other two FTAs herein considered, being ASEAN and COMESA that cover areas with a less well-developed economy. The latter FTAs have therefore opted for inward looking policies to strengthen their own private sector players to develop their capacity for development and utilise such newly acquired economic strength to spur development within their areas of

influence. These are much closer to the realities the AfCFTA is set to face as it covers regions of varying economic standing. And a relatively fledgling private sector yet to truly compete favourably with its counterparts at the global stage<sup>284</sup>.

A golden thread is herein spotted where one considers that the efforts regarding private sector inclusion are geared majorly towards trade facilitation in the form of access to finance, investment in infrastructure, technical capacity building and reduction of trade barriers. What this points to is the need for an enabling environment in which the private sector can grow exponentially. This is due to the fact that the private sector will only be able to effect development in their various spheres of influence based on their own relative economic strength.

The AfCFTA should therefore focus its efforts on creating an enabling environment for increased and more efficient trade flows on the African continent through private sector inclusion. This not only results into greater innovation as a result of added incentive for the private sector to engage in trade under the umbrella of the AfCFTA, but also attracts more investors not necessarily based within the African continent but nevertheless desirous of trading in such an economic ecosystem. Which in turn opens up even more avenues for the local private sector. This entry of foreign investors should nevertheless be regulated so as to ensure that the local investors are not placed in situations of unfair competition with foreign investors who generally have greater access to capital resources whose importance to trade cannot be overstated.

To inform a more inclusive AfCFTA policy, the African Union can draw from the best practices of these regional economic blocs. First, the AfCFTA should prioritise policies that promote private sector development, such as investment in infrastructure, access to finance, and reduction of trade barriers. Second, the AfCFTA should establish regional investment agencies and business councils to

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<sup>284</sup> World Bank, 2023. *The World Bank in Africa*. [Online] Available at: <https://www.worldbank.org/en/region/afr/overview> [Accessed 7 March 2023].

support private sector growth. Third, the AfCFTA should implement measures to improve access to finance and reduce regulatory barriers. Finally, the AfCFTA should establish a business advisory council to ensure that private sector interests are represented in policy decisions.

In summary, the EU, COMESA, and ASEAN provide examples of how regional economic blocs can prioritise private sector inclusion in their development policies. The African Union can draw from these best practices to inform its economic policies going forward to realise its own economic objectives and achieve development on the African continent by improving upon and utilising private sector inclusion.

#### **4.9 Conclusion**

This chapter has served as a study into how other FTAs have tackled the issue of private sector inclusion to promote economic development. Here the EU, COMESA and ASEAN served as existing models whose experience could be drawn upon to aid the AfCFTA in its development objectives through the utilisation of private sector inclusion.

Under each FTA, programmes related to private sector inclusion were examined noting things like the rationale for their formation and impact had. These programmes were generated to facilitate trade and in so doing create an enabling environment for the private sector to grow. It is this growth that is targeted and leveraged to realise economic objectives of the various FTAs due to the overwhelming influence the private sector has on trade volumes.

The fact that these programmes exist is a clear indicator that other more established FTAs have realised the crucial role played by the private sector in development. And have therefore made active steps to harness its potential for growth and gone on to realise increase in trade volumes and development as a result.

It is against this backdrop that the chapter calls for affirmative action under the umbrella of the AfCFTA to increase private sector inclusiveness in its policy formulation to realise similar or even achieve better results. Keeping in mind that these programmes serve only as a roadmap, a guide and must therefore be adopted to suit the realities of Africa's economy and the needs of the private sector here to achieve development.



# CHAPTER FIVE

## CONCLUSION AND RECOMMENDATIONS.

### 5.1 Introduction

The overall aim of this mini thesis was to determine whether the African Continental Free Trade Area (AfCFTA)'s institutional and legal framework adequately accommodates inclusion of the private sector to facilitate development<sup>285</sup>. And where necessary to propose how the AfCFTA can adopt better legal and institutional frameworks to promote private sector inclusion in order to realise development objectives envisioned for the African continent. The present chapter summarises the key findings of this study, and further proposes some recommendations in relation to how the AfCFTA's institutional and legal framework can be leveraged and improved upon in order to realise development on the African continent with a focus on Private Sector Development (PSD) for greater regional integration.

