

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**REGULATING SMALL CROSS BORDER TRADERS AS A SOLUTION TO
INCREASE INTRA AFRICAN TRADE: IMPLICATIONS OF THE AFRICAN
CONTINENTAL FREE TRADE AREA**

**A Mini thesis submitted in partial fulfilment of the requirements for the degree
of Master of laws (LLM) in the department of Mercantile Law**

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DECLARATION

I declare that, **Regulating small cross border traders as a solution to increase intra African trade: implications of the African continental free trade area**, is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

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KEY WORDS

African Continental Free Trade Area (AfCFTA)

AfCFTA Agreement

East African Community

Informal Cross Border Trade

Intra African Trade

Regional Economic Communities

Southern African Development Community

World Trade Organisation Trade Facilitation Agreement



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LIST OF ACRONYMS AND ABBREVIATIONS

AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
CSTR	Continental Simplified Trade Regime
CU	Customs Union
DRC	Democratic Republic of Congo
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICBT	Informal Cross Border Trade
ICBTs	Informal Cross Border Traders
MFN	Most Favoured Nation
MSME	Micro Small and Medium Enterprise
NT	National Treatment
OAU	Organisation of African Unity
OSBP	One-Stop Border Post
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SADC	Southern African Development Community
STR	Simplified Trade Regime
UNCTAD	United Nations Conference on Trade and Development

UNECA	United Nations Economic Commission for Africa
WCO	World Customs Organisation
WTO	World Trade Organisation
WTO TFA	World Trade Organisation Trade Facilitation Agreement



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CHAPTER 1

INTRODUCTION

1.1 Background

In January 2012, fifty-four African countries agreed to establish the African Continental Free Trade Area (AfCFTA) during the 18th Ordinary session of the assembly of heads of state and government of the African Union (AU) held in Addis Ababa, Ethiopia.¹ The formation of AfCFTA dates back to July 1991 when the then Organisation of African Unity (OAU) member countries adopted the Abuja Treaty that set the creation of Free Trade Areas (FTAs) in each region as the first step towards the creation of an African Economic Community (AEC) by 2028, followed by customs unions, common markets and monetary unions.²

The agreement establishing the AfCFTA was signed by the AU heads of state and government in Kigali, Rwanda on 21 March 2018,³ as one of the flagship projects of the AU Agenda 2063.⁴ The AfCFTA entered into force on 30th May 2019 after 24 Member states deposited their instruments of ratification.⁵ The AfCFTA marks the start of a new era for mega-regional trade relations on the African continent and enhanced efforts at deepening trade and regional integration.⁶ Amongst other objectives, the AfCFTA aims to create a single market for goods and services, facilitate the movement of persons, remove Non-Tariff Barriers and tariff to trade and promote industrial development and inclusive socio-economic growth on the continent in order to boost intra-African trade.⁷ In addition, if fully implemented, the AfCFTA will unite all 55-member states of the AU covering a market of more than 1.3 billion people, including

¹ African Union 'The African Continental Free Trade Area' available at: <https://au.int/en/african-continental-free-trade-area> (accessed 2 March 2022).

² Lagos plan of Action for the Economic Development of Africa available at: <https://www.nepad.org/publication/lagos-plan-of-action> (accessed 2 March 2021).

³ African Union 'The African Continental Free Trade Area' available at: <https://au.int/en/african-continental-free-trade-area> (accessed 2 March 2022).

⁴ African Union 'Flagship projects of Agenda 2063' available at: <https://au.int/en/agenda2063/flagship-projects> (accessed 2 March 2022).

⁵ The number of ratifications as of August 2023 is 47 countries. (see African Continental Free Trade Area, legal text and Policy documents available at: <https://www.tralac.org/resources/by-region/cfta.html> (accessed 2 October 2023)).

⁶ Tralac 'African Continental Free Trade Area, legal text and Policy documents' available at: <https://www.tralac.org/resources/by-region/cfta.html> (accessed 2 March 2022)

⁷ Article 3 of the AfCFTA Agreement.

a growing middle class, and a combined Gross Domestic Product (GDP) of more than US\$3.4 trillion⁸. In terms of numbers of participating countries, the AfCFTA will be the largest free trade area in the world since the formation of the World Trade Organisation (WTO).⁹

While the AfCFTA promises to boost intra-African trade as whole, which is around 18% in terms of official statistics,¹⁰ little attention has been paid to the impact it will have on the Informal Cross Border Trade (ICBT), which constitutes a significant part of most African markets.¹¹

ICBT often referred as small cross border trade is a significant aspect of the African economy and the labour market.¹² As such, It holds fundamental social and economic development implications across the continent, countless informal cross border traders daily to sell goods or services in a neighbouring country, this kind of trade accounts for almost half of all intra-African trade.¹³ Though it is difficult to capture the exact data of ICBT of goods and services undertaken by informal traders, according to some estimates, ICBT contributes to the income of about 43 percent of Africa's entire population.¹⁴ In terms of intra-regional trade, the ratio of ICBT for regional trade as a whole is around 30-40 percent of total intra-regional trade in the Southern African Development Community (SADC) region and 40 percent in the Common Market for Eastern and Southern Africa (COMESA) region.¹⁵

⁸ African Union 'African integration day' available at: <https://au.int/en/newsevents/20230707/african-integration-day-2023> (accessed 10 July 2023).

⁹ African Union 'African integration day' available at: <https://au.int/en/newsevents/20230707/african-integration-day-2023> (accessed 10 July 2023).

¹⁰ World Economic Forum 'Growing Intra-Africa trade through digital transformation of customs and borders' available at: <https://www.weforum.org/reports/growing-intra-africa-trade-through-digital-transformation-of-customs-and-borders/> (accessed 4 March 2022).

¹¹ Sommer L & Nshimbi C 'The African Continental Free Trade Area: an opportunity for informal cross-border trade' (2018) *Bridges Africa*, 7(4), 7.

¹² Dushime A 'The role of the AfCFTA in improving informal cross border trade' available at: <https://futureafricaforum.org/the-role-of-the-afcfta-in-improving-informal-cross-border-trade-in-africa-2/> (accessed 30 September 2021).

¹³ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 1.

¹⁴ Lesser C & Moisé-Leeman E 'Informal cross-border trade and trade facilitation reform in Sub-Saharan Africa' (2009) *OECD Trade Policy Papers*, No 86, 5.

¹⁵ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 4.

In addition, several studies done in the sector indicate that for specific products and countries, the value of informal trade may equal or surpass the value of formal trade.¹⁶ For instance, data for Rwanda estimates that ICBT to its four neighbours Democratic Republic of Congo (DRC), Kenya, Tanzania and Burundi, is estimated to be around 59% of total exports to these countries, while formal imports total to a much lower figure just 4% of the total.¹⁷ In Uganda, about 60 percent of exports to the DRC in 2019 were informal.¹⁸

ICBT plays a key role in the absence of sufficient formal economic opportunities on the African continent.¹⁹ This means such trade supports livelihoods, creates employment and income and contributes towards food security in the region.²⁰ ICBT is practiced by a range of actors in Africa, including, formal business and informal business (unregistered individuals).²¹ This study will be focused on informal businesses, who often deal with smaller consignments of goods and the majority of them are women who constitute up to 70% in certain countries.²²

However, while this phenomenon is providing solutions to poor households, the trade facilitation needs of ICBT or like many other informal economy workers are often not adequately accounted for in the formation of trade policy by governments of the region as well as regional organisations across the continent.²³ As a result, informal cross

¹⁶ Afreximbank 'African Trade Report 2020 Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 4 March 2022).

¹⁷ Stuart J 'Informal cross border trade in Africa in a time of a pandemic' available at: <https://www.tralac.org/blog/article/14487-informal-cross-border-trade-in-africa-in-a-time-of-pandemic.html> (accessed 4 March 2022).

¹⁸ Afreximbank, African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA available at <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 4 March 2022).

¹⁹ Sommer L & Nshimbi C 'The African Continental Free Trade Area: an opportunity for informal cross-border trade' (2018) *Bridges Africa*, 7(4), 7.

²⁰ Chaza L 'Women without borders, what the AfCFTA can do for Botswana's Informal cross border traders', available at <https://www.africaportal.org/features/women-without-borders-what-the-afcta-can-do-for-botswanas-informal-cross-border-traders/> (accessed 4 March 2022).

²¹ Stuart J 'Informal cross border trade in Africa in a time of a pandemic' available at: <https://www.tralac.org/blog/article/14487-informal-cross-border-trade-in-africa-in-a-time-of-pandemic.html> (accessed 4 March 2022).

²² Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations.' (2012) *Africa Economic Brief*, 3(10), 1.

²³ African union 'A study on the opportunities in the AfCFTA for women in the informal cross border trade' available at: <https://www.aprm-au.org/wp-content/uploads/2022/03/ENG-AfCFTA-study-on-Women-in-ICBT.pdf> (accessed 4 October 2022).

border traders face several challenges when conducting business. These include, among others, limited access to finance, inadequate border facilities and infrastructures, high taxes, limited access to information, corruption, harassment and violence.²⁴

These challenges grossly disadvantage ICBTs and hinder their full participation in trade across the continent. Thus, this study seeks to assess how the implications of the AfCFTA could be the solution for ICBT to play a key role in increasing intra-African trade.

1.2 Problem Statement

Despite being a source of income for many in Africa, the sad reality is that ICBT has been marginalised since it is regarded as illegal commercialisation of cross-border activities.²⁵

Although there are numerous initiatives on the promotion of trade facilitation existing in different Regional Economic Communities (RECs)²⁶ in Africa, yet, they have not gone far enough to eliminate challenges faced by ICBTs at the border posts on the continent.²⁷ For this study, two RECs namely SADC and East African Community (EAC) were selected as a case study for this mini thesis as they have the highest levels of intra-regional trade and ICBT represents an important aspect of the economy.²⁸ Some of the initiatives taken by both RECs, include Protocol on Trade,²⁹ Regional Indicative Strategic Development Plan (RISDP),³⁰ The Protocol on the

²⁴ Sommer L & Nshimbi C 'The African Continental Free Trade Area: an opportunity for informal cross-border trade' (2018) *Bridges Africa*, 7(4), 7.

²⁵ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations.' (2012) *Africa Economic Brief*, 3(10), 1.

²⁶ In this mini thesis, Regional Economic Communities (RECs) has been used to refer to eight of the Regional Trade Agreements in Africa.

²⁷ Chidede T 'Trade facilitation and the African Continental Free Trade Area' available at: <https://www.tralac.org/documents/events/tralac/2740-tralac-brief-trade-facilitation-and-the-african-continental-free-trade-area-> (accessed 4 March 2022).

²⁸ Abrego M, de Zamaroczy M, & Gursoy T et al. 'The African Continental free trade area: Potential economic impact and challenges.' International Monetary Fund. (2020) 10.

²⁹ Southern African Development Community (SADC) 'SADC Protocol on Trade' available at: <https://www.sadc.int/document/protocol-trade-1996-0> (accessed 4 March 2022).

³⁰ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://www.sadc.int/sites/default/files/2021-08/RISDP_2020-2030.pdf (accessed 4 March 2022).

Facilitation of Movement of Persons in the SADC region,³¹ the Simplified Trade Regimes (STRs)³² and One-Stop Border Post act (OSBP) in the EAC region.³³

It is important to note that although these protocols are relevant and important to the informal trade sector at the regional levels, they do not respond to ICBT needs effectively. In most cases the protocols are silent on how ICBTs or their associations can access the protocol in terms of being within the ambit of its provisions or whether they are considered as relevant actors in regional trade.³⁴ As a result, ICBTs are exposed to several challenges as mentioned above.

Therefore, there is work to be done at the policy level to ensure that if well-regulated ICBT is a major tool in increasing intra-African trade which remained low at 18 percent compared to the levels of intra-regional trade in other regions such as the North America 40 percent, Asia 59 percent and 68 percent in Europe.³⁵

For this reason, with the arrival of the AfCFTA whose main objective is to boost intra-African trade, this mini thesis reflects on how the AfCFTA Agreement and its accompanying instruments, Protocols and Annexes, ought to benefit ICBT, including how the agreement has the potential to address all barriers that militate against ICBTs participation in the trade sector.

1.3 Research Question

Following the challenges faced by ICBTs stated above, this mini thesis will be guided by this research question: what trade measures have been taken by the AfCFTA and how the AfCFTA can help to regulate ICBT to increase intra-African trade?

³¹ SADC 'Protocol on Facilitation of Movement of Persons' available at: <https://www.sadc.int/document/protocol-facilitation-movement-persons-2005> (accessed 4 March 2022).

³² United States Agency for International Development (USAID) 'East African Community (EAC) Simplified Certificate of Origin' available: https://pdf.usaid.gov/pdf_docs/PA00JZ3R.pdf (accessed 4 March 2022).

³³ EAC 'East African Community One Stop Border Posts Act, 2016' available at: <https://www.eala.org/documents/view/the-east-african-community-one-stop-border-posts-act-2016> (accessed 2022).

³⁴ Fundira T 'Informal cross border trading, review of the simplified trade regimes in east and southern Africa.' Tralac trade brief available: <https://www.tralac.org/documents/publications/trade-briefs/2018-1/1816-us18tb032018-fundira-informal-cross-border-trading-review-of-simplified-trade-regimes-esa-08032018-fin/file.html> (accessed 4 March 2022).

³⁵ UNCTAD 'UNCTAD Handbook of statistics' available at: https://unctad.org/system/files/official-document/tdstat47_FS02_en.pdf (accessed 13 September 2023).

1.4 Research objectives

This study aims to highlight the relevance of ICBT to the African economy and analyse how the AfCFTA can benefit them in order to improve intra-African trade. The study has the following additional objectives.

- To establish the WTO rules and principles on the formation of Regional Trade Agreements such as the AfCFTA.
- To examine trade policies existing particularly in the two selected regions, SADC and EAC regions and analyse to what extent they are being implemented to strengthen the ICBT sector.
- To discuss the concrete challenges faced by the ICBT.
- To discuss the similarities between the WTO Trade Facilitation Agreement and the AfCFTA for the benefit of ICBT.
- To provide recommendations on what should be included in the next AfCFTA phase of negotiations to better integrated ICBT into intra-African trade framework.

1.5 Significance of the Study

The findings of the research are useful not only in assisting informal traders and all the stakeholders, but also provides useful information to other policy makers at country, regional and continental levels to consider full implementation of AfCFTA to all their border posts to facilitate ICBT in order to promote intra-African trade.

1.6 Research Methodology

The study adopts a desktop research methodology involving a qualitative review of relevant materials available from various sources including library research and internet sources that support the regularisation of the ICBT. Primary sources will include international agreements such as the AfCFTA Agreement and relevant protocols and annexes, the WTO Trade Facilitation Agreement (TFA). Secondary resources such as journal articles, reports, theses, textbooks, working papers and newspaper articles.

1.7 Chapter Outline

The study is divided into five chapters.

Chapter One:

This chapter contains the study's background, problem statement, research questions, significance of the study, research methodology and chapter outline.

Chapter Two:

This chapter first provides an overview of the WTO rules on regional trade agreements. Thereafter, the chapter examines the AfCFTA, the background of its establishment, its objectives and the potential benefits and challenges that may hinder the full implementation of the AfCFTA.

Chapter Three.

This chapter provides an overview of ICBT by outlining its definition, the goods traded, the motives and the challenges faced by ICBTs for a better understanding of the trade environment of ICBT. It also discusses the policy instruments and protocols relevant to ICBT, particularly in the two selected regions namely the SADC and the EAC.

Chapter Four.

This chapter discusses the significance of ICBT to the economy. Then it examines the implications of the AfCFTA alongside complementary measures such as the WTO TFA in regulating trade for the benefit of the ICBTs.

Chapter Five.

This chapter contains a summary of conclusions from the whole study and makes recommendations on what should be included in the next coming AfCFTA phase of negotiations to better integrated ICBT into intra-African trade framework.

CHAPTER 2

THE AFRICAN CONTINENTAL FREE TRADE AREA IN TERMS OF THE WORLD TRADE ORGANISATION

2.1 Introduction

Since the entry into force of the World Trade Organisation (WTO) Agreement in January 1995,³⁶ the idea of achieving regional integration through reduction and removal of tariff barriers and Non-Tariff Barriers (NTBs) on the mobility of goods, services, capital and factors of production between countries has always been on the agenda of most countries throughout the world.³⁷ Over the years, one of the ways of realising such an ambitious initiative has been through the establishment of trade groupings, also known as Regional Trade Agreements (RTAs).³⁸ As a result, there has been exponential growth in the number RTAs being negotiated within the WTO since its establishment.³⁹ As of August 2023, there are over 360 RTAs in force over the world.⁴⁰ Well-known examples of these RTAs are the North American Free Trade Agreement, the Southern Common Market Agreement and the Association of the Southeast Asian Nations Free Trade Area.⁴¹

Thus, in pursuit of her long-standing aspiration for deepening regional integration and improving intra-African trade, on 21 March 2018 in Kigali, the African Union (AU) introduced the African Continental Free Trade Area (AfCFTA) to create a single continental market for the free movement of goods and services within the African continent.⁴² Through the AfCFTA, the AU is committed to several objectives, such as to progressively eliminate tariffs as well as NTBs to facilitate trade within the continent

³⁶ The World Trade Organisation (WTO) 'What is the World Trade Organisation' available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm# (accessed 11 August 2023).

³⁷ Whalley J 'Why Do Countries Seek Regional Trade Agreements?' University of Chicago Press (2007) 71.

³⁸ The WTO defines an RTA as any reciprocal trade agreement involving two or more partners who need not belong in the same region, it can take the form of Free Trade Areas and Customs Unions.

³⁹ Owoeye O 'Regionalism and WTO multilateralism: The case for an African continental free trade area.' *Journal of World Trade*, 50(6), 1.

⁴⁰ The WTO 'Regional Trade Agreements' available at https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 11 August 2023).

⁴¹ Van den Bossche P & Zdouc W 'The Law and Policy of the World Trade Organisation: Text, Cases and Materials' 4 ed (2017) 672.

⁴² African Union 'The African Continental Free Trade Area' available at: <https://au.int/en/african-continental-free-trade-area> (accessed 11 November 2022).

for African traders and businesses.⁴³ It proposes to deal with the institutional environment at border crossings through enhanced trade facilitation,⁴⁴ it also proposes to simplify and harmonise trade procedures to process goods.⁴⁵

Before turning to an examination of the AfCFTA, which is our focus in this chapter, it is essential first to determine what WTO rules on RTAs entail, as most member states negotiating the AfCFTA are also member states of the WTO. Thus, the discussion in this chapter is structured as follows. First, the chapter considers the WTO, its establishment, objectives, the rules/principles and exceptions to these rules. Secondly, the chapter discusses the AfCFTA, it provides the historical background to the establishment of the AfCFTA, its institutional structure, objectives, the potential benefits and potential challenges that may hinder the full implementation of the AfCFTA.

2.2 The establishment of the World Trade Organisation

As noted above, the WTO began life on 1 January 1995.⁴⁶ However, it is important to note that the trading system that it administers is half a century older.⁴⁷ Since 1947, the international trade was governed by the General Agreement on Tariffs and Trade (GATT 1947).⁴⁸ GATT was signed by 23 founding member states and took effect on 1 January 1948.⁴⁹ It was enacted as an attempt to reduce the number of tariffs and trade barriers and to foster international trade in the years after the World War II.⁵⁰

Following the signing of the GATT, a series of global trade negotiations were performed in rounds to achieve its objective.⁵¹ Between 1947 and 1994, a total of eight multilateral negotiations were held, comprising four conferences and four multilateral

⁴³ Article 3 of the AfCFTA.

⁴⁴ Annex 4 of the AfCFTA.

⁴⁵ Annex 4 of Article 2 of the AfCFTA.

⁴⁶ The WTO 'What is the World Trade Organisation' available at:

https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 12 June 2022).

⁴⁷ The WTO 'Understanding the WTO 5ed (2011) Geneva: World Trade Organisation' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (accessed 12 June 2022).

⁴⁸ The WTO 'the history of the multilateral trading system' available at:

https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed 12 June 2022).

⁴⁹ The WTO 'the history of the multilateral trading system' available at:

https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed 12 June 2022).

⁵⁰ Agreement establishing GATT 1947.

⁵¹ The WTO 'General Agreement on Tariffs and Trade (GATT) bilateral negotiating material by Round' available at: https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (accessed 12 June 2022).

trade negotiations.⁵² These were as follows: 1947 Geneva Conference, 1949 Annecy round, 1956 Geneva Round, 1960-1961 Dillon Round, 1961-1967 the Kennedy Round, 1973-1979 the Tokyo Round, and the last and largest GATT round, was the Uruguay Round, which lasted from 1986 to 1994 and led to the WTO's creation.⁵³ Hence, the establishment of the WTO has been a harbinger of a great transformation for the world economy.⁵⁴ As of August 2023, the WTO had 164 members.⁵⁵

The WTO is an international institution that aims to supervise and liberalise international trade and primarily deals with the regulation of trade between nations.⁵⁶ It provides a platform where member states meet in an attempt to negotiate and formalise trade agreements, and to solve trade related issues they encounter with each other through the Dispute Settlement Body.⁵⁷ The WTO comprises of the agreements negotiated and signed by most of the countries acceding to international trade and approved by the governments of these countries.⁵⁸

The agreement establishing the WTO consists of four annexes as follows: the multilateral agreements on goods (annex 1), understanding on rules and procedures governing the settlement of disputes (annex 2), trade policy review and mechanism (annex 3), and plurilateral trade agreements (annex 4).⁵⁹ As it can be understood from the annexes in question, the WTO assumed a broader role in global trade. The WTO administers the dispute settlement system for its members.⁶⁰ It manages the trade agreement that forms the foundation of the organisation, signed by member states. It reviews the national trade policies of the member countries.⁶¹ In addition, the WTO

⁵² The WTO 'GATT bilateral negotiating material by Round' available at: https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (accessed 12 June 2022).

⁵³ The WTO 'GATT bilateral negotiating material by Round' available at: https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (accessed 12 June 2022).

⁵⁴ The WTO available at: https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 12 June 2022).

⁵⁵ The WTO available at: https://www.wto.org/english/res_e/booksp_e/sli_e/4wtomembers.pdf (accessed 12 August 2023).

⁵⁶ The WTO 'Understanding the WTO' available at: https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 12 June 2022).

⁵⁷ The WTO 'Understanding the WTO 5ed (2011) Geneva: World Trade Organisation' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (accessed 12 June 2022).

⁵⁸ The WTO 'WTO in brief' available at: https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf (accessed 12 June 2022)

⁵⁹ The WTO available at: https://www.wto.org/english/res_e/booksp_e/agrmntseries1_wto_e.pdf (accessed 12 June 2022).

⁶⁰ Article 3 agreement establishing the WTO.

⁶¹ Article 3 agreement establishing the WTO.

undertakes the functions of providing technical cooperation and training to developing countries when necessary.⁶² While performing all these functions, the WTO carries out its objectives, which are outlined in the following section.

2.3 The objectives of the World Trade Organisation

The WTO objectives are set out in the preamble to the WTO Agreement.⁶³ According to the preamble, the parties to the WTO Agreement agreed to the terms of this agreement and the establishment of the WTO in the following basis.

'Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...

Recognising further that there is need for positive efforts designed to ensure that developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.'⁶⁴

When the preamble is analysed the ultimate objectives of WTO are:

1. To increase the standard of living;
2. The attainment of full employment;
3. To grow real income and effective demand; and
4. To expand the production of and trade in goods and services.

However, it is clear from the preamble that in pursuing these objectives the WTO must take into account the need for preservation of the environment and the needs of developing countries. The Preamble emphasises the significance of sustainable

⁶² Article 3 agreement establishing the WTO.

⁶³ Van den Bossche P & Zdouc W (2017) 89.

⁶⁴ Van den Bossche P & Zdouc W (2017) 86.

economic development and of the integration of developing countries, and in particular least-developed countries, in the world trading system.⁶⁵

Having discussed the establishment and objectives of the WTO above. The next section discusses the most pertinent rules/principles of the WTO.

2.4 The rules and principles of the World Trade Organisation

The law of the WTO addresses a broad spectrum of issues ranging from tariffs, import quotas and customs formalities to intellectual property rights, food safety regulations, and national security measures.⁶⁶ There are five groups of basic rules, which can be distinguished as follows: First, rules of non-discrimination; secondly, rules on market access; thirdly, rules on unfair trade; fourthly, the rules on conflicts between trade liberalisation and other societal values and interests; and finally, institutional and procedural rules, including those relating to WTO decision-making, trade policy review and dispute settlement.⁶⁷ For the purpose of this mini thesis it is important to highlight that only the rules related to non-discrimination and its exceptions are subject to discussion as they relate to RTA of which the AfCFTA is an example.

2.4.1 The rules of non-discrimination

Under the WTO conceptual framework, one of the core touchstones of the WTO's system is the principle of non-discrimination, which is enforced by two tools: the Most Favoured-Nation treatment (MFN) Article I of the GATT 1994 and the National Treatment (NT) Article III of the GATT 1994.⁶⁸

2.4.1.1 The Most Favoured Nation Treatment obligation: Treating trading parties equally

The MFN principle is based on non-discrimination between WTO members and their products.⁶⁹ It is regarded as a bedrock principle of WTO.⁷⁰ With this principle, the WTO is promising to all of its members to be treated fairly and without any kind of

⁶⁵ Van den Bossche P & Zdouc W (2017) 86.

⁶⁶ Van den Bossche P & Zdouc W (2017) 38.

⁶⁷ Van den Bossche P & Zdouc W (2017) 38.

⁶⁸ Van den Bossche P & Zdouc W (2017) 39.

⁶⁹ GATT Article I: 1

⁷⁰ Most-favoured-nation treatment principle available at:

<https://www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf> (accessed 11 June 2022).

discrimination among the other members in the matter of trading with each other.⁷¹ It further guarantees that if any kind of support is given to a country in terms of doing that country a favour, then all the other member countries of WTO will have the same level of support by the WTO.⁷²

2.4.1.2 National Treatment obligation: Treating foreigner and local goods equally

Under the NT obligation, imported and locally produced goods should be treated equally at least after the foreign goods have entered the market.⁷³ With this principle, members must not accord discriminatory treatment between imports and 'like' domestic products.⁷⁴

NT only applies once a product, service or item of intellectual property has entered the domestic market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally produced products are not charged an equivalent tax.⁷⁵

Although the above principle is strict and highly important for the vision and mission of the WTO, however, there are some exceptions provided for by Article XXIV of the GATT 1994.

2.4.2 The existing forms of exceptions

As noted earlier, the MFN principle normally requires members not to discriminate among imported products from other members and the NT principle requires members not to discriminate against imported products within the domestic market. However, GATT 1994 exempts some measures from being considered WTO violations if they comply with certain conditions.⁷⁶ Therefore, there are several exceptions in the WTO trading system, two of which include:

⁷¹ GATT 1994 Article I:1.

⁷² GATT 1994 Article I:1.

⁷³ The WTO 'Understanding the WTO' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (accessed 11 June 2021).

⁷⁴ Article III of the GATT 1994.

⁷⁵ The WTO 'Understanding the WTO' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (accessed 11 June 2021).

⁷⁶ GATT Article XXIV.

- Exceptions for RTAs GATT Article XXIV, the right to depart from the MFN principle in order to grant preferential treatment to goods.
- The Enabling Clause, the 1979 GATT decision on Differential and more favourable treatment, reciprocity and fuller participation of developing countries, commonly known as the 'Enabling Clause'.⁷⁷

The next section analyses the two exceptions mentioned above. It commences with the GATT Article XXIV, and then the Enabling Clause will be highlighted.

2.4.2.1 . Regional Trade Agreement (Article XXIV)

In order to strengthen economic relations between two or more countries, RTAs are permitted for Customs Unions (CUs) or Free Trade Areas (FTAs) under certain conditions.⁷⁸ These agreements liberalise trade among countries within the regions while maintaining trade barriers with countries outside the region or regions. They may also lead to results that are contrary to the MFN principle because countries inside and outside the region are treated differently.⁷⁹ Thus, countries outside the region could be disadvantaged. However, completely prohibiting such agreements is considered too severe, and GATT allows them under strict conditions.⁸⁰

GATT Article XXIV provides that RTA may be permitted as an exception to the MFN principle if the following conditions are met:

1. The party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation that fully meets the requirements of sub-paragraphs 8(a) and 5 (a) of Article XXIV.
2. That party must demonstrate that the formation of that CUs would be prevented if it were not allowed to introduce the measure at issue.⁸¹

⁷⁷ The WTO 'Enabling Clause' available at:

https://www.wto.org/english/tratop_e/dispu_e/repertory_e/e1_e.htm (accessed 11 June 2021)

⁷⁸ GATT 1994 Article XXIV:4.

⁷⁹ Most-favoured-nation treatment principle available at

<https://www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf> (accessed 20 June 2021).

⁸⁰ Most-favoured-nation treatment principle' available at

<https://www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf> (accessed 20 June 2021).

⁸¹ GATT Article XXIV.

The exceptions in Article XXIV of GATT apply to CUs and FTAs, as defined in Article XXIV:8 (a) and (b) respectively. This section discusses these conditions, first, with regard to a measure adopted in the context of a CU, secondly, with regard to a measure adopted in the context of FTA.

1. Customs union

In light of Article XXIV:8(a) of the GATT 1994, a CU is defined as the substitution of a single customs territory for two or more customs territories, so that almost all restrictions are eliminated with respect to substantially all trade between the parties, and the parties apply substantially the same restrictions to the trade of other countries.⁸²

In essence, Article XXIV: 8(a) establishes certain conditions with which an agreement must comply in order to fall within the definition of a customs union. For customs unions.

- 'i. Duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
- ii. substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.'

The next section looks at the requirements of Articles XXIV:8 (b).

2. Free Trade Area

FTA is a group of two or more customs territories in which almost all restrictions are eliminated with respect to substantially all internal trade.⁸³

For FTA, the corresponding requirements is contained in Article XXIV: 8 (b):

- 'A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are

⁸² GATT 1994 Article XXIV:8(a).

⁸³ GATT 1994 Article XXIV:8(b).

eliminated on substantially all the trade between the constituent territories in products originating in such territories.’

However, a FTA under Article XXIV, must not only meet the requirements of Article XXIV:8(b). It must also meet the requirement of Article XXIV:5(b):

‘With respect to a free-trade area ... the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area ... to the trade of [Members] not included in such area ... shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area.’

Finally, both CUs and FTAs, require the elimination of restrictions on substantially all the trade between the RTA parties; define the restrictions that must be eliminated as duties and other restrictive regulations of commerce; and expressly allow the maintenance of certain restrictions, where necessary namely those permitted under Articles XI, XII, XIII, XIV, XV, and XX’ of GATT 1994. Therefore, all WTO members must ensure that any RTAs to which it is a party complies with the conditions of the relevant WTO exception. Otherwise, the member risks acting inconsistently with its WTO obligations.

2.4.2.2 Enabling Clause for developing countries

Trading under preferential terms is also allowed under the Enabling Clause, which is implemented through the Generalised System of Preferences (GSP).⁸⁴ The GSP is a system that grants products originating in developing countries lower tariff rates than those normally enjoyed under MFN status and grants special measure to developing countries in order to increase their export earnings and to promote their development.⁸⁵

The policy justification behind this clause is the need for leeway as a means to enhance the economic development of least developed and as well as developing

⁸⁴ The WTO ‘Special and differential treatment provisions’ available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 30 June 2022).

⁸⁵ The WTO ‘Special and differential treatment provisions’ available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 30 June 2021).

countries and ultimately enhance trade liberalisation.⁸⁶ Therefore, the need to have different treatment for least developed countries is well recognised under paragraph two of the preamble of the establishment document of the WTO, which indicates that positive effort should be exerted to enable developing countries and least developed countries to secure fair share of participation in international trade.⁸⁷

The Enabling Clause allows preferential arrangements among developing countries in derogation from the MFN treatment obligation of Article I of the GATT 1994.⁸⁸ The conditions that RTAs under the Enabling Clause must meet are less demanding and less specific than those set out in Article XXIV of the GATT 1994.⁸⁹

Paragraph 3 of the Enabling Clause sets out the following substantive conditions below:

Any differential and more favourable treatment provided under this clause:

1. Shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other members;
2. Shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
3. Shall in the case of such treatment accorded by developed-country members to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.⁹⁰

Generally, the type of preference given by developed countries to the developing countries under the Enabling Clause should be generalised, non-reciprocal and non-discriminatory in nature.⁹¹ However, the general trend shows that developed nations

⁸⁶ Tegegn Y. T 'AfCFTA Notification options to WTO: Enabling Clause or Article XXIV Exception' (2020) vol. 14 *Mizan Law Review* 14(2) 362.

⁸⁷ Tegegn Y. T 'AfCFTA Notification options to WTO: Enabling Clause or Article XXIV Exception' (2020) vol. 14 *Mizan Law Review* 14(2) 362.

⁸⁸ Van den Bossche (2017) 688.

⁸⁹ Van den Bossche (2017) 688.

⁹⁰ The WTO 'Differential and more favourable treatment reciprocity and fuller participation of developing countries' available at: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (accessed 30 June 2022)

⁹¹ Tegegn Y. T 'AfCFTA Notification options to WTO: Enabling Clause or Article XXIV Exception' (2020) vol. 14 *Mizan Law Review* 14(2) 362.

usually embody conditions with which developing countries should comply to benefit from preferential regime.⁹²

Besides the rules and exceptions of the WTO discussed above. The next section briefly highlights the relevance of the RTAs related to the establishment of the AfCFTA.

2.5 The relevance of Regional Trade Agreements

The RTAs have become in recent years a prominent feature of the multilateral trading system.⁹³ Today, nearly all countries now participate in at least one RTA, and as of August 2023 there were approximately 360 RTAs in force worldwide.⁹⁴ The key characteristic of RTAs is that the parties to such agreements offer each other more favourable treatment in trade matters than they offer other trading partners.⁹⁵

The WTO law recognises the advantages of economic integration and trade liberalisation even when these efforts involve only small number of WTO members.⁹⁶ At a regional level, it may be possible to achieve a degree of trade liberalisation, which may be out of reach at global level.⁹⁷ It has been argued that trade liberalisation will occur more quickly if it is pursued within regional trading blocs, and that trade liberalisation achieved at a regional level may serve as a stepping-stone for trade liberalisation at the multilateral level at a later time. Also, regional trade liberalisation may create significant economic growth within the region concerned, which can, in turn, generate more trade with the rest of the world.⁹⁸

In many RTAs, the agreement not only removes barriers to trade in goods and services but also factors of production. Labour and capital are free to flow to member countries.⁹⁹ In addition to cost advantages, trade liberalisation gives domestic firms access to bigger markets and the opportunity to benefit from economies of scale. Once

⁹²Tegegn Y. T 'AfCFTA Notification options to WTO: Enabling Clause or Article XXIV Exception' (2020) vol. 14 Mizan Law Review 14(2) 357-362.

⁹³ Fiorentino R V, Verdeja L & Toqueboeuf 'The changing landscape of regional trade agreements: 2006 update' No. 12 WTO discussion paper (2007) 1.

⁹⁴ The WTO 'Regional Trade Agreements' available at https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 11 August 2023).

⁹⁵ Van den Bossche (2017) 674.

⁹⁶ Van den Bossche (2017) 674.

⁹⁷ Van den Bossche (2017) 674.

⁹⁸ Van den Bossche (2017) 674.