This chapter concludes this thesis and makes recommendations. The chapter is divided into two sections. The first section summarises the findings of the study. The findings mainly relate to results for the five research objectives defined for the study in Chapter One. These objectives are reiterated as follows<sup>286</sup>:

- (i) to review the current legal and institutional framework of the AfCFTA with a focus on private sector inclusion.
- (ii) to highlight the role played by the private sector in economic development across Africa and on the global stage citing challenges faced.
- (iii) to highlight appropriate regulatory measures to build the capacity of the AfCFTA to facilitate private sector participation in economic development on the African continent and seek out appropriate solutions to obstacles to achieving this goal.

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<sup>285</sup> Chapter 1, Section 1.

<sup>286</sup> Chapter 1, Section 3.

- (iv) to do a comparative study on how private sector participation has promoted and facilitated development in other jurisdictions (FTAs)
- (v) to provide recommendations for the AfCFTA's legal and institutional framework in order to realise the private sector's participation in economic development and realise its full potential in this role.

The second section outlines the study's recommendations. The recommendations are meant to be a guiding instrument for African states and different actors seeking to utilise the AfCFTA for the purpose of realising development for all on the African continent. It is made with an aim to be a useful tool for academics, scholars and international trade law and policy-makers as they consider ways in which they can look to utilise the AfCFTA as a tool for economic development. Highlighting its strong points and offering suggestion for areas of improvement.

## **5.2 Summary of Findings**

Chapter Two dealt with an overview of the AfCFTA and its objectives towards development. Despite PSD being traced within the objectives of the AfCFTA, there is no express provision providing for private sector inclusion to facilitate development under the AfCFTA legal and institutional framework<sup>287</sup>. Also considered was the African Private Sector Forum initiative which, though not officially forming part of the AfCFTA framework, serves as an example of a worthwhile pursuit in as far as inclusion of the private sector to facilitate development is concerned<sup>288</sup>. It is measures such as these that will encourage meaningful participation of the private sector in policy considerations and further dialogue giving different perspectives that will help inform a broader policy formulation approach for future AfCFTA engagement considerations. The AfCFTA's legal and institutional framework was found to be substantially lacking in regards to private sector inclusion to facilitate development<sup>289</sup>.

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<sup>287</sup> Chapter2, Section 2.4.3.

<sup>288</sup>Chapter 2, Section 2.5.2.

<sup>289</sup> Chapter 2, Section 2.6.



Chapter Three tackled the second objective in as far as it sought to highlight the role played by the private sector in economic development across Africa and on the global stage<sup>290</sup> alongside citing challenges the private sector in Africa is likely to face in efforts to achieve inclusion under the AfCFTA <sup>291</sup>. Chapter One explored the literature on the private sector's influence on development the world over and showed that it is a powerful force that has been, and is still being, used to spur development. Under Chapter Three, what was considered was the institutional framework of the AfCFTA which was found to be lacking in as far as inclusion of the private sector to facilitate development is concerned <sup>292</sup>. Nonetheless, it was pointed out that there exist possible pathways. For example, it was pointed out that The Committee of Senior Trade Officials using its powers to request a Technical Committee to investigate any particular matter, could stand to benefit from the expertise of leading private sector stakeholders in resolving trade related issues. Also, the fact that FTAs shall be represented in the Committee of Senior Trade Officials, be it in an advisory capacity, provides for those FTAs already having inclusive policies for private sector facilitation of development to influence the policy considerations of the AfCFTA in this capacity which hopefully creates leeway for increased private sector inclusion that could be made concrete with legal and institutional changes to accommodate these deliberations.

Additionally, this chapter highlighted challenges to private sector inclusion under the AfCFTA in order to facilitate development on the African continent<sup>293</sup>. It offered possible solutions to some but focused mainly on showing how these were detrimental to private sector inclusion which the study posits as essential to the realisation of the economic growth and development sought on the African continent under the umbrella of the AfCFTA.

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<sup>290</sup> Chapter 3, Section 3.1.

<sup>291</sup> Chapter 3, section 3.3.

<sup>292</sup> Chapter 3, Section 3.2.

<sup>293</sup> Chapter 3, Section 3.3.