⁹⁹ Regional Trade Agreements 'Regional Trade Agreements: meaning and types' available at: <https://penpoint.com/regional-trade-agreement/> (accessed 12 December 2021).

the small local market constraints are lifted, trade may not only allow firms to grow faster but also to have better access to finance and technology in the world economy.¹⁰⁰ Therefore, if the agreement is well designed, it can increase trade traffic, investment, promote economic growth, and social welfare.¹⁰¹

In Africa, the results reveal significant potential welfare gains from trade liberalisation.¹⁰² To date, out of several Regional Economic Communities (RECs) in Africa, the AU recognises eight RECs as building blocks of the African Economic Community (AEC).¹⁰³ Some examples of the RECs that excelled in terms of laying the groundwork for liberalising trade in goods and for customs administration include the East African Community (EAC) and Southern African Customs Union.¹⁰⁴ From this it can be observed that the member states of the AU, by creating the AfCFTA hope to boost intra-African trade, which is low compared to other developed regions.¹⁰⁵ Thus, the next section of this mini thesis discusses the AfCFTA.

2.6 The African Continental Free Trade Area

This section is structured as follows: the first part provides an overview of the historical background of the formation of the AfCFTA, the institutional structure and objectives of the AfCFTA. The second part assesses the potential benefits of the AfCFTA, followed by a discussion of possible challenges that the AfCFTA is likely to encounter for its full implementation.

¹⁰⁰ Saygili M, Peters R & Knebel C 'African continental free trade area: Challenges and opportunities of tariff reductions' (2018) United Nations Conference on Trade and Development No. 82 7.

¹⁰¹ Regional Trade Agreements 'Regional Trade Agreements: meaning and types' available at: <https://penpoin.com/regional-trade-agreement/> (accessed 12 December 2021).

¹⁰² Abrego M, Amado M, & GURSOY T et al. 'The African Continental Free Trade Agreement: welfare gains estimate from a general equilibrium model.' (2019) International Monetary Fund, 1.

¹⁰³ The AU recognises eight RECs namely: The Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC).

¹⁰⁴ Erasmus, G 'Is the African AfCFTA changing the gameplan for African Integration?' available at: <https://www.tralac.org/documents/publications/trade-reports/2023-tr/4867-s23tr012023-erasmus-is-the-afcfta-changing-the-gameplan-for-african-integration-28062023/file.html> (accessed 12 August 2023)

¹⁰⁵ See chapter 1.3.

2.6.1 The background of the formation of the African Continental Free Trade Agreement

While the new AfCFTA signals a significant shift in the international legal order, African continental integration is not a new proposition.¹⁰⁶ The initial ambition was reflected in the establishment of the Organisation of African Unity (OAU) in 1963.¹⁰⁷ Apart from the liberalisation efforts of colonisation, the OAU had at its heart the intra-African economic, thus the main objectives of OAU were to promote unity and solidarity among African States, to organise and strengthen cooperation for development on the continent.¹⁰⁸ In 1980, in pursuit of this objective, the OAU came up with comprehensive developmental strategy called the Lagos Action Plan, which emphasised the necessity to have independent economy and self-reliance that can eventually lead to the formation of the AEC.¹⁰⁹

Thus, as stated earlier, in 1991 the OAU heads of state meeting in Abuja adopted the treaty establishing the AEC commonly known as the Abuja Treaty. The treaty, which came into effect in 1994, sets out a plan towards an AEC, whereby the economies of the member states of the AU will be fully integrated and an AEC created.¹¹⁰ This was an important step in seeking to re-energise the integration agenda in Africa. It was agreed that the community shall be established gradually in six stages of variable duration not exceeding thirty-four years, from 1994 to 2028.¹¹¹ This move eventually involves developing FTA in each REC, followed by a continent-wide customs union with the removal of tariffs and quotas between members, the creation of a common external tariff, and finally to form a monetary union.¹¹² Unfortunately, these aims have not been achieved during that period. As a result, this put the continent on the

¹⁰⁶ Kuhlmann K & Agutu A 'The African continental free trade area: toward a new legal model for trade and development' (2020) *51 Geo J Int'l L* 755.

¹⁰⁷ Organisation of African Unity was established in 1963 to promote self-government, respect for territorial boundaries and social progress throughout the African Continent.

¹⁰⁸ Article 2 of AOU charter.

¹⁰⁹ United Nations Economic Commission for Africa (UNECA) 'History of Africa's Regional integration' available at: <https://archive.uneca.org/oria/pages/history-africa%E2%80%99s-regional-integration-efforts> (accessed 12 December 2022).

¹¹⁰ African Union 'Treaty establishing the African Economic Community' available at: <https://au.int/sites/default/files/treaties> (accessed 20 November 2023).

¹¹¹ Article 6 of the Abuja treaty.

¹¹² Tralac 'The AfCFTA: Opportunities and challenges' available at: <https://www.tralac.org/documents/resources/cfta/3181-afcfta-opportunities-and-challenges-cuts-international-study-2019/file.html> (accessed 20 November 2022).

competing path of pursuing regional integration while also maintaining national sovereign identities.

In 2000, the OAU transitioned to African Union (AU) with the adoption of the Consecutive Act and was formally launched in Durban on 9 July 2002.¹¹³ Among its main objectives were the acceleration of the continent's political and socio-economic integration; the promotion of sustainable development, and the integration of African economies.¹¹⁴ In 2012, following up on the Constitutive Act of the AU, the heads of states of the AU endorsed the action plan on Boosting Intra-African Trade and adopted a decision to fast-track a Continental Free Trade Area (CFTA) by indicative date of 2017.¹¹⁵ In January 2015, the AU launched its 50 years' vision & action plan 'Agenda 2063: The Africa We Want', which contains seven aspirations on several topics with regards to development, and CFTA is one of the flagship projects of the First Ten Year Implementation Plan under the AU's Agenda 2063.¹¹⁶ Following that, on the 15th of June 2015, in Johannesburg, South Africa, the AU Heads of States launched the negotiations towards a CFTA and the negotiations began in earnest in early 2016 at the level of technical working groups, senior officials and ministers.¹¹⁷ The negotiations on CFTA Agreement were finalised and drafted by African Ministers of trade in December 2017.¹¹⁸

In January 2018, the name African Continental Free Trade Area was adopted by the AU. The Agreement establishing the AfCFTA was signed on 21 March 2018 in Kigali, along with the Kigali Declaration and Protocol to the Treaty establishing the African Economic Community relating to the free movement of persons. AfCFTA Agreement

¹¹³ African Union 'about the African Union' available at: <https://au.int/en/overview> (accessed 20 November 2022).

¹¹⁴ Article 3 of the Consecutive Act of the AU.

¹¹⁵ Africa Union 'Decision, Resolutions and Declarations of the 18th Session of the African Union' available at: <https://au.int/en/decisions-21> (accessed 20 November 2022).

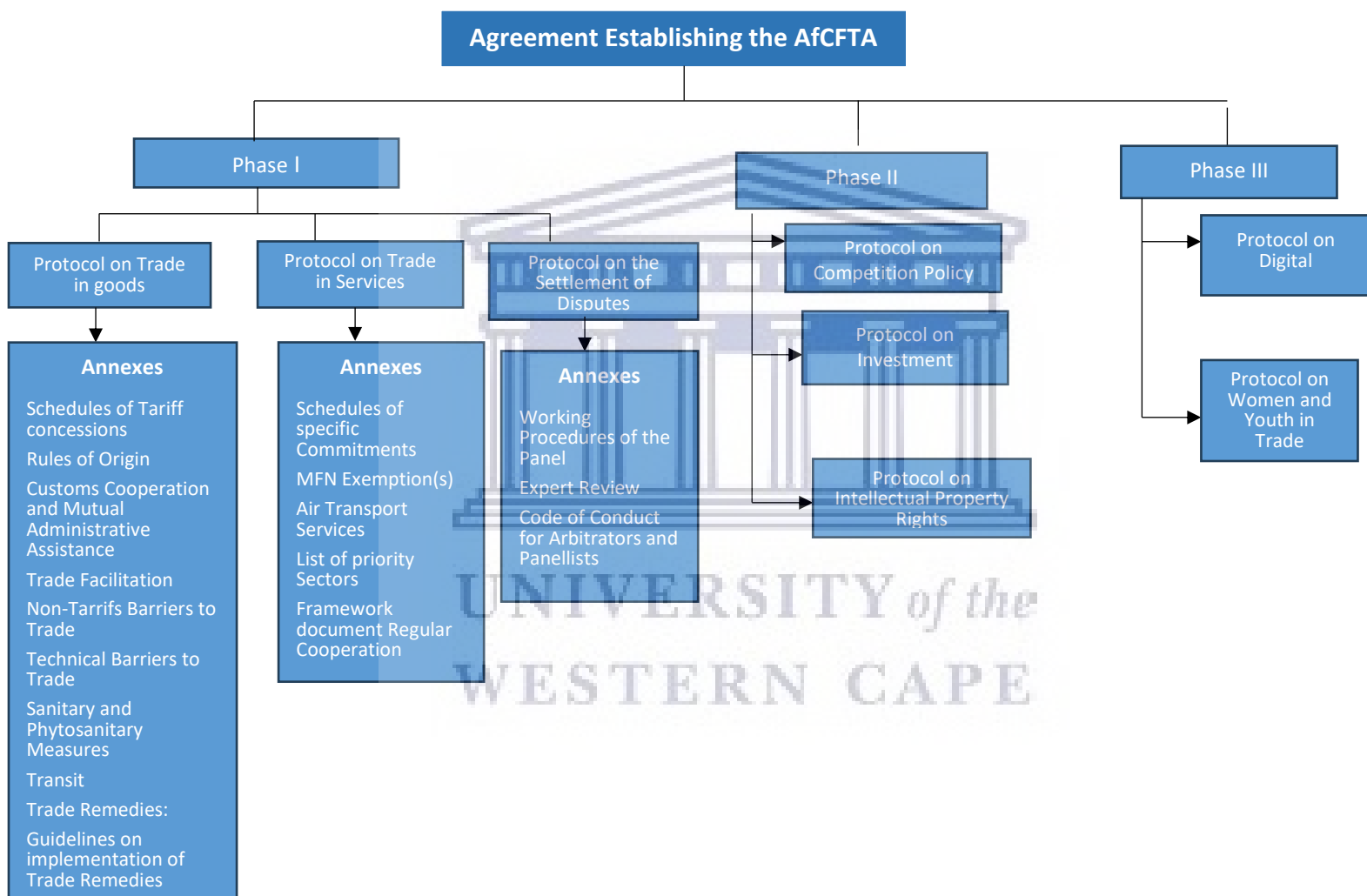
¹¹⁶ Africa Union 'Agenda 2063: The Africa we want' available at: <https://au.int/en/agenda2063/overview> (accessed 20 November 2022).

¹¹⁷ Tralac 'African Continental Free Trade Area legal texts and policy document' available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 20 November 2022).

¹¹⁸ Tralac 'African Continental Free Trade Area legal texts and policy document' available at <https://www.tralac.org/resources/by-region/cfta.html> (accessed 20 November 2022).

was signed by all African countries except Eritrea.¹¹⁹ The Agreement entered into force on 30 May 2019 after achieving the minimum number of ratifications, as specified in Article 23 of the Agreement.¹²⁰ The AfCFTA Agreement is the founding agreement of the AfCFTA and provides for Protocols on Trade in Goods, Trade in Services, Investments (together with their Annexes), Intellectual Property Rights, and Competition Policy. The AfCFTA negotiations take place in phases. Figure 2.6.1 below depicts the architecture of the AfCFTA protocols and annexes.

Figure 2.6.1: The AfCFTA protocols and annexes.¹²¹



¹¹⁹ Tralac 'Status of the AfCFTA ratification' available at: <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 20 August 2023).

¹²⁰ Article 23 of the AfCFTA Agreement specifies that the Agreement would enter into force 30 days after the deposit of the 22nd instrument of ratification.

¹²¹ Tralac 'African Continental Free Trade Area, frequently asked questions' available at: <https://www.tralac.org/documents/resources/faqs/4621-updated-tralac-afcfta-faqs/file.html> (accessed 10 October 2023).

From Figure 2.6.1, Phase I is organised around three protocols, Protocol on Trade in Goods, Protocol on Trade in Services and Protocol on the Dispute Settlement, which have been concluded.¹²² Phase II includes investment, competition policy, and intellectual property rights. These Draft Protocols have been adopted by the AU Assembly. Lastly, phase III will cover additional topics such as e-commerce (digital trade) and women and youth in trade. For purposes of this study, the discussion will focus on the Protocol on Trade in Goods and its annexes as it is relevant to this mini thesis topic because they aim to create a liberalised market for trade in Goods.

As of August 2023, about 47 of the 55 African Union member countries have deposited their instruments of AfCFTA ratification.¹²³ As stated in chapter 1, this makes the AfCFTA the biggest RTA in the world as it connects 1.3 billion people with a combined GDP valued at \$3.4 trillion.¹²⁴ Trading under the AfCFTA formally began on first January 2021, after a sixth month delay as a result of the impact of Covid-19.¹²⁵

2.6.2 Institutional structure of the African Continental Free Trade Area

The AfCFTA establishes an institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the continental free trade area. This is detailed in part III, Article 9 of the agreement; it includes the assembly, the council of ministers, the committee of senior trade officials and the secretariat, which are discussed below.

The assembly of heads of state and government, is the highest decision-making organ of the AfCFTA, is in charge of supervising and providing strategic guidance to the AfCFTA, including the action plan for Boosting Intra-African trade.¹²⁶ The assembly is

¹²² Tralac 'African Continental Free Trade Area Legal texts and policy documents' available at: <https://www.tralac.org/resources/by-region/cfta.html> (accessed 20 August 2023).

¹²³ Tralac 'Status of AfCFTA ratification' available at: <https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html> (accessed 30 November 2023).

¹²⁴ African Union 'African integration day' available at: <https://au.int/en/newsevents/20230707/african-integration-day-2023> (accessed 30 November 2023).

¹²⁵ Tralac 'Status of African Continental Free Trade Area ratification' available at: <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 12 October 2023).

¹²⁶ Article 10 of the AfCFTA.

responsible for establishing the council of African ministers responsible for Trade, and for also adopting interpretation of the AfCFTA recommended by the council.¹²⁷

The council of ministers, which is comprised of relevant ministers of the state parties responsible for trade, is responsible for the implementation and enforcement of the agreement.¹²⁸ Implementation and enforcement powers provided for are through delegating responsibilities to committees, working groups and/or expert groups, making regulations, issuing directives, taking decisions, and making recommendations in line with the provisions of this Agreement.¹²⁹ The council of ministers meets twice a year in ordinary session and may meet as and when necessary, in extraordinary sessions.¹³⁰

The committee of senior trade officials which, like the council of ministers, must also meet at least twice a year, consists of permanent or principal secretaries of the AfCFTA who implements council decision, request investigations, and directs the secretariat to undertake assignments. It promotes the harmonisation of policies, considers reports, takes actions as required, and establishes committees.¹³¹

Finally, The AfCFTA also establishes a Secretariat, which is an autonomous independent body.¹³² The Secretariat is responsible for convening meetings, monitoring and evaluating the implementation process and other duties assigned to it by the committee of senior officials, council of ministers, and the assembly.¹³³ Since 2020, the Secretariat is based in Accra and it is the only permanent institution.¹³⁴

Therefore, it is important to note that the decision-making process (Article 14) of the AfCFTA institutions on substantive issues is consensual, meaning that negotiators shall find an agreement that satisfies the positions and interests of all parties.¹³⁵ This

¹²⁷ Article 10 of the AfCFTA.

¹²⁸ Article 11 of the AfCFTA.

¹²⁹ Article 11 of the AfCFTA.

¹³⁰ Article 11 of the AfCFTA.

¹³¹ Article 12 of the AfCFTA.

¹³² Article 13 (3) of the AfCFTA.

¹³³ African Union available at: <https://au.int/en/african-continental-free-trade-area> (accessed 30 August 2023).

¹³⁴ African Union available at: <https://au.int/en/african-continental-free-trade-area> (accessed 30 August 2023).

¹³⁵ Tralac 'The institutions of the African Continental Free Trade Area' available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> (accessed 30 July 2022).

kind of process, even though it is the fairest, may lead to political stagnation by causing very long negotiation rounds. According to paragraph 2 of Article 4, in the event that no consensus is found, the committee of senior trade officials shall refer the matter to the council of ministers. In response, the council of ministers shall refer the matter to the assembly where consensus could not be reached.¹³⁶ Moreover, decisions regarding procedure shall be taken by a simple majority of State Parties who are eligible to vote.¹³⁷ At the same time, decisions on whether or not a question is related to procedure shall also be determined by a simple majority of State Parties who are eligible to vote. The abstention of a state party eligible to vote shall not prevent the adoption of decisions.¹³⁸ The next section examines the objectives of the AfCFTA.

2.6.3 Objectives of the African Continental Free Trade Area

The AfCFTA Agreement contains lofty objectives designed to enhance trade integration and promote the free flow of capital and investments. Article 3 of the AfCFTA Agreement identifies the general objectives as follows:

1. to create a single market for goods and services, facilitated by the movement of people to deepen the economic integration of the African continent, and in accordance with the pan-African vision of an integrated, prosperous and peaceful Africa enshrined in Agenda 2063;
2. to create a liberalised market for goods and services through successive rounds of negotiations;
3. to contribute to the movement of capital and people and facilitate investments building on the initiatives and developments in the state parties and regional economic communities (RECs);
4. to lay the foundation for the establishment of a continental customs union at a later stage;

¹³⁶ Tralac 'The institutions of the African Continental Free Trade Area' available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> (accessed 30 July 2022).

¹³⁷ The institutions of the African Continental Free Trade Area' available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> (accessed 30 July 2022).

¹³⁸ Tralac 'The institutions of the African Continental Free Trade Area' available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> (accessed 30 July 2022).

5. to promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the state parties;
6. to enhance the competitiveness of the economies of state parties within the continent and the global market;
7. to promote industrial development through diversification and regional value chains in agriculture and food security; and
8. to resolve the challenges of multiple and overlapping memberships, and expedite the regional and continental integration processes.¹³⁹

In addition, for the purpose of fulfilling and realising the objectives set out in Article 3. Article 4, identifies 7 specific objectives as stated below:

State parties shall:

1. progressively eliminate tariffs and non-tariff barriers to trade in goods;
2. progressively liberalise trade in services;
3. cooperate on investment, intellectual property rights and competition policy;
4. cooperate on all trade-related areas;
5. cooperate on customs matters and the implementation of trade facilitation measures;
6. establish a mechanism for the settlement of disputes concerning their rights and obligations; and
7. establish and maintain an institutional framework for the implementation and administration of the AfCFTA.¹⁴⁰

Articles 3 and 4 of the AfCFTA Agreement stated above, show that the AfCFTA is much more ambitious among several RECs created over the years;¹⁴¹ by creating a single for goods and services, the AfCFTA will contribute to the movement of capital and natural persons, promote and attain sustainable and inclusive socio-economic development for the African continent. This is expected to enhance trade opportunities and thus improve the overall living standards of societies. Especially for vulnerable

¹³⁹ Article 3 of the AfCFTA.

¹⁴⁰ Article 4 of the AfCFTA.

¹⁴¹ Abrego M, de Zamacrozy T, & M, Gursoy et al. 'The African continental free trade area: potential economic impact and challenges' *International Monetary Fund* (2020) 7.

people in ICBT, such as women and youth. This leads us to the next subsection dealing with the potential benefits of the AfCFTA.

2.6.4 Assessing the potential benefits of the African Continental Free Trade Area

Trade integration in Africa has long been seen by African policymakers as a mechanism for fostering prosperity.¹⁴² As aforementioned, several trade and regional economic integration groups have been established over the years. The AfCFTA is the most ambitious initiative in this vein. If fully implemented, the AfCFTA offers an invaluable opportunity to realise the continent's economic promise. The United Nations Economic Commission for Africa (UNECA) projects that the implementation of the AfCFTA will increase intra-Africa trade by 52.3 percent as the agreement is expected to eliminate tariffs on 90 percent of goods over 5 years for non-list-Least developed countries and 10 years for least developed countries, with future possibility of scrapping tariffs on 10 percent of sensitive goods.¹⁴³

According to World Bank report, AfCFTA would significantly boost African trade, particularly intra-regional trade in manufacturing.¹⁴⁴ By 2035, the volume of total exports would increase by over 29 percent relative to business as usual. Intra-continental exports would increase by more than 81 percent, while exports to non-African countries would rise by 19 percent.¹⁴⁵ The Bank predicts that full implementation of the agreement could contribute to lifting an additional 30m people from extreme poverty and 68m people from moderate poverty.¹⁴⁶ In West Africa, the

¹⁴² Abrego M, de Zamacrozy T, & M, Gursoy et al. 'The African continental free trade area: potential economic impact and challenges' *International Monetary Fund* (2020) 7.

¹⁴³ UNECA 'The AfCFTA: towards the finalisation of modalities on goods' available <https://hdl.handle.net/10855/24379> (accessed 20 July 2022)

¹⁴⁴ World Bank 'African Continental Free Trade Area, economic and distributional effects' <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content> (accessed 20 July 2022)

¹⁴⁵ World Bank 'African Continental Free Trade Area, economic and distributional effects' available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf> (accessed 20 July 2022)

¹⁴⁶ World Bank 'African Continental Free Trade Area, economic and distributional effects' available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf> (accessed 20 July 2022).

poverty headcount would decline by 12 million people, while the decline for Central and East Africa would be 9.3 million and 4.8 million, respectively.¹⁴⁷

In addition to numerous benefits of the AfCFTA mentioned above, this mini thesis highlights that in light of the huge potential of the AfCFTA for Africa continent, there is no doubt that the agreement would play a significant role in boosting trade in the informal sector, including Informal Cross Border Trade (ICBT). ICBT, which is discussed in detail in chapters 3 and 4, employs the majority of Africans but often neglected by governments of the region and regional policies. Therefore, the agreement establishing the AfCFTA recognises the need to improve the export capacity of both formal and informal sector.¹⁴⁸ In addition, it contains multiple commitments on customs cooperation and mutual administrative assistance, trade facilitation, non-tariff barriers and tariff reduction. These commitments have the possibility to reduce, if not eliminate, unnecessary barriers to trade for ICBTs benefits. In this sense, the AfCFTA is a powerful tool to regulate ICBT sector for the purpose of increasing the intra-African trade.

However, there are also several challenges in achieving the objectives of the AfCFTA, which are discussed below.

2.6.5 Potential challenges

Despite the optimism of the AfCFTA, indeed, the continent is facing a number of trade-related challenges today.¹⁴⁹ In order to reap the full potential benefits of the AfCFTA, member countries must address the persistent issues that have troubled RECs. In this mini thesis, among others, the work ahead should include the following key issues which are important in regional integration in Africa: Disparity between the agreement and their effective implementation and infrastructures.

¹⁴⁷ World Bank 'African Continental Free Trade Area, economic and distributional effects' available at: <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content> (accessed 20 July 2022).

¹⁴⁸ Article 27(2) (d) of the AfCFTA Protocol trade on trade in service.

¹⁴⁹ Dushime A 'The African Continental Free Trade Area: economic and Distributional effects' available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf> (accessed 20 July 2021).

2.6.5.1 Effective implementation of the agreement

Although, the AfCFTA aspires to liberalise intra-African trade in goods and services to foster socio-economic development, however, several challenges still confront regional integration. The first challenge is the disparity between the agreements and their implementation. In Africa, the record of implementations of treaties, protocols and decisions is far from satisfactory.¹⁵⁰ Most RECs have established functioning free trade areas, but not all member states participate, and those that do often fail to honour specific commitments.¹⁵¹ This disparity between agreement and implementation has hampered trade growth in Africa and undermined the transformative potential of intra-regional trade. There are several barriers inhibiting African countries' ability to implement what has been argued and signed. Lack of political will and inadequate financing are two examples.

Political will: African leaders frequently prioritise their own countries' interests above the agreed-upon shared goals and objectives of the continent. While it may be rational for sovereign states to protect their national interests but taking such action without consideration for continental objectives has hindered their success. For instance, the Southern African Development Community (SADC) a regional economic group, which launched FTA in 2008. Despite SADC's decision to remove trade restrictions, some countries have not eliminated tariffs as stipulated by the agreement.¹⁵²

Finance: A significant part of the financial and technical support for the African regional organisations is from external, particularly the European Union and individual European states.¹⁵³ This source of support may present issues related to sustainability and diverse interests for AfCFTA. African member states need to address these

¹⁵⁰ Wapmuk S & Ali J 'The African Continental Free Trade Area (AFCFTA) and regional economic integration: Prospects and challenges.' (2022) *Zamfara Journal of Politics and Development*, 3(1), 15-15.

¹⁵¹ Woolfrey S & Byiers B 'The African Continental Free Trade Area and the politics of industrialisation' available at: <https://ecdpm.org/work/the-african-continental-free-trade-area-and-the-politics-of-industrialisation> (accessed 20 August 2022).

¹⁵² Such countries include Zimbabwe, Angola and Democratic Republic of the Congo.

¹⁵³ Institute for Security Studies 'AU financial independence: still long way to go' available at: <https://issafrica.org/pscreport/psc-insights/au-financial-independence-still-a-long-way-to-go> (accessed 20 August 2023).

shortfalls if the continent is to make any headway towards full implementation of the AfCFTA.

2.6.5.2 Infrastructures

It is also important to highlight the substantial need for enhancing African infrastructures such as roads, railways, internet, energy and customs infrastructure. Overcoming the deficit of infrastructure, which has been a major constraint to both economic growth and intra-African trade expansion, will become ever more critical during the implementation of the AfCFTA.¹⁵⁴ Although, the operational phase of the AfCFTA has been launched, there is still inadequate infrastructure development and connectivity in Africa to boost trade, growth and regional integration.¹⁵⁵ Over the years, infrastructure impediments have posed a significant obstacle to the progress of intra-African trade.¹⁵⁶ African economic integration requires up-to-date technology and the application and dissemination of knowledge to facilitate rapid trade.

In sum, African countries must ensure that the AfCFTA avoids this implementation disparity, for that to happen African leaders must have the political will and economic will to implement and enforce policies and agreements at national, sub-regional, and regional levels. Also, African countries must improve trade related infrastructures. Infrastructure development in Africa has been identified as a barrier to free trade, therefore, African countries must prioritise infrastructure development to ensure that the AfCFTA is implemented successfully.

2.7 Conclusion

This chapter has discussed the WTO rules on regional trade agreements. In order to understand the concept regional trade, it has been shown that trade in the WTO is based upon different rules and principles. The most relevant rules to this mini thesis related to non-discrimination, which is enforced by two tools namely the MFN and NT.

¹⁵⁴ Fofack H 'Making the AfCFTA work for The Africa We Want ' Brooking Africa Growth Initiatives working paper (2020) 9.

¹⁵⁵ Kanyesigye F 'Africa's infrastructure gap poses challenge to success of continental free trade area: experts' available at: <https://www.iol.co.za/business-report/international/africas-infrastructure-gap-poses-challenge-to-success-of-continental-free-trade-area-experts-28991635> (accessed 20 August 2022).

¹⁵⁶ Onwuka O & Udegbonam K. C 'the African continental free trade area: prospects and challenges' (2022) *conflicts trends* (3) 9.

Although this principle is strictly and highly important for the vision and mission of the WTO, however, there are some exceptions provided for by GATT 1994, namely Article XXIV and Enabling Clause. These exceptions give provision to WTO members to trade on preferential terms, which depart from rules of non-discrimination and allow WTO's member states to enter into RTAs such as the AfCFTA. Further, the chapter establishes some benefits of RTAs, which aim to offer each other more favourable treatment in trade matters than they offer other trading partners.

The chapter further discussed the AfCFTA in detail as this is a crucial part of this mini thesis. It was highlighted that AfCFTA has its historical foundations in the OAU and the AU regional integration agenda. The AfCFTA was signed by AU Heads of state in March 2018 and entered into force in May 2019. It has been noted that the AfCFTA represents an opportunity for AU to pursue its goals for deepening regional integration and improving intra-African trade. Through its objectives of facilitating the movement of goods and services among African countries. The AfCFTA will create opportunities to accelerate intra-African trade, grow local businesses, create jobs, and reduce poverty. Therefore, for the agreement to work the chapter further addressed some of the challenges that have troubled the RECs, including gap between the agreements and their implementation and poor infrastructures. It has, therefore, been highlighted that African leaders must avoid this implementation deficit and prioritise infrastructures development in order to reap the full potential benefits of the AfCFTA.

Having discussed the WTO with its rules and principles on regional trade agreement as well as the AfCFTA's objectives, institutional structure, potential benefits and challenges, the next chapter examines the challenging trade environment of ICBT. The chapter covers the ICBT concept and trade policy instruments which exist in two selected regions, the SADC and EAC.

CHAPTER 3

THE CHALLENGING ENVIROMENT OF THE INFORMAL CROSS BORDER TRADE

3.1 Introduction

In the previous chapter, the rules governing the regional trade agreements under the World Trade Organisation (WTO) was discussed. It was mentioned that such agreement happens via Article XXIV General Agreement on Tariffs and Trade and Enabling Clause. Article XXIV provides for the formation of Free Trade Areas and Customs Unions amongst WTO members, which are exceptions to the Favoured-Nation Treatment principle. Furthermore, the relevance of African Continental Free Trade Area (AfCFTA) was highlighted. It was noted that the AfCFTA offers an opportunity for African countries to boost intra-African trade and structurally transform and meet the regional integration objectives goals to which the continent is committed under Agenda 2063.¹⁵⁷ If successfully implemented, the AfCFTA which includes provisions on trade facilitation and customs operations, will play a significant role in boosting all types of trade across the continent including Informal Cross Border Trade (ICBT), which is our focus in this study.

ICBT, as mentioned earlier, forms a significant part of intra-African trade by contributing to the income of about 43 percent of Africa's total population.¹⁵⁸ This means a large share of African economy is informal and the majority of the participants are women.¹⁵⁹ However, while the role of ICBT has socio-economic development impacts in terms of providing livelihoods to many people. The trade facilitation needs of ICBT have been isolated from national trade policies, national development plans, and budgets in the majority African countries, as most governments still view the

¹⁵⁷ African Union 'Agenda 2063: the Africa We want' available: <https://au.int/en/agenda2063/overview> (accessed 21 November 2022).

¹⁵⁸ Breton P and Soprano C' Small scale cross border trade in Africa: why it matters and how it should be supported' (2018) 7(4) *Bridges Africa* 3.

¹⁵⁹ International Labour Organisation (ILO) 'More than 60 percent of the world's employed population are in the informal' available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.htm (accessed 21 November 2022).

activities of the ICBT are illegal.¹⁶⁰ As a result, ICBTs face challenges when conducting business, which prevents the full developmental potential of ICBT from being realised.

This chapter aims to discuss the challenging environment of ICBT in African continent. To achieve this, the chapter first defines ICBT, provides the goods traded by the ICBTs, and examines the motives and origins of ICBT. Thereafter, the chapter assesses the trade provisions related to ICBT that exist in the two RECs, namely the Southern African Development Community (SADC) and the East African Community (EAC) regions where ICBT represents an important aspect of the economy. Ultimately, the chapter concludes with a detailed assessment of the challenges faced by ICBTs.

3.2 Definition of informal cross border trade

ICBT has been defined in several ways in the literature. Some of the following examples mentioned below relate to the definitions of different authors and organisations:

The Common Market for Eastern and Southern Africa (COMESA) defines ICBT as a form of unrecorded business transactions undertaken across borders.¹⁶¹ For the United Nations Conference on Trade and Development (UNCTAD), ICBT is a trade between neighbouring countries conducted by vulnerable, small, unregistered traders.¹⁶² Typically, it is proximity trade involving the move of produce between markets close to the border. The informality refers to the status of the trader who is unregistered, not necessarily to the trade itself, which is captured or unrecorded by the official customs system.¹⁶³ Afrika Jean-Guy and Ajumbo Gerald pointed out that ICBT refers to trade in processed or non-processed merchandise which may be legal imports or exports on one side of the border and illicit on the other side and vice-versa,

¹⁶⁰ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 1.

¹⁶¹ COMESA 'Review national policy developments in the targeted countries related to the formalisation of the informal economy' available at: <https://www.comesa.int/wp-content/uploads/2022/03/Final-Report-Review-of-Informal-Sector-in-Selected-Countries.pdf> (accessed 02 November 2022).

¹⁶² UNCTAD 'Economic development: reaping the potential benefits of the African Continental free trade Area for inclusive growth' available at: https://unctad.org/system/files/official-document/aldcafrica2021_Ch2_en.pdf (02 November 2022).

¹⁶³ UNCTAD 'Reaping the potential benefits of the African Continental free trade Area for inclusive growth' available at: https://unctad.org/system/files/official-document/aldcafrica2021_Ch2_en.pdf (02 November 2022).

on account of not having been subjected to statutory border formalities such as customs clearance.¹⁶⁴ SADC defines it as businesses operating in goods and services that trade across the border, which have no official export/import license or permit within a defined threshold and frequency.¹⁶⁵ Lesser and Moisé-Leeman describe ICBT as trade in legitimately produced goods and services, which escape the regulatory framework set by the government, as such avoiding certain tax and regulatory burdens; hence fully or partly evading payment of duties and charges.¹⁶⁶

Based on the above definitions, one can observe that attempts at defining ICBT by different organisations and authors have not been universally conclusive. The difficulty in defining ICBT between actors arises from the fact that there are inter-linkages between informal and formal trade. For instance, in some cases the merchandise acquired through informal means ends up being traded through formal supply chains in another country where they are included in the official trade statistics of that country.¹⁶⁷ The other challenge in defining ICBT comes from the fact that in some cases the people trading in goods acquired informally may go through formal clearance at the border crossing points in terms of migration rules and other regulations, except that their goods are smuggled across unofficial border channels or they are wrongly declared at the official border crossing points. Thirdly, one must make a distinction between the merchandise (informal goods) and the agents of such trade (informal traders) when defining ICBT.¹⁶⁸ Thus, to sort out the various meanings of the term, Lesser and Moisé-Leeman proposed three types of ICBT as shown in Table 1 below.¹⁶⁹

¹⁶⁴ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 2.

¹⁶⁵ Macheng C 'Women without borders: What the AfCFTA can do for Botswana's informal cross border traders.' (2021) 2.

¹⁶⁶ Lesser C & Moisé-Leeman E 'Informal cross-border trade and trade facilitation reform in Sub-Saharan Africa' (2009) *OECD Trade Policy Papers*, No 86, 9.

¹⁶⁷ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 4.

¹⁶⁸ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 4.

¹⁶⁹ Lesser C & Moisé-Leeman E 'Informal cross-border trade and trade facilitation reform in Sub-Saharan Africa.' (2009) *OECD Trade Policy Papers*, No 86, 10.

Table 1: Types of Informal cross border traders

Type A	Informal (unregistered) traders or firms operating entirely outside the formal economy
Type B	Formal (registered) firms fully evading trade-related regulations and duties (avoiding official border crossing posts)
Type C	Formal (registered) firms partially evading trade-related regulations and duties by resorting to illegal practices (for instance under-invoicing)

For purposes of this study Type A category is most appropriate as it normally applies to traders who deal with smaller consignments of goods and who find themselves excluded from opportunities and benefits of formal trade. To understand why and how Africans engage in ICBT, the next section explores the origins and motives of the ICBT.