Chapter Four of this mini thesis answered objectives three and four in so far as it involved a comparative study with other FTAs in place and how they have tackled the issue of private sector inclusion in order to facilitate development <sup>294</sup>. It was therein shown that other FTAs such as the EU <sup>295</sup>, COMESA <sup>296</sup> and ASEAN <sup>297</sup> have realised great economic growth and development as a result of not only stopping at supporting private sector development but going as far as to take measure for inclusion of the private sector under policy and legal consideration in their various governing frameworks <sup>298</sup>. In so doing, the chapter provided for examples of appropriate regulatory measures to build the capacity of the AfCFTA to facilitate private sector participation in economic development on the African continent.

Much as the study focuses on private sector inclusion under the AfCFTA as key to the African continent realising economic growth and development. It nevertheless gives due cognisance to the fact that many other factors like political will, the ability to attract FDI, actual implementation, possible pandemic outbreaks case in point the COVID-19 occurrence and many others will have a significant bearing on the success levels achieved under the umbrella of the AfCFTA.

### **5.3 Recommendations**

Given the above findings, the study makes the following recommendations in order to facilitate inclusion of the private sector in order to better able it make meaningful contributions to the economic growth and development of the African continent. This, will lead to a more developed and thriving private sector that will be better placed to influence legal and policy considerations through inclusion under the legal and institutional framework of the AfCFTA.

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<sup>294</sup> Chapter 4, Section 4.1

<sup>295</sup> Chapter 4, Section 4.2

<sup>296</sup> Chapter 4, Section 4.4

<sup>297</sup> Chapter 4, Section 4.5

<sup>298</sup> Chapter 4, Sections 4.3, 4.4 & 4.5

### **5.3.1 Elimination of Non-Trade Barriers**

The AfCFTA, it has been stated, should define and set out legal tests that can be used to identify and regulate all the categories of NTBs identified <sup>299</sup>. in addition to ensuring that its legal framework adequately addresses all the categories of NTBs envisioned in Annex 5 of the AfCFTA Agreement <sup>300</sup>.

To reduce the challenge of overlapping and duplication of health and safety measures and administrative procedures such as custom procedures, the AfCFTA should harmonise different FTA policy frameworks that lead to multiple standards. The continued operation of existing FTAs will undoubtedly delay the harmonisation of rules of origin, SPS and border processes in accordance with the AfCFTA. The AfCFTA should consider setting out mandatory regional standards for use by all member states.

### **5.3.2 Considerations under AfCFTA's Dispute Settlement Mechanism**

An effectual Dispute Settlement Mechanism (DSM) maintains a trade regime based on rules; it also guarantees trading system predictability and articulates, develops, and clarifies the jurisprudence of the trade agreement that makes up the DSM. This study revealed that the AfCFTA does have a DSM in place that facilitates settlement of disputes as between private sector actors. Article 20 of the AfCFTA establishes the AfCFTA-DSM. It has been shown that the considerations within the legal framework of the AfCFTA limits participation as to only happening between states. Private parties have no standing before the DSB and cannot file disputes. Their states of nationality or domicile will have to litigate or act on their behalf. However, it was also noted that the majority of trading activities are carried out by private sector actors and hence these are the persons most in need of dispute settlement mechanisms.

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<sup>299</sup> Penda, N. C., 2021. Eliminating 'Thick' Borders: Analysing the legal framework on non-tariff barriers in the Africa continental free trade area agreement. *Strathmore Law Review*, 6(1), pp. 167-194.

<sup>300</sup> Penda, N. C., 2021. Eliminating 'Thick' Borders: Analysing the legal framework on non-tariff barriers in the Africa continental free trade area agreement. *Strathmore Law Review*, 6(1), pp. 167-194.

It therefore stands to reason that there ought to be clear avenues put in place by which private sector actors can seek to realise consistent and reliable judgments. African countries could consider using African arbitration institutions, regional courts or the continental judicial organs in investment dispute resolution.

### **5.3.3 Ratification of the UN Convention on Contracts for the International Sale of Goods (CISG)**

The United Nations Commission on International Trade Law (UNCITRAL) made significant progress in unifying the laws governing contracts for the international sale of goods with the UN Convention on Contracts for the International Sale of Goods (CISG). It is therefore an international legal instrument that could serve to aid in the fulfilment of the AfCFTA's objectives in regards to economic development in so far as uniformity of commercial laws is involved. The whole concept of conflict of laws due to the already existing FTAs was looked at in the preceding chapters and similar considerations cut across even into commercial law. The CISG provides a means of redress for this state of affairs of a proliferation of commercial laws in need of harmonisation.