3.3 Motives and origins of informal cross border trade

The practice of cross border movements in general and ICBT in particular are not new phenomena.¹⁷⁰ In Africa, this practice originated during the pre-colonial era, when traders moved freely across borders to conduct business.¹⁷¹ Communities and people from the regions interacted and traded without need of interfering with traditional practices or requiring formal registration for such trade.¹⁷² The colonial masters then came up with boundaries to demarcate the regions upon gaining independence, and once borders were established ICBT became illegal.¹⁷³ This is mainly because tariffs and non-tariff barriers were imposed which severely disrupted the economic activities.¹⁷⁴ ICBT has, however, re-emerged and continued to flourish after independence.

¹⁷⁰ Ruffin F, Chindimba A, & Zimano F et al. 'Looking under the veil: Challenges faced by people with disabilities in cross-border entrepreneurship.' (2020) *African Journal of Disability*, 9(1), 4.

¹⁷¹ Ruffin F, Chindimba A & Zimano F et al. (2020), 4.

¹⁷² UNECA 'Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade' available at: <https://repository.uneca.org/handle/10855/15956> (accessed 02 November 2022).

¹⁷³ UNECA 'Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade' available at: <https://repository.uneca.org/handle/10855/15956> (accessed 02 November 2022).

¹⁷⁴ UNECA 'Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade' available at: <https://repository.uneca.org/handle/10855/15956> (accessed 02 November 2022).

Between 1970 and the early 1980s, ICBT practice became a prominent phenomenon.¹⁷⁵ Although the motivation behind the growth of ICBT are numerous, but there is a presumption that the emergent socio-economic reality of Africa, characterised by rural to urban migration, decline in agricultural production, the legacy of failed economic structural adjustment programmes, unemployment and underemployment, lack of opportunities for the youth, and porous borders is what explains modern ICBT.¹⁷⁶ Further to the above, there is a suggestion that ICBT emanates from barriers to Africa's challenging business environment.¹⁷⁷ The view is especially popular among multilateral lenders and supranational organisations including the African Development Bank Food and Agriculture Organisation, Organisation for Economic Cooperation and Development and the United States Agency for International Development.¹⁷⁸ They cite high transactions costs, bureaucracy, corruption, lack of knowledge, restricted access to financing, and limited education and skills.¹⁷⁹

Over time, ICBT has increased across the continent.¹⁸⁰ Although accurate data on the volume of ICBT is limited, literature suggests that it represents a significant proportion of regional cross-border trade.¹⁸¹ According to the United Nations Economic Commission for Africa (UNECA), ICBT accounts for the employment of about 20 percent to 75 percent of the total active population in most African countries, both in rural and urban areas.¹⁸² Additionally, regarding intra-regional trade, the ratio of ICBT for regional trade as a whole is 30–40% in the SADC with an estimated value of \$17.6

¹⁷⁵ Nakayama Y 'Why Do Informal Cross Border Traders Operate Informally? The Paradox of the Formalisation of ICBTs in Africa' (2022) *ASC-TUFS Working Papers*, 2, 65.

¹⁷⁶ Kahiya E & Kadirov D 'Informal cross border trade as a substratum marketing system: a review and conceptual framework' (2020) *Journal of Macromarketing*, 40(1), 91.

¹⁷⁷ Kahiya E & Kadirov D (2020) *Journal of Macromarketing*, 40(1), 91.

¹⁷⁸ Kahiya E & Kadirov D (2020) *Journal of Macromarketing*, 40(1), 91.

¹⁷⁹ Kahiya E & Kadirov D (2020) *Journal of Macromarketing*, 40(1), 91.

¹⁸⁰ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 02 November 2022).

¹⁸¹ Ama N, Mangadi K & Ama H 'Characterization of informal cross border traders across selected Botswana borders' (2014) *International Journal of Management and Marketing Research*, 7(1), 86.

¹⁸² UNECA 'A snapshot of Cross Border Trade along the Abidjan-Lago' available at: <https://repository.uneca.org/handle/10855/43680> (accessed 02 November 2022).

billion¹⁸³ and 40% in the COMESA region.¹⁸⁴ In other African countries, such as Ghana, Nigeria, Benin, Niger, Chad and Cameroon, ICBT contributes significantly to intra-regional trade.¹⁸⁵ This means that ICBT, which is dominated by women, up to 70 %, ¹⁸⁶ plays an important role in addressing vital issues of livelihoods such as income security and food. This developmental role of ICBT thus brings us to the next section to deal with the goods traded by the ICBT. The aim of the section is to identify which goods are being traded in ICBT.

3.4 Goods traded in the informal cross border trade

The types of goods that are traded in ICBT are generally categorised as: non-processed goods; manufactured goods; and re-exports goods including handicrafts, food, non-food stuff and livestock as shown in Table 2 below.¹⁸⁷

Non-processed items: include most primary foodstuffs such as beans, maize and rice, but also comprise non-food stuff such as hides and skins, paintings and handicrafts.

Processed goods: include industrial products such as sugar, edible oils, clothing, dairy products, packaged beverages, soft drinks, and juices.

Manufactured and re-export goods: comprise low-quality processed goods originating from Asia, which consist mainly of products for daily use such as electronic appliances, apparel and shoes.

Contraband and counterfeit goods are more difficult to discern but are estimated to include fuels, cosmetics, pharmaceutical drugs, and electronics.¹⁸⁸

¹⁸³ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations.' (2012) *Africa Economic Brief*, 3(10), 4.

¹⁸⁴ Sommer L & Nshimbi C 'The African Continental Free Trade Area: an opportunity for informal cross-border trade' (2018) *Bridges Africa*, 7(4), 7.

¹⁸⁵ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations.' (2012) *Africa Economic Brief*, 3(10), 8.

¹⁸⁶ Parshotam A & Balongo S 'Women traders in East Africa: The case study of the Busia One Stop Border Post.' (2020) 2.

¹⁸⁷ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 3.

¹⁸⁸ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 3.

Regions	Non-processed goods	Manufactured goods	Re-exports goods	Estimated value goods
Eastern Africa	Food and non-food stuff, livestock	Low quality manufactured and processed goods		US\$50- US\$1000
Western Africa	Food and non-food stuff, livestock		Low quality goods from Asia, contrabands, counterfeits, and substandard goods	
Central Africa	Minerals, Jewellery, forest products, food and non-food stuff			
Southern Africa	Handicrafts, Food, and non-food stuff			
North Africa	Food oil	Household appliances, clothing, equipment, electronic devices		

The above table also illustrates that the types of goods that are traded in ICBT are varied across the regions.¹⁸⁹ In central Africa, jewellery and minerals are traded whereas, in Southern Africa handicrafts are traded. In East Africa, agricultural products, such as grains, fruits, vegetables, food crops, and cash crops, are traded frequently because women ICBTs manage their households from agriculture.

Low-quality locally manufactured and re-exported goods from Asia, with values not greater than US \$1000, are commonly traded in all regions. Among the items that are re-exported are contraband items such as counterfeit goods, fuels and pharmaceuticals.¹⁹⁰ There is some variation in locally traded non-processed goods, with agricultural products and foodstuffs being prominent in all regions as well.

As noted earlier, ICBT is recognised as a significant aspect of the African economy and the labour market. However, because of its informality, over the years traders engaging in informal cross border trade are not given legal protection.¹⁹¹ The next

¹⁸⁹ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 3.

¹⁹⁰ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 3.

¹⁹¹ Nakayama Y 'Why Do Informal Cross Border Traders (ICBTs) Operate Informally? The Paradox of the Formalisation of ICBTs in Africa' (2022) *ASC-TUFS Working Papers*, 2, 66.

section examines how ICBT has been regulated in the African continent through two selected regions, the SADC and EAC regions.

3.5 Trade policies in regional trade dealing with informal cross border trade

As noted earlier, informal trade phenomenon has long occurred across the continent. There are thus several policy instruments and protocols that exist at the regional levels and are relevant to the informal trade sector, some of which promote trade facilitation and the integration of the regions. In this section related to the provisions dealing with the ICBT, we discuss what trade policies exist and to what extent they are being implemented to strengthen ICBT sector in the two regions namely the SADC and the EAC regions. The two RECs are chosen as a case in this mini thesis because much of the intra-regional trade has been driven by the two regions and have the highest levels of intra-union trade.¹⁹²

This examination aims not only to analyse the legal framework addressing ICBT in the two RECs but also to understand the economic contribution of ICBT in the said RECs. The first section examines the trade instruments dealing with the ICBT in the SADC; thereafter the trade instruments that exist in the EAC region will be examined.

3.5.1 Trade policies dealing with informal cross border trade in the Southern African Community Development region

This section, as outlined above, aims to discuss the trade policies regulating the ICBT in the SADC region. Therefore, before any analyses can be attempted, and for the convenience of analysis, it is necessary to first provide a brief overview of ICBT in the SADC region. Thus, this section will be divided into the following subsections, (1) the overview of the informal cross border trade in the SADC and (2) the trade policies dealing with the informal cross border trade.

¹⁹² Abrego M, de Zamaroczy M, & Gursoy T et al. 'The African Continental free trade area: Potential economic impact and challenges.' International Monetary Fund. (2020) 10.

3.5.1.1 Brief overview of the informal cross border trade in the Southern African Development Community

SADC has its origins in the early 1980s, when several independent frontline southern African states¹⁹³ established the Southern African Development Coordination Conference, with the main aim to achieve political solidarity and attain economic independence from the then apartheid South Africa.¹⁹⁴ The transformation of the organisation from a Coordinating Conference into a Development Community SADC took place in 1992 in Namibia, when the Declaration and Treaty was signed at the Summit of Heads of State and Government.¹⁹⁵ Currently, the region comprises 16 member States¹⁹⁶ and has a population of approximately 350 million and a GDP of USD 471, 1 billion.¹⁹⁷

The main objectives of the SADC treaty are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life for the peoples of Southern Africa and to support the socially disadvantaged through regional integration.¹⁹⁸ To achieve these objectives, SADC aims at eliminating barriers to the free movement of goods, services, capital and labour force.¹⁹⁹ Thus, since 1992, SADC Member States have signed a number of policy instruments and protocols (33 protocols),²⁰⁰ declarations, charters, and memoranda of understanding on various matters, ranging from trade, mining, and finance and investment to illicit drugs, forestry, and shared watercourses, as well as the empowerment of women and young people.²⁰¹

¹⁹³ These states included: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

¹⁹⁴ SADC 'History and treaty' available at: <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 10 January 2022).

¹⁹⁵ SADC 'History and treaty' available at: <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 10 January 2022).

¹⁹⁶ The 16 SADC countries including, Angola, Botswana, Comoros, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe.

¹⁹⁷ SADC 'About SADC' available at: <https://www.sadc.int/about-sadc/> (accessed 10 January 2022).

¹⁹⁸ Article 5 of SADC Treaty.

¹⁹⁹ SADC 'About SADC' available at: <https://www.sadc.int/about-sadc> (accessed 10 January 2022).

²⁰⁰ SADC 'Status of integration in the SADC' available at: https://www.sadc.int/sites/default/files/2021-08/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 10 January 2022).

²⁰¹ SADC 'Status of integration in the SADC' available at: https://www.sadc.int/sites/default/files/2021-08/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 10 January 2022).

ICBT has long occurred in Southern Africa and is a significant feature of regional trade.²⁰² This is due to successive years of; increasing unemployment rates, retrenchments and poor economic performance.²⁰³ As the battle to survive intensified, ICBT has become a viable alternative.²⁰⁴ In most SADC countries, ICBT represents an important aspect of the economy, accounting between 30-40 percent of total intra-regional trade.²⁰⁵ People in the region are being drawn to it because of the changing socio-economic environment, where opportunities for formal are shrinking.²⁰⁶ ICBT plays a part in poverty reduction, as it is a source of livelihoods for many people and moves goods, capital and services across borders.²⁰⁷ For instance, in 2008 ICBT traded goods that provided them approximately US\$ 2,500 per capita in income per month.²⁰⁸

In addition, the total trade involving informal cross border traders in the SADC region accounts for an estimated of \$20 billion annually,²⁰⁹ representing approximately 40 percent of the intra-SADC trade.²¹⁰ ICBT not only contributes to moving goods and services across the region but is also responsible for empowering people at the grassroots.²¹¹ For instance, in Zimbabwe, where unemployment is estimated at up to 90% when considering only the formal economy, ICBT has created significant employment opportunities, with an estimated 5.7 million people currently employed in

²⁰² Peberdy S & Crush J 'Calibrating informal cross-border trade in Southern Africa.' African Books Collective (2015) 1.

²⁰³ Chingati H, Maina A & Masango R (ed) et al. 'Informal Cross Border Trade a focus on Malawi, Mozambique, Swaziland and Zambia' available at <https://www.sexrightsafrika.net/wp-content/uploads/2016/11/EJN-study-on-ICBT.pdf> (accessed 10 January 2022).

²⁰⁴ Chingati H, Maina A & Masango R (ed) et al. 'Informal Cross border Trade a focus on Malawi, Mozambique, Swaziland and Zambia' available at: <https://www.sexrightsafrika.net/wp-content/uploads/2016/11/EJN-study-on-ICBT.pdf> (accessed 10 January 2022).

²⁰⁵ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 4.

²⁰⁶ Chingati H, Maina A & Masango R (ed) et al. 'Informal Cross Border Trade a focus on Malawi, Mozambique, Swaziland and Zambia' available at: <https://www.sexrightsafrika.net/wp-content/uploads/2016/11/EJN-study-on-ICBT.pdf> (accessed 10 January 2022).

²⁰⁷ Nshimbi C & Moyo I 'Migration, cross-border trade and development in Africa.' Palgrave Studies of Sustainable Business in Africa). Cham, Switzerland: Palgrave Macmillan (2017) 7.

²⁰⁸ Nshimbi C & Moyo I (2017) 7.

²⁰⁹ The Organisation for Economic Co-operation and Development (OECD) 'Aid for trade, Case story' available at: <https://www.oecd.org/aidfortrade/casestories/casestories-2017/CS-148-USAID-Women-in-Informal-Cross-Border-Trade-in-Southern-Africa.pdf> (accessed 10 January 2022)

²¹⁰ Nshimbi C & Moyo I (2017) 7.

²¹¹ Nshimbi C & Moyo I (2017) 7.

the informal economy.²¹² This is especially significant for women in ICBT, who constitute the majority of actors in the region, accounting for approximately 70 percent of the traders.²¹³

3.5.1.2 Trade policies in the Southern African Development Community

As mentioned above, SADC has adopted several policy instruments and protocols to facilitate the achievement of its integration objectives relevant to the informal trade sector. Among them, are the SADC Protocol on Trade;²¹⁴ the Southern African Development Community Regional Indicative Strategic Development Plan (RISDP),²¹⁵ and the Draft Protocol on the Facilitation of Movement of Persons,²¹⁶ which are discussed below.

1. *The SADC Protocol on Trade*

In 1996, the SADC member states adopted a protocol on trade, which entered into force in 2000 following ratification by the requisite two thirds majority of members states.²¹⁷ The main objectives of this Protocol on trade are outlined in Article 2, which is to further liberalise intra-regional trade in goods and services with the view; to ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members; promote an open cross-border investment regime; enhance economic development, diversification and industrialisation.²¹⁸ Further, the Protocol commits SADC Member States to: gradually remove duties and non-tariff barriers, raise awareness amongst their citizenry regarding the importance of trade to economic development; facilitate the strengthening of internal capacities to undertake trade effectively; strengthen national and regional infrastructure; involve the private sector in policy development, encourage small and medium enterprise participation;

²¹² The South African Institute of International Affairs (SAIIA) 'A cry for recognition and protection: Zimbabwe's forgotten Informal Cross Border traders' available at: <https://saiia.org.za/research/a-cry-for-recognition-and-protection-zimbabwes-forgotten-informal-cross-border-traders/> (accessed 10 May 2022).

²¹³ Nshimbi C & Moyo I (2017) 7.

²¹⁴ SADC 'SADC Protocol on Trade' available at: <https://www.sadc.int/pillars/> (accessed 10 May 2022)

²¹⁵ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://www.sadc.int/sites/default/files/2021-08/RISDP_2020-2030.pdf (accessed 10 May 2022)

²¹⁶ SADC 'Protocol on Facilitation of Movement of Persons' available at: <https://www.sadc.int/document/protocol-facilitation-movement-persons-2005> (accessed 10 May 2022)

²¹⁷ SADC 'SADC Protocol on Trade' available at: <https://www.sadc.int/pillars/> (accessed 10 May 2022)

²¹⁸ Article 2 SADC Protocol on Trade.

raise awareness of trade; and to harmonise laws and practice, as well as simplify and harmonise customs procedures.

However, while the aforementioned provisions of the Protocol are relevant and important to facilitate intra-regional trade, these provisions only address the SADC formal cross-border trade framework which favours formal economic activities and do not specifically address the needs and challenges of informal traders like informal cross border traders. It is unclear how informal traders or their associations can access the Protocol within the scope of its provisions or whether they are considered as relevant actors in regional trade.²¹⁹ For this reason, ICBTs who appear to be playing an important role in the import and export of goods are handicapped by a policy regulatory regime.²²⁰

2. *The regional indicative strategic development plan*

Another important regional instrument is the SADC RISDP, which was formulated in March 2001 and approved in August 2003.²²¹ Through the 2001 RISDP, SADC has outlined its short, medium and long-term policies and strategies for achieving deeper regional integration with the ultimate objective of eradicating poverty.²²² The RISDP outlines a regional integration roadmap that envisages a SADC Free Trade Area by 2008, Customs Union by 2010, Common Market by 2015, Monetary Union by 2016 and economic union by 2018.²²³

According to the RISDP, despite the seeming non-presence of informal trade issues in the other SADC Protocols, the RISDP does acknowledge the importance of ICBT, describing it as substantial and thriving across the region.²²⁴ Therefore, the RISDP

²¹⁹ Makombe P 'Informal Cross Border Trade and SADC: The Search for Greater' available at: https://www.academia.edu/14109152/Informal_Cross_Border_Trade_and_SADC_The_Search_For_Greater_Recognition (accessed 10 January 2023).