In this way, the AU would ensure that member states trading under the umbrella of the AfCFTA would have uniform laws governing their trade relations. A consideration that would likewise extend to the private sector stakeholders whose compatriots in other jurisdictions have made use of conflict resolution under the CISG.

The CISG already has a track record of being used as a tool for creating consistency and predictability in some jurisdictions which is what legitimate harmonisation seeks to achieve. Harmonisation of laws such as the Principles of European Contract Law (PECL), the Africa OHADA uniform Act of General Commercial Law, the UNIDROIT Principle of International Commercial Contract (PICC) and the Common European Sales Law (CESL) which have all been influenced by the CISG.

#### **5.3.4 Infrastructure Development**

Transport infrastructure at the national, regional and international stage is a crucial driver of development and Africa's development is no exception. We have to consider infrastructure as evaluated for different sectors, namely, telecommunications, electric power, transportation, and water and sanitation.

Infrastructure development, wherein this is used to refer to roads and power production plants is a catalyst for sustainable economic development and growth. Improved infrastructure in Africa would facilitate and grow domestic, regional and international trade, lower the cost of doing business and make African nations more competitive, both within the continent and globally.

Considering that the world is experiencing the 4<sup>th</sup> Industrial Revolution (4IR), telecommunication in all its aspects is key and in this we will include internet coverage. In a world where e-commerce grows by the day the African continent needs to be able to compete favourably across all sectors. Telecommunication technologies are an area where the majority of African states are still lagging. There is, therefore, a need for increased investment in this area to further build the capacity of the private sector to grow their businesses beyond physical boundaries. It is this growth that will create a ripple effect and enable them to spearhead development efforts across their spheres of influence.

These initiatives, where successfully undertaken, will ensure that the private sector is enabled to carryout trade activities more effectively and efficiently which will lead to increased trade flows. And these come with increased job creation, technology exchange, access to wider markets and increased capacity to utilise capital. All relevant factors for realising increased economic growth and development on the continent with the private sector stakeholders driving this change.

### **5.3.5 Creation of Regional and International Value Chains**

Global value chains (GVCs) provide opportunities for developing countries to diversify their exports and intensify their integration into the global economy. Infrastructure and trade facilitation are evident ways to start for nations looking to increase their involvement in GVCs. Policy formulation in the way of governments and respective authorities avoiding the temptation to increase the effective tax burden on small, medium and micro businesses through compliance burdens and contrived tariffing. In this way, the AfCFTA should seek to reform tax, trade and industrial policies in favour of investment, business creation and expansion. Which translates into creating tax and other investment incentives, ensuring the use of special economic zones, sectoral policies to coordinate upstream and downstream production and the removal of tariff or non-tariff barriers. All of these will encourage private sector actors to innovate and thrive as it better their chances to compete favourably in GVCs. The education sectors across the African continent should also create emphasis for the inclusion of Information and Communications Technology (ICT) within the respective curriculums in order to skill and re-skill manpower essential to the effective engagement in GVCs. The Logistics Performance Index (LPI) of the World Bank provides evidence of the significance of lower transaction costs. It measures how successfully infrastructure and bureaucracy interact to move products through the manufacturing process and deliver them to consumers.

### **5.3.6 Develop a Diverse and Robust Private Sector**

As simple as it might sound, this is likely to be the determining factor as to whether the AfCFTA can realise its objectives. A growing private sector enables governments to generate sufficient tax revenues to provide essential public services such as health care and education. In this respect, this mini thesis has provided research backing MSMEs as an important focus for PSD support due to their large contribution to employment creation and poverty reduction across the African continent.

Creating awareness about the AfCFTA through governments and advocacy agencies with a bid to come up with specific interventions towards developing policies and initiatives that promote private sector inclusivity will strengthen the private sector greatly since through business, they are the drivers of economies. With a strong private sector in an enabling legal and institutional framework environment, economic development will be realised. It is hoped therefore, that this study will provoke further research leading to regulatory and policy reforms that will strengthen private sector inclusivity so as to realise the African economic development envisioned by the AfCFTA.

I wish to conclude by observing, therefore, that while there has been a remarkable buy-in from African countries with 46 out of 55 countries ratifying the agreement, it is imperative to note that for it to thrive, there has to be an intentional and purposeful strategy to amalgamate private sector inclusion and participation at all levels so as to achieve the desired development on the continent.



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