²²⁰ Makombe P 'Informal Cross Border Trade and SADC: The Search for Greater' available at: https://www.academia.edu/14109152/Informal_Cross_Border_Trade_and_SADC_The_Search_For_Greater_Recognition (accessed 10 January 2023).

²²¹ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://www.sadc.int/sites/default/files/2021-08/RISDP_2020-2030.pdf (accessed 10 January 2023).

²²² Matorofa E, Chamuka T & Bayano V et al. 'Optimising regional integration in Southern Africa' available at: <https://www.sardc.net/books/ICBTReport/ICBTReport.pdf> (accessed 10 January 2022).

²²³ Matorofa E, Chamuka T & Bayano V et al. 'Optimising regional integration in Southern Africa' available at: <https://www.sardc.net/books/ICBTReport/ICBTReport.pdf> (accessed 10 January 2022).

²²⁴ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://www.sadc.int/sites/default/files/2021-08/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 10 January 2023).

has also acknowledged the issue of ICBT as a challenge of the existing trade policies and strategies and note that the other challenge is in developing new policies and strategies that would target vulnerable group such as the rural and urban poor, small business, informal operators to ensure that they take advantage of the policies. Moreover, the revised RISDP 2015-2020 considers ICBT since it is based on the premise that the original RISDP priorities remain the same.²²⁵ In the revised RISDP, one of the priorities is economic liberalisation and development. The overall goal is to facilitate trade and financial liberalisation, competitive and diversified industrial development and increased investment for deeper regional integration and poverty eradication in the SADC region.²²⁶

Although, the architects of the RISDP provide some indication that the concerns of informal cross-border traders are important, but a number of questions and concerns remain. As a result, ICBTs who often travel to other countries to purchase or order goods for their store continue to be marginalised and confronted with several challenges, which constitute the key factors hindering trade flows in the SADC region.

3. *The Protocol on the Facilitation of Movement of Persons in the SADC.*

The Protocol on the Facilitation of Movement of Persons in the SADC is the legal instrument that implements the provisions of the SADC Treaty on the movement of persons in the region.²²⁷ This Protocol contained different ambitions, it commits to support, inter alia, to develop policies that would progressively eliminate obstacles to the movement of people of the region into and within the territories of state parties.²²⁸ The Protocol has been formally adopted and signed by six member states.²²⁹ However, before an implementation framework can be created, at least two-thirds of member states need to have both signed and ratified it before an implementation

²²⁵ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://sadc-eu.sardc.net/resources/RISDP/Draft_Revised_RISDP_27_03_2015.pdf (accessed 10 January 2023).

²²⁶ SADC 'SADC Regional Indicative Strategic Development Plan' available at: https://sadc-eu.sardc.net/resources/RISDP/Draft_Revised_RISDP_27_03_2015.pdf (accessed 10 January 2023).

²²⁷ SADC 'About Protocol on the Facilitation of Movement of Persons in the SADC' available at: <https://www.sadc.int/document/protocol-facilitation-movement-persons-2005> (accessed 10 January 2023).

²²⁸ Article 2 of the SADC Protocol on the Facilitation of Movement of Persons.

²²⁹ Tralac 'Movement of persons and African integration: Trade facilitation and the African Free Movement of Persons Protocol' available at: <https://www.tralac.org/documents/events/tralac/4663-tralac-annual-conference-2022-background-note-movement-of-persons-and-african-integration-trade-facilitation/file.html> (accessed 26 July 2022).

framework can be drawn up. To date, the Protocol on the Facilitation of the Movement of Persons is not in force.²³⁰ The protocol is important not just for ICBT but for regional integration itself. Therefore, in the absence of a protocol to govern regional cross-border movement, ICBT among SADC states is regulated by national laws and bilateral agreements of respective states.²³¹

Having looked at the policy instruments dealing with the informal cross border trade in the SADC region, the next section deals with the policy instruments regulating the ICBT in the EAC region.

3.5.2 Trade policies dealing with informal cross border trade in the East African Community

This section of the chapter first provides an overview of ICBT in the EAC. Secondly, the trade policies dealing with the ICBT will be provided.

3.5.2.1 Brief overview of the informal cross border trade in the East African Community

The treaty that established the EAC was signed in Arusha, Tanzania, in 1999.²³² The treaty entered into force on July 7, 2000, following the conclusion of the process of its ratification and deposition of the instruments of ratification with the Secretary general by all three original partner states, Kenya, the United Republic of Tanzania and Uganda.²³³

The EAC has since expanded to include, by end August 2023, an additional four states: Rwanda, Burundi, South Sudan and the Democratic Republic of Congo.²³⁴ The EAC as the inter-governmental regional organisation was developed with a vision for

²³⁰ Nshimbi C 'Migration is a decisive factor in African Integration' available at <https://www.news24.com/news24/analysis/analysis-christopher-changwe-nshimbi-migration-is-a-decisive-factor-in-african-integration-20220726> (accessed 10 January 2023)

²³¹ Nshimbi C & Moyo I' *Migration, cross-border trade and development in Africa.* Palgrave Studies of Sustainable Business in Africa). Cham, Switzerland: Palgrave Macmillan (2017) 3.

²³² O'Reilly P & Heron T 'Institutions, ideas and regional policy (un-) coordination: The East African Community and the politics of second-hand clothing.' *Review of International Political Economy*, 30(2), 614.

²³³ O'Reilly P & Heron T 'Institutions, ideas and regional policy (un-) coordination: The East African Community and the politics of second-hand clothing.' *Review of International Political Economy*, 30(2), 614.

²³⁴ EAC 'EAC Partner States' available at: <https://www.eac.int/eac-partner-states> (accessed 15 July 2023).

a stable, productive, safe and policy oriented East Africa.²³⁵ Other visions included the mission of growing and deepening economic, political, social and cultural integration to raise competition, the added value of the production of goods, and improving trade and investment to improve the quality of life of citizens of East Africa.²³⁶ The EAC aims to achieve integration through four phases namely: a Customs Union, a Common Market, a Monetary Union, and Political Federation.²³⁷ So far, the EAC has achieved a Customs Union in 2005,²³⁸ a Common Market in 2010.²³⁹

Like in the SADC region, ICBT has long occurred in the EAC, and it contributes to the economies among partner States in various ways. In the region, ICBT enables small-scale entrepreneurs to escape poverty and to meet the education, housing and other basic needs.²⁴⁰ ICBT by small and medium enterprises in the EAC is estimated to be worth \$1.76 billion dollars annually.²⁴¹ ICBT traders employ people in their home countries as well as in the countries where they source their goods. It serves also as a supplementary source of family income to people who are under-employed and a source of employment to some people who were retrenched following economic restructuring that was occasioned by structural adjustment programmes.²⁴² For instance, between Kenya and Uganda border, informal trade represents an estimated 80% of official.²⁴³

In addition, from a consumer's perspective, ICBT brings the benefit of lower prices of informally imported products.²⁴⁴ This is of importance as large numbers of people in EAC are subject to abject poverty and cannot afford the commodities sold in the

²³⁵ EAC treaty preamble.

²³⁶ Article 5 (1) of the EAC treaty.

²³⁷ Article 5 (2) of the EAC treaty.

²³⁸ EAC 'EAC Customs Unions' available at: <https://www.eac.int/customs-union> (accessed 15 July 2023).

²³⁹ EAC 'EAC Common Market' available at: <https://www.eac.int/common-market> (accessed 15 July 2023).

²⁴⁰ Ogalo V 'Informal cross-border trade in EAC: Implications for regional integration and development' research paper: CUTS Geneva Resource Centre, (2010) 4.

²⁴¹ Ruiter C Hadley L & Li Q 'Impacts of Non-Tariff Barriers for Women Small Scale Cross-Border Traders on the Kenya-Uganda Border.' *Recuperado de*, 2.

²⁴² Ogalo V 'Informal cross-border trade in EAC: Implications for regional integration and development' research paper: CUTS Geneva Resource Centre, (2010) 4.

²⁴³ UNCTAD 'Cross border trade and enterprise formalisation in Kenya' available at: https://unctad.org/system/files/non-official-document/aldc_2022_pdsd_pdw_ken_ppt1_16-18_mar_kris_terauds_eng.pdf (accessed 15 July 2023).

²⁴⁴ Ogalo V 'Informal cross-border trade in EAC: Implications for regional integration and development.' (2010) *Research Paper: CUTS Geneva Resource Centre*, 4.

domestic markets.²⁴⁵ Through their networks, ICBTs are able to supply their goods even in the very remote areas of the region.²⁴⁶

3.5.2.2 Instruments dealing with the informal cross border trade in the East African Community

As ICBT is among the major activities for self-employed in the informal economy in East Africa. The EAC member states have adopted several reforms aimed at facilitating trade, including the Simplified Trade Regimes (STRs) and One-Stop Border Post (OSBP).

1. Simplified Trade Regimes

The STR is a provision under the EAC Customs Union that aims to promote regional integration by providing a framework to ease the requirements of small-scale traders participating in structured cross border trade.²⁴⁷ Under the STR, EAC governments have bilaterally agreed upon a list of products that do not require certification in small consignments. The list of goods is displayed at border posts at customs offices and allows small traders to obtain a Simplified Certificate of Origin for the goods that will be resold and qualify for import duty exemption. STR apply to low-value, cross-border consignments under agreed thresholds that usually do not exceed \$2,000.²⁴⁸

STR was introduced to solve problems faced by ICBT such as lack of knowledge and information on the benefits of trading with others, complex documents and complicated documents of filling the existing forms, and increased clearance costs.²⁴⁹ Several countries in Sub-Saharan Africa including the EAC, have introduced it to encourage informal traders to switch to formal trade.²⁵⁰ However, it is important to note the

²⁴⁵ Muthee K' the effect of the east African community integration process on informal cross-border trade: an analysis of the customs union Protocol' Unpublished LLM thesis, UCT, 2015) 21.

²⁴⁶ Muthee K' the effect of the east African community integration process on informal cross-border trade: an analysis of the customs union Protocol' Unpublished LLM thesis, UCT, 2015) 21.

²⁴⁷ Parshotam A & Balongo S 'Women traders in East Africa: The case study of the Busia One Stop Border Post.' (2020) 8.

²⁴⁸ Parshotam A & Balongo S 'Women traders in East Africa: The case study of the Busia One Stop Border Post.' (2020) 8.

²⁴⁹ Mudzingwa E 'Small-scale Trade and the Simplified Trade Regime' available at:

<https://www.tralac.org/blog/article/15847-small-scale-trade-and-the-simplified-trade-regime> (accessed 15 July 2022).

²⁵⁰ STR is being implemented by Burundi, Kenya, Malawi, Rwanda, Uganda, Zambia and Zimbabwe.

effective uptake of EAC STR by small-scale traders is low.²⁵¹ While the intentions behind the STR are commendable, there are some setbacks which may help explain the low level uptake.

The effective uptake is limited because the STR, while introducing streamlined paperwork and exemption from cumbersome formal customs clearance procedures do not provide an exemption for other domestic taxes or other border requirements.²⁵² In addition, the high cost of complying with legal requirements of STR and lack of clear information on procedures are also serious challenges for traders.²⁵³ Consequently, there still remains a significant number of traders that lack sufficient knowledge about the rights provided under protocols and how these provisions are applied as well as the obligatory customs procedures and documentation.²⁵⁴ Such lack of awareness puts cross border traders, and especially women, at a disadvantage in terms of being able to claim their rights and the proper enforcement of applicable laws at the border, particularly when public officials themselves are not familiar with them.²⁵⁵

2. One-Stop Border Post

The OSBP is the inter-country facility whose main role is to reduce direct trade transaction costs related to compliance with document requirements and indirect costs related to long customs clearance time, as such having the capacity to incite firms to formalise their cross-border trade operations.²⁵⁶ The EAC has enacted the One-Stop Border Posts Act in 2016,²⁵⁷ which has led to the establishment of the one-stop border

²⁵¹ Nkurunziza M 'East Africa: what hinders uses of EAC's Simplified Trade Regime' available at: <https://allafrica.com/stories/202209060081.html> (accessed 15 October 2022).

²⁵² UNCTAD 'East African Community Regional Integration: Trade and Gender Implications' available at: https://unctad.org/system/files/official-document/ditc2017d2_en.pdf (accessed 15 July 2022).

²⁵³ African union 'A study on the opportunities in the AfCFTA for women in the informal cross border trade' available at: <https://www.aprm-au.org/wp-content/uploads/2022/03/ENG-AfCFTA-study-on-Women-in-ICBT.pdf> (accessed 15 October 2022).

²⁵⁴ Fundira T 'informal cross border trading review of simplified trade regimes in East and Southern Africa' available at: <https://www.tralac.org/publications/article/12825-informal-cross-border-trading-review-of-the-simplified-trade-regimes-in-east-and-southern-africa.html> (accessed 15 July 2022).

²⁵⁵ UNCTAD 'East African Community Regional Integration: Trade and Gender Implications' available at: https://unctad.org/system/files/official-document/ditc2018d3_en.pdf (accessed 15 July 2022).

²⁵⁶ Lesser C & Moisé-Leeman E 'Informal cross-border trade and trade facilitation reform in Sub-Saharan Africa' (2009) 9.

²⁵⁷ EAC 'East African Community One Stop Border Posts Act, 2016' available at: <https://www.eala.org/documents/view/the-east-african-community-one-stop-border-posts-act-2016> (accessed 15 July 2022).

posts.²⁵⁸ The objective is to enhance trade across the EAC through the efficient movement of goods, persons and services.²⁵⁹ As of June 2023, out of the 15 borders earmarked to operate as OSBPs, 12 have been completed.²⁶⁰

Indeed, where OSBPs have been realised, there is good evidence that significant strides have been taken toward minimising the obstacles to the free movement of goods and people.²⁶¹ The reconstruction of the main arterial roads and the reduction in the number of checkpoints has helped to reduce overall journey times.²⁶² According to one study, the OSBP facility has undoubtedly improved formal trade by streamlining processes and reducing costs.²⁶³ It also has improved working environment for border officials and improved safety and security for cross-border traffic.²⁶⁴

However, it is important to note that completed and operational OSBPs face several challenges, which hinder either full operationalisation or smooth operations.²⁶⁵ Such challenges include, gaps in both physical and soft infrastructure such as offices for border officials, equipment, warehouse, cross border information and communications technology connectivity, roads and parking which need to be addressed to facilitate smooth and efficient operations at the already constructed OSBPs.²⁶⁶ In addition

²⁵⁸ EAC 'East African Community One Stop Border Posts Act, 2016' available at: <https://www.eala.org/documents/view/the-east-african-community-one-stop-border-posts-act-2016> (accessed 15 July 2022).

²⁵⁹ EAC 'East African Community One Stop Border Posts Act, 2016' available at: <https://www.eala.org/documents/view/the-east-african-community-one-stop-border-posts-act-2016> (accessed 15 July 2022).

²⁶⁰ EAC 'East African Legislative Assembly' available at: <https://www.eala.org/documents/view/report-of-the-on-spot-assessment-of-the-status-of-implementation-of-the-eac-one-stop-border-post-elegu-nimule-kobero-kabanga-and-rusumo-and-the-rusumo-hydro-electric-infrastructures> (accessed 15 July 2022)

²⁶¹ Nugent P & Soi I 'One-stop border posts in East Africa: state encounters of the fourth kind' (2020) *Journal of Eastern African Studies*, 14(3), 441.

²⁶² Nugent P & Soi I 'One-stop border posts in East Africa: state encounters of the fourth kind' (2020) *Journal of Eastern African Studies*, 14(3), 441.

²⁶³ Nkundabaramye V 'Effects of One Stop Border Posts (OSBPs) Trade Facilitation Initiative on the Movement of Goods along the Rwandan Customs Posts' (2021) *Open Access Library Journal*, 8(11), 2.

²⁶⁴ EAC 'Infrastructure and Customs Directorates, Development of the One Stop Border Posts in the EAC' available at: <http://repository.eac.int/handle/11671/24353> (accessed 15 July 2022).

²⁶⁵ EAC 'Infrastructure and Customs Directorates, Development of the One Stop Border Posts in the EAC: Phase II OSBP Development Program.' available at: <http://repository.eac.int/handle/11671/24353> (accessed 15 July 2022).

²⁶⁶ EAC 'Infrastructure and Customs Directorates, Development of the One Stop Border Posts in the EAC: Phase II OSBP Development Program.' Available at: <http://repository.eac.int/handle/11671/24353> (accessed 15 July 2022).

simplifications and harmonisation of operational procedures and joint controls at the OSBPs.

From the above discussion, it is clear that ICBT has long occurred across the two regions and constitutes an important component of national economies and a major contributor to socio-economic progress. This means that without ICBT operations, many people would be living in abject poverty. Although, there are several trade initiatives and protocols relevant and important to the informal trade sector at the regional levels. However, it is important to note that these protocols do not seem to take ICBT sector seriously and thus do not respond to its needs effectively. In most cases, the protocols are silent on how informal cross border traders or their associations can access the protocol in terms of being within the ambit of its provisions or whether they are considered as significant actors in regional trade. In addition, where there are trade policy initiatives which promote and support trade there is a limited or non-implementation of such trade policy initiatives. As a result, ICBTs face several challenges when conducting business and these continue to slow down intra-regional trade. Thus, the focus in the next section on the challenges faced by ICBTs.

3.6 The challenges faced by the informal cross border traders

ICBTs face a variety of challenges that prevent them from leveraging their full potential. Although the key causes vary from one region to the other. This mini thesis discussed the most common challenges faced by many African traders across the continent; these include: limited access to finance, high taxes, inadequate border facilities and infrastructures, limited access to information, corruption, low knowledge and business management skills, harassment and violence, which are discussed below.

3.6.1 Limited access to finance

Limited access to finance plays a prominent role since traders are not bankable and transactions are cash based or bartered.²⁶⁷ The majority of traders lack working capital and tangible business assets making it difficult for them to get financing and expand

²⁶⁷ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

their business.²⁶⁸ In addition, the stringent measures demanded by banks and the shortage of foreign currency experienced in some countries in the region compound the situation for this partially developed sector.²⁶⁹ Since policymakers generally regard ICBT as illegal, the scope and opportunities for developing ICBT related trade finance facilities have not been adequately explored. Consequently, most traders fund their activities from their personal savings or through backstreet moneylenders, friends and relatives. Only a few can raise money from banks or savings and credit institutions.²⁷⁰

3.6.2 High taxes

One of the characteristics of informal cross border trade is the fact that the traders evade payment of taxes.²⁷¹ This is caused by high customs duties and taxes, as well as procedures such as customs, sanitary and phytosanitary standards, immigration, technical regulations at the border posts, which can be time consuming, inefficient, or unclear.²⁷² As a result, ICBTs are forced to conduct business informally since the tariffs imposed by some nations are excessive, particularly for those ICBTs that frequently deal in small volumes of items.²⁷³

3.6.3 Inadequate border facilities and infrastructure

Inadequate border infrastructure for instance, proper warehousing facilities, community markets, transport networks, improper sanitary conditions and daycare centres for women, functional and adequately staffed border institutions and agencies make it unattractive, inefficient and sometimes downright dangerous to trade via formal routes.²⁷⁴ In addition, the lack of adequate public and private transportation

²⁶⁸ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁶⁹ Mwaniki, J 'The impact of informal cross border trade on regional integration in SADC and implications for wealth' (2011) *Harare: Great Zimbabwe University*, 4.

²⁷⁰ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁷¹ Muthee K 'The effect of the East African community integration process on informal cross border trade: An analysis of the customs union Protocol' (Unpublished LLM thesis, UCT, 2015) 18.

²⁷² Brenton P, Dihel N, & Hoppe M et al. 'Improving behaviour at borders to promote trade formalisation the charter for cross-border traders' (2014) No. 89473, The World Bank, 5.

²⁷³ Brenton P, Dihel N, & Hoppe M et al. 'Improving behaviour at borders to promote trade formalisation the charter for cross-border traders' (2014) No. 89473, The World Bank, 5

²⁷⁴ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

systems causes delays, which accelerates the deterioration of their consumable goods, particularly agricultural produce.²⁷⁵

3.6.4 Limited access to information

This is one of the key challenges because it is difficult for ICBTs to tap into regional and local market opportunities.²⁷⁶ In most African regions, the provision of information on cross border markets is at best, minimal. Since most traders operate outside regular business circles, prices along with supply and demand are generally not available to them. They generally rely on informal sometimes-unreliable information networks.²⁷⁷ Moreover, information on market information on trade rules and customs procedures, regulations, agreements and protocols for the facilitation of cross border trade is equally difficult to obtain.²⁷⁸

3.6.5 Corruption

Corruption is another border obstacle that affects ICBTs.²⁷⁹ Due to lack of knowledge on customs procedures by most of the local traders. Border officials, revenue authority officials and other public service workers at the border posts take advantage of their ignorance and continue to charge them exorbitant duties on their goods. To clear their goods quickly and the fact that they do not know the legislations in place, they pay bribes to avoid further delay.²⁸⁰ For instance, one study at the Busia and Malaba border crossings on the Kenya/Uganda revealed that 56% of women traders

²⁷⁵ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁷⁶ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁷⁷ Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁷⁸ Mudzingwa E 'Challenges women traders face at border posts and what can be done to address these challenges' available at: <https://www.tralac.org/blog/article/15701-challenges-women-traders-face-at-border-posts-and-what-can-be-done-to-address-these-challenges.html> (accessed 30 July 2022)

²⁷⁹ African Union 'A study on the opportunities in the AfCFTA for women in the Informal Cross Border Trade available at: https://au.int/sites/default/files/documents/41579docstudy_on_opportunities_in_the_afcfta_for_women_in_informal_and_cross-border_trade.pdf (accessed 25 July 2022).

²⁸⁰ Muthee K 'the effect of the East African community integration process on informal cross border trade: An analysis of the customs union Protocol' (Unpublished LLM thesis, UCT, 2015) 18.

reportedly experienced corruption daily, while 81% had experienced it at least once in a month.²⁸¹

3.6.6 Low knowledge and business management skills

ICBT traders are generally less educated and often lack basic business management skills.²⁸² Business skills are generally acquired via traditional means and numeracy as well as literacy levels are notoriously low in some regions. This is exacerbated by a lack of knowledge and understanding of customs procedures and regional trade protocols. As a result, it is even harder to comply with complex requirements and controls, and traders may not have the capacity and resources needed to take advantage of regional agreements such as STR regimes in the EAC.²⁸³

3.6.7 Harassment and violence

One of the major problems at the borders is the strict and inflexible importation procedures, which requires physical inspections and searches.²⁸⁴ This has resulted in an increase of reports of harassment by cross border traders as they claim that enforcing customs soldiers and other border agencies are not trained on customs related procedures and policies.²⁸⁵ As a result, the majority of travellers are often subjected to various forms of harassment including physical, verbal, emotional and sexual harassment by officials, police brutality at the border post.²⁸⁶ Women, in particular are the most vulnerable, as they constitute the vast majority of traders.²⁸⁷

²⁸¹ Sriram S 'The Gendered Nature of Corruption: A Case Study on Small-Scale Cross Border Trade in Kenya' available at: <https://ace.globalintegrity.org/the-gendered-nature-of-corruption/> (accessed 25 July 2022).

²⁸² Afrika J & Ajumbo G 'Informal cross border trade in Africa: Implications and policy recommendations' (2012) *Africa Economic Brief*, 3(10), 10.

²⁸³ Brenton P, Dihel N, Hoppe M, & Soprano C 'Improving behaviour at borders to promote trade formalisation the charter for cross-border traders' (2014) No. 89473, The World Bank, 5.

²⁸⁴ Chiukira L 'Thick borders and women in informal cross border trading in Africa. The case of Zimbabwe.' (2021) 4.

²⁸⁵ Chiukira L 'Thick borders and women in informal cross border trading in Africa. The case of Zimbabwe.' (2021) 4.

²⁸⁶ Chilya N, Masocha R & Zindiye S 'Challenges Facing Zimbabwean Cross Border Traders Trading in South Africa: A Review of Literature' available at:

<https://pdfs.semanticscholar.org/c094/5ad8f7535196cd3a94103b9ea83ae61d6d52.pdf> (accessed 25 July 2022).

²⁸⁷ Chilya N, Masocha R & Zindiye S 'Challenges Facing Zimbabwean Cross Border Traders Trading in South Africa: A Review of Literature' available at:

<https://pdfs.semanticscholar.org/c094/5ad8f7535196cd3a94103b9ea83ae61d6d52.pdf> (accessed 25 July 2022).

Undoubtedly, the infrastructure, corruption, high taxes, limited access to information, limited access to information and violence, as discussed above, grossly disadvantage ICBTs at the border posts across the continent. Among the wide range of regulatory requirements facing traders, little knowledge on customs procedures, formalities and charges have often acted as important barriers to formal trade. Most traders, especially women who are among the most vulnerable groups, are less motivated to use the formal routes because of fear of taxation, harsh security officials, harassment and longer delays at border posts.

3.7 Conclusion

This chapter has discussed the overview of the concept of ICBT, including the definitions of ICBT as provided by different organisations, motivation to engage in ICBT and goods traded by ICBTs. It was noted that ICBT is not a new phenomenon and remains a cornerstone of African economies, especially for women who constitute the majority of actors. Despite being a source of immediate livelihood for millions of people living in the borderlands, ICBT has remained marginalised because it is regarded as illegal commercialisation of cross border activities.

The chapter has specifically focused on two RECs namely the SADC and EAC regions. It has established the trade policies that are relevant to the informal trade sector, which exist in the two RECs. Such policies included the Trade Protocol, the RISDP, the Protocol on the Facilitation of Movement of Persons in the SADC region and the Simplified Trade Regimes and the OSBP in the EAC. From the above discussion, although these instruments are important and have an element that includes facilitation and promoting informal trade, which is helpful for integration, it was shown that in the two RECs, these provisions do not seem to specifically take the ICBT sector seriously and thus do not respond to its needs effectively.

Accordingly, the most common challenges that the majority of ICBTs face while doing their business, including limited access to finance, infrastructures, high taxes, limited access to information, corruption, harassment and violence. Women, who are the majority of traders, are especially vulnerable to such abuses which sometimes also take the form of sexual harassment. Consequently, this makes the urgency of

governments of the region to provide informal cross border traders with a suitable environment in which to trade.

The next chapter assesses the trade measures adopted by the AfCFTA alongside complementary measures such as the WTO Trade Facilitation Agreement (TFA) for the benefit of ICBT sector.



CHAPTER 4

IMPLICATIONS OF THE AFRICAN CONTINENTAL FREE TRADE AREA AND OTHER COMPLEMENTARY MEASURES IN REGULATING INFORMAL CROSS BORDER TRADERS TO INCREASE INTRA AFRICAN TRADE

4.1 Introduction

The previous chapter discussed the Informal Cross Border Trade (ICBT) within the African continent with all its aspects including the definition of ICBT, the origins and goods traded by ICBTs. The chapter also examined the policy instruments and protocols that are relevant to the informal trade sector existing in the two selected Regional Economic Communities (RECs), the Southern African Development Community (SADC) and the East African Community (EAC) regions. The results from the examination in Chapter 3 found that, although there are a number of provisions relevant and important for informal traders in the two RECs, they do not seem to take the ICBT sector seriously and, therefore, do not respond to its needs effectively. As a result, ICBTs face many challenges when doing business, these include limited access to finance, high taxes, inadequate border facilities and infrastructures, limited access to information, corruption, harassment and violence.

This chapter aims to answer the primary research question on what trade measures have been taken by the African Continental Free Trade Area (AfCFTA) and how the AfCFTA can help to regulate ICBT in order to increase intra-African trade. In doing so, the chapter is divided into two sections. The first section examines the role of ICBT in the African economy. The discussion includes an overview of intra-African trade, in order to determine the current level of intra-African trade and the subsequent discussion focuses on the impact of ICBT on the African economy. The second section examines the opportunities presented by the AfCFTA alongside complementary measures contained in the WTO Trade Facilitation Agreement (TFA) to highlight the importance of implementing such measures to improve trade in ICBT sector. Lastly, the chapter analyses how the AfCFTA presents a continent-wide opportunity to regulate ICBT.

4.2 Informal cross border trade and its role in the African economy

This section discusses the role played by ICBT in the African economy. The focus here is on four sectors including employment and income, poverty reduction, food security and empowerment of women. These sectors are linked to the economic development of the African continent as outlined in several African union's key policies and reports. Therefore, before elaborating more on the contribution of the ICBT to the African economy, it is necessary to know the current situation of intra-African trade. Thus, the section begins with a brief overview of the intra-African trade to understand the current intra-African trade profile and performance achieved by African countries, thereafter the role played by the ICBTs will be examined.

4.2.1 Overview of the intra-African trade

Despite significant efforts to promote regional trade, intra-Africa trade, defined as the average of intra-African exports and imports, has historically been low.²⁸⁸ In 2018, the intra-African trade fell from US\$156 billion to an estimated US\$147.8 billion in 2019, a decline of 5.23 percent.²⁸⁹ This was much larger than the decline of 2.82 percent for extra-African trade, which means trade with all economies outside the African continent that occurred over the same time period.²⁹⁰ Further, intra-African trade decline reduced its contribution to overall African trade, from about 15 percent in 2018 to 14.4 percent in 2021.²⁹¹ This fall in total intra-African trade was mainly attributed to disruptions in supply chains caused by the Covid-19 pandemic.²⁹² In particular, the decreasing average price of commodities such as oil, which is heavily traded between the two largest economies and champions of intra-African trade on the continent

²⁸⁸ UNCTAD 'Facts and Figures' available at: <https://unctad.org/press-material/facts-figures-0> (accessed 13 September 2023).

²⁸⁹ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 13 September 2023).

²⁹⁰ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 13 September 2022).

²⁹¹ UNCTAD 'New opportunities for accelerating pan African trade' available at: <https://unctad.org/news/blog-new-opportunities-accelerating-pan-african-trade> (accessed 13 September 2023).

²⁹² Fundira T 'State of Intra-REC Trade and liberalisation' available at: <https://www.tralac.org/documents/publications/working-papers/2022/> (accessed 13 September 2022).

namely Nigeria and South Africa.²⁹³ In 2022, although the value of intra-African trade grew by 18.23 percent due to the robust and synchronised global recovery,²⁹⁴ as mentioned earlier, intra-African trade remains low compared to the level of intra-regional trade of approximately 40 percent in North America, 59 percent in Asia and 68 percent in Europe.²⁹⁵

Intra-African trade involves both the primary and manufactured products.²⁹⁶ Amongst the top products traded, numerous studies reveal that the products traded are mainly manufactured products with chemical products, processed foods, beverages, tobacco products, machinery and transport equipment.²⁹⁷ Amongst the products, mineral products accounts for the largest share by value accounting for 24 percent of total exports, however in terms of intra-African trade, this represents only 10 percent of total exports with 90 percent leaving the continent.²⁹⁸ Agriculture products as a group accounts for only 23 percent in terms of intra-African trade.²⁹⁹ As noted earlier much of the intra-regional trade has been driven by the SADC and EAC regions, which have the highest levels of intra-union trade, compared with other groupings on the continent.³⁰⁰

However, considering the opportunity for trade across various product types stated above, intra-African trade has thus far not grown at the rate that would be expected in terms of the official statistics. Over the last two decades, Africa has integrated with the

²⁹³ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at <https://media.afreximbank.com/afrexim/African-Trade-Report-2020.pdf> (accessed 13 September 2023).

²⁹⁴ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://media.afreximbank.com/afrexim/Africa-trade-report-2022.pdf> (accessed 13 September 2023).

²⁹⁵ UNCTAD 'handbook of statistics' available at: https://unctad.org/system/files/official-document/tdstat47_FS02_en.pdf (accessed 13 September 2022).

²⁹⁶ Fundira T 'State of Intra-REC Trade and liberalisation' available at: <https://www.tralac.org/documents/publications/working-papers/2022> (accessed 12 January 2023)

²⁹⁷ Fundira T 'State of Intra-REC Trade and liberalisation' available at: <https://www.tralac.org/documents/publications/working-papers/2022> (accessed 12 January 2023)

²⁹⁸ Fundira T 'State of Intra-REC Trade and liberalisation' available at: <https://www.tralac.org/publications/article/15484-state-of-intra-rec-trade-and-trade-liberalisation.html> (accessed 12 January 2023).

²⁹⁹ Fundira T 'State of Intra-REC Trade and liberalisation' available at: <https://www.tralac.org/publications/article/15484-state-of-intra-rec-trade-and-trade-liberalisation.html> (accessed 13 September 2022).

³⁰⁰ Abrego M, de Zamaroczy M, Gursoy T, Nicholls G, Perez-Saiz H & Rosas, J. N. 'The African Continental free trade area: Potential economic impact and challenges.' International Monetary Fund. (2020) 10.

rest of the world faster than with itself.³⁰¹ According to the United Nations Conference on Trade and Development (UNCTAD) study, most African countries prefer the import tariffs provided by the European Union, United States, Canada and Japan.³⁰² For instance, the study reveals that the share of exports from Africa to the rest of the world ranged from 80% to 90% in the period of 2000 –2020.³⁰³

This is often seen as evidence that borders in Africa have remained thick, despite the long focus on tariff reductions by African trade blocs. Therefore, while most official statistics indicate the level of intra-African trade to be the lowest compared to other regions. It must be noted that a significant amount of trade across the continent is taking place between African countries informally according to literature.³⁰⁴ For instance, research done by the United Nations Economic Commission for Africa (UNECA) has shown that ICBT is estimated to be between 7 and 16 percent of the formal intra-African trade flows and between 30 and 72 percent of formal trade between neighbouring countries.³⁰⁵ In addition, another study conducted by the UNCTAD concluded that the number of female cross border traders in Sub-Saharan African range between 70 and 80 percent.³⁰⁶ This means, the informal economy, including ICBT is Africa's Real Economy.³⁰⁷ Hence, if ICBT is to function well, these are significant figures and have important implications for the value, composition and sophistication of intra-African trade.

Having discussed the level of intra-African trade, the following section focuses on the role played by ICBTs in the African economy. In going about this discussion, amongst

³⁰¹ Tralac 'African companies prefer trading with non-African countries' available at: <https://www.tralac.org/news/article/15935-tralac-daily-news-3-march-2023.html> (accessed 12 January 2023).

³⁰² Tralac 'African companies prefer trading with non-African countries' available at: <https://www.tralac.org/news/article/15935-tralac-daily-news-3-march-2023.html> (accessed 12 January 2023).

³⁰³ UNCTAD 'Facts and Figures' available at: <https://unctad.org/press-material/facts-figures-0> (accessed 12 January 2023).

³⁰⁴ Ndiaye T 'Case study on gender dimension of aid force' available at: <https://www.oecd.org/aidfortrade/47715006.pdf> (accessed 12 January 2023).

³⁰⁵ UNECA 'Data of Informal Trade is key in accurate monitoring of Intra-African Trade available at <https://www.uneca.org/stories/data-of-informal-trade-is-key-in-accurate-monitoring-of-intra-african-trade-says-karingi-of> (accessed 12 January 2023).

³⁰⁶ UNCTAD 'Women in informal cross border in Zambia' available at: https://unctad.org/system/files/official-document/unda2023W-ICBTguide_zambia_en.pdf (accessed 12 January 2023).

³⁰⁷ Ndiaye T 'Case study on gender dimension of aid force' available at: <https://www.oecd.org/aidfortrade/47715006.pdf> (accessed 12 January 2023).

the sectors stated above, focus would be on women as they constitute the majority of the traders.

4.2.2 Informal cross border trade and its role in supporting the African economy

ICBT sector is a critical component of the African economy and the labour market.³⁰⁸ It plays a huge role in the absence of sufficient formal economic opportunities, this means it contributes to a number of sectors such as employment and income, poverty reduction, food security and contributes to the empowerment of women, which are discussed below.

4.2.2.1 Informal cross border trade as a source of employment and income

In the absence of sufficient opportunities for employment in the formal sector, ICBT is critical for generating employment across the African continent.³⁰⁹ It accounts for the employment of about 20 percent to 75 percent of the total active population in most African countries, both in rural and urban areas.³¹⁰ It is also a source of income for most families as majority of people seek employment in ICBT as the main source of income. In addition, the profits obtained from ICBT are mostly utilised to cover their households' essential expenses, such as rent, food, healthcare, and their children's school tuition.³¹¹

4.2.2.2 Informal cross border trade help in poverty reduction

It has been observed that the sole reason for most of the traders' engagement in ICBT is economic reasons, that is, to earn income and support their families.³¹² Income derived from small-scale trading activities is key to reducing poverty. Although, traders

³⁰⁸ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 12 January 2023).

³⁰⁹ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 12 January 2023).

³¹⁰ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 12 January 2023).

³¹¹ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 8.

³¹² Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 8.

make little profit from small-scale trade, with most of the revenue covering basic household needs and difficult for them to reinvest in their business. Therefore, revenues from cross border trade are often the main source of income for the households of cross border traders.³¹³

4.2.2.3 Informal cross border trade is important for food security

Food security has been defined by Food Agricultural Organisation as encompassing the ability of all consumers to have both physical and economic means to access sufficient safe and nutritious food at all times.³¹⁴ For this to be the case, the most important ingredients include ensuring adequacy of food supply, maintaining supply stability and ensuring supplies of all consumers.³¹⁵ However, according to 2022 World Bank report on food crises, at least one in five Africans goes to bed hungry and an estimated 140 million people in Africa face acute food insecurity.³¹⁶

Although the types of goods carried by ICBTs vary widely, the trade in Africa is dominated by food, agricultural and livestock products.³¹⁷ The dominance of these items makes ICBT a critical part of food security by linking markets across borders in many places.³¹⁸ In the event of a local food shocks and crises ICBT is more responsive than formal trade. For instance, in West Africa, a food deficit region, ICBT accounts for about 30 percent of intra-regional food trade.³¹⁹

³¹³ Breton P & Soprano C 'Small scale cross-border trade in Africa: why it matters and how it should be supported' (2018) *Bridges Africa*, 7(4), 6.

³¹⁴ Food and Agriculture Organisation 'An introduction to the basics concepts of Food Security' available at: <https://www.fao.org/3/al936e/al936e00.pdf> (accessed 12 January 2023).

³¹⁵ Food and Agriculture Organisation 'An introduction to the basics concepts of Food Security' available at: <https://www.fao.org/3/al936e/al936e00.pdf> (accessed 12 January 2023).

³¹⁶ World Bank 'Putting Africans at the heart of food security and climate resilience' available at: <https://www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience> (accessed 12 January 2023).

³¹⁷ Spurt 'Demystifying Intra-African Trade: the role of Informal Cross Border Trade in the Era of AfCFTA' available at: <https://medium.com/spurt-group/demystifying-intra-african-trade-the-role-of-informal-cross-border-trade-in-the-era-of-afcfta-170b038d7158> (accessed 12 January 2023).

³¹⁸ Spurt 'Demystifying Intra-African Trade: the role of Informal Cross Border Trade in the Era of AfCFTA' available at: <https://medium.com/spurt-group/demystifying-intra-african-trade-the-role-of-informal-cross-border-trade-in-the-era-of-afcfta-170b038d7158> (accessed 12 January 2023).

³¹⁹ Afreximbank 'African Trade Report 2020: Informal Cross-Border Trade in Africa in the Context of the AfCFTA' available at: <https://afr-corp-media-prod.s3-eu-west-1.amazonaws.com/afrexim/African-Trade-Report-2020.pdf> (accessed 12 January 2023).

4.2.2.4 Informal cross border trade for the empowerment of women

ICBT is profoundly gendered; as highlighted above, the vast majority of Africa's ICBTs are female, up to 70 percent in some cases.³²⁰ ICBT is often their only source of livelihood.³²¹ According to the International Labour Organisation study, about 60 percent of non-agricultural self-employment of women in Sub-Saharan Africa comes from informal trade.³²² In addition, the contribution of women informal traders to national GDP amounted to 64 percent of value added in trade in Benin; 46 percent in Mali and 41 percent in Chad.³²³ Furthermore, in West and Central Africa women represents 60 percent in ICBT, and employ more than one person in their home businesses and support on average three children as well as three dependents who were not children or spouses.³²⁴

Unfortunately, women traders are among the most vulnerable groups in many areas across the continent, and compared to their male counterparts, they suffer disproportionately from the various constraints related to ICBT activities.³²⁵ They are exposed to a number of gender-specific challenges and risks such as sexual harassment and violence at the border and are more readily denied access to key trader networks and information about the relevant procedures.³²⁶ Additionally, time-consuming trade measures and documentary requirements impinge more heavily on them.³²⁷

³²⁰ UNCTAD 'Women in informal cross border trade in Zambia: A small scale trader's guide to trade rules and procedures' available at: https://unctad.org/system/files/official-document/unda2023W-ICBTguide_zambia_en.pdf (accessed 12 January 2023).

³²¹ Tralac 'Women in informal cross border trade in South Africa' available at: <https://www.tralac.org/images/docs/11885/women-in-informal-cross-border-trade-in-southern-africa-usaid-2017-aid-for-trade-case-story-cs-148.pdf> (accessed 12 January 2023).

³²² ILO 'More than 60 percent of the world's employed population are in the informal' available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.htm (accessed 12 January 2023).

³²³ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 14.

³²⁴ Koroma S, Nimarkoh J & You, N et al. 'Formalization of informal trade in Africa: Trends, experiences and socio-economic impacts.' (2017) *Food Agric. Organ. Accra*, 14.

³²⁵ Brenton P & Soprano C 'Small-scale cross-border trade in Africa: why it matters and how it should be supported' (2018) *Bridges Africa*, 7(4), 4.

³²⁶ Erasmus G & Hartzenberg T 'Women in trade in the AfCFTA, what could the Protocol provide?' available at: <https://www.tralac.org/blog/article/15667-women-in-trade-in-the-afcfta-what-the-protocol-provide.html> (accessed 12 January 2023).

³²⁷ Erasmus G & Hartzenberg T 'Women in trade in the AfCFTA, what could the Protocol provide?' available at: <https://www.tralac.org/blog/article/15667-women-in-trade-in-the-afcfta-what-the-protocol-provide.html> (accessed 12 January 2023).

Women make up the majority of informal traders and play a critical role in addressing vital issues of livelihood such as food and income security.³²⁸ Efforts to facilitate women in ICBT will develop their economic activities and can thus play a key role in supporting women's economic empowerment, which can in turn lead to larger societal transformation in a variety of ways and lessen women's marginalisation.

Given the above contributions of ICBT to the African economy, there is a need to address the challenges faced by ICBTs when doing business. Thus, the next section discusses possible solutions to the problem stated in Chapter 3 through the trade measures adopted by the AfCFTA alongside the complementary measures negotiated in the WTO FTA.³²⁹

4.3 Measures to help informal cross border traders at border posts

Several trade initiatives have already been adopted by African trade blocs as seen in the previous chapter.³³⁰ Yet, they have not gone far enough to eliminate barriers to trade faced by ICBTs at the border posts on the continent. This section examines several trade measures negotiated within the current AfCFTA alongside the WTO TFA for the benefit of the traders. First, the section analyses the measures negotiated at the multilateral level, the WTO TFA, these include the publication and availability of information; the release and clearance of goods from customs custody; simplification and reduction of documentation requirements and formalities; reduction of fees and charges for imports and customs cooperation.³³¹ Secondly, the section explores measures in the AfCFTA and its accompanying instruments which constitute our focus in this mini thesis, these include the Protocol of Free Movement of People,³³² Protocol of Free Movement of Goods, which contains measures on Customs Co-Operation and

³²⁸ Such as in Kenya 63 percent of street vendors are women (See Engaging informal women entrepreneurs in East Africa: approaches to greater formality available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/briefingnote/wcms_430946.pdf (accessed 12 January 2023)).

³²⁹ See section 3. 6.

³³⁰ See section 3. 5.

³³¹ WTO 'Trade Facilitation Agreement' available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True> (accessed 12 January 2023).

³³² African Union 'the Protocol to the treaty establishing the African Economic Community relating to free movement of persons, right of residence and right of establishment' available at: <https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons> (accessed 12 January 2023).

mutual administrative assistance, trade facilitation in cross-border trade procedures, elimination of Non-Tariff Barriers (NTBs) and tariff reduction.³³³

4.3.1 Analysis of the World Trade Organisation Trade Facilitation Agreement

Moving goods across borders has long posed a burden on small and medium-sized enterprises.³³⁴ At the multilevel, WTO trade facilitation discussion began in December 1996, at the Singapore Ministerial Conference, when the member states instructed the WTO Council for trade in goods to conduct exploratory and analytical work on the simplification of trade procedures in order to assess the scope for WTO rules in this area.³³⁵

The trade facilitation negotiations came to an official end in December 2013 during the Ninth WTO Ministerial Conference, which took place in Bali, Indonesia.³³⁶ The FTA entered into force on 22 February 2017, upon ratification by two-thirds (112 countries) of the WTO member states, including 18 African countries.³³⁷

The TFA aims at simplifying, modernising and harmonising export and import processes.³³⁸ It includes provisions for expediting the movement of goods across borders, release and clearance of goods including consignments in transit.³³⁹ It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. The agreement also, contains provisions for technical assistance and capacity building in this area.³⁴⁰

³³³ African Union 'Compiled Annexes to the on the establishment of the continental free trade area' available at: <https://au.int/en/documents/20221010/draft-compniled-annexes-establishment-continental-free-trade-area> (accessed 12 January 2023).

³³⁴ Fundira T' Informal Cross Border Trading, review of the simplified trade regimes in East and Southern Africa 'available at: <https://www.tralac.org/documents/publications/trade-briefs/2018-1/1816-us18tb032018-fundira-informal-cross-border-trading-review-of-simplified-trade-regimes-esa-08032018-fin/file.html> (accessed 12 January 2023).

³³⁵ The WTO 'Trade Facilitation Agreement' available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 12 January 2023).

³³⁶ The WTO 'Trade Facilitation Agreement' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 19 November 2022).

³³⁷ The WTO 'Trade Facilitation Agreement' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 12 January 2023).

³³⁸ The WTO 'Trade facilitation Agreement' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm (accessed 12 January 2023)

³³⁹ The WTO 'Trade Facilitation Agreement' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm (accessed 12 January 2023).

³⁴⁰ The WTO 'Trade Facilitation Agreement' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm (accessed 12 January 2023).

The TFA is divided into three main sections; the first section contains provisions dealing with trade facilitation measures and obligations, discussed in detail further below, it contains 12 substantive Articles with provisions to ensure the quick movements of goods as well their clearance within a territory.³⁴¹ It also seeks to clarify the three trade facilitation provisions of the GATT 1994 namely Articles V, VIII and X.³⁴²

The second section contains the Special and Differential Treatment provisions for developing and least-developed countries.³⁴³ This allows developing and least-developed countries to determine within specified time frames, the specific commitments that they will implement according to their specific needs and commensurate with their levels of development. To benefit from the agreement, countries are required to categorise each provision provided by Articles 1 to 12 of the TFA and notify other WTO members of these categories. There are three categories namely A, B and C.³⁴⁴

- **Category A** contains provisions that a developing country will implement upon entry into force of the TFA. Least-developed countries are required to implement their Category A provisions within one year after entry into force.
- **Category B** contains provisions that developing or least-developed countries designate for implementation on a date after a transitional period following the entry into force. In this case, a country notifies other members, no later than one year after entry into force, of the specific provisions and indicative dates of implementation.
- **Category C** contains provisions that developing and least-developed countries will implement on a date after a transitional period; the assistance they need to

³⁴¹ The WTO 'Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023).

³⁴² The WTO 'Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023).

³⁴³ The WTO 'Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023).

³⁴⁴ The WTO 'Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023)

implement such provisions is also noted. The technical and financial support for implementing category C provisions is provided by the WTO TFA facility which aims to assist developing and least-developed countries in implementing the agreement. This facility has been operational since 27 November 2014 when WTO members adopted the trade facilitation protocol. In addition to WTO, the technical and financial support for capacity building can be obtained from other international organisations such as World Bank, UNCTAD and World Customs Organisation (WCO).

The third section contains provisions on institutional arrangements wherein a committee on trade facilitation is set up and members are further mandated to set up national committees concerning trade facilitation, which ensure that the provisions are implemented domestically and trade is facilitated.³⁴⁵ The committee on trade facilitation at the WTO provides the member states with a platform where they can consult on such issues, which are related to the TFA and the promotion of its objectives.³⁴⁶

To highlight some benefits of the TFA, we examine the measures adopted by the agreement that are relevant to this study. These include activities related to the general for expediting the movement, release and clearance of goods. These include the publication and availability of information (Article 1 of the TFA); the release and clearance of goods from customs custody (Article 7 of the TFA); simplification and reduction of documentation requirements and formalities (Article 10 of the TFA); reduction of fees and charges for imports, exports and transit (Article 6 of the TFA); customs cooperation (Article 12 of the TFA), which are discussed below.

4.3.1.1 The publication and availability of information

Article 1 of the TFA requires that trade-related information, as listed in the Article, be published promptly and in a non-discriminatory and easily accessible manner, allowing other governments, traders and other interested parties to become acquainted with

³⁴⁵ The WTO 'The Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023)

³⁴⁶ The WTO 'The Trade Facilitation Agreement: An overview' available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 12 January 2023).

them.³⁴⁷ The list includes *inter alia* procedures for importation, exportation and transit and required forms and documents; fees and charges; and import, export or transit restrictions or prohibitions, some of which will be linked to technical regulations and/or conformity assessment procedures.³⁴⁸ Furthermore, this first Article calls for transparency by providing that members should ensure that there exists a web-based, where relevant parties can have easily regular and reliable access to enquire on information provided for in Article 1 of the TFA and receive the applicable answers.³⁴⁹

The aforementioned steps are intended to improve transparency in order to lower the direct costs related to information collecting and the indirect expenses resulting from the trading environment's unpredictability. These are more beneficial to ICBT across the continent, as it is usually difficult for them to acquire the right information regarding laws and procedures. In this regard, publication and availability of information will reduce corruption and promote transparency and certainty in customs procedures.

4.3.1.2 The release and clearance of goods from customs custody

Article 7 of the TFA disciplines a number of issues related to the release and clearance of goods.³⁵⁰ These include: pre-arrival processing, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival; electronic payment of all charges and tariffs collected by customs; release of goods pending final determination of all payable charges; fees and taxes; establish a risk management system for customs agencies to concentration on high risk consignment than on low risk consignments; Establishment and publication of average of release time; and trade facilitation measures for authorised operators which requires each Member to provide additional trade facilitation measures related to import, export or transit formalities and procedures to operators who meet specified criteria.³⁵¹

These detailed rules on release and clearance of goods, make import and export faster, cheaper and more efficient, and with a view to further reduce waiting times at the border, which particularly affect ICBT. For instance, according to the Organisation

³⁴⁷ TFA Article 1.1.

³⁴⁸ TFA Article 1.2.

³⁴⁹ TFA Article 1.3.

³⁵⁰ TFA Article 7.

³⁵¹ TFA Article 7 (1-7)

for Economic Cooperation and Development, on average, Africa has the longest customs delays in the world.³⁵² Consignments commonly experience substantial and unpredictable delays of 30 to 40 days before release from customs control.³⁵³

4.3.1.3 Simplifying and reducing documentation requirements and formalities

Provisions in Article 10 of the TFA cover, more specifically, formalities and documentation requirements with the intention of minimising their incidence and complexity as well as decreasing and simplifying documentation requirements.³⁵⁴ It includes, among other things the following: acceptance of paper or electronic copies supporting documents required for import, export, or transit formalities; use of international standards; establishment of single window; pre-shipment inspection; common border procedure and uniform documentation requirements; and rejected goods.³⁵⁵

4.3.1.4 Reduction of fees and charges for imports, exports and transit

Article 6 of the TFA regulates fees and charges imposed on or in connection with importation and exportation; fees and charges for customs processing.³⁵⁶ It requires Members to publish information on fees and charges, to accord an adequate time between the publication of new or amended fees and their entry into force and to periodically review these with a view to reducing their number and diversity, where practicable.³⁵⁷ Any penalties for breach of laws or regulations will be proportional to the breach, and the collection and assessment of penalties and duties will be guarded against conflicts of interest.³⁵⁸

These detailed rules on fees and penalties, on how and when they can be applied, prevent businesses from being subjected to arbitrary imposition of fees and penalties. In addition, lower trade related fees and charges for import and export, would reduce

³⁵² Organisation for Economic Cooperation and Development (OECD) 'Informal cross border trade and trade facilitation reform in sub-Saharan African' available at:

<https://one.oecd.org/document/TAD/TC/WP%282008%2913/FINAL/En/pdf> (accessed 13 March 2023)

³⁵³ OECD 'Informal cross border trade and trade facilitation reform in sub-Saharan African' available at <https://one.oecd.org/document/TAD/TC/WP%282008%2913/FINAL/En/pdf> (accessed 13 March 2023)

³⁵⁴ TFA Article 10.1.

³⁵⁵ TFA Article 10 (4-8).

³⁵⁶ TFA Article 6.

³⁵⁷ TFA Article 6 (1-3).

³⁵⁸ TFA Article 6.3.

the cost of formal cross border trading and encourage ICBT, who are disproportionately affected by such fees, to formalise their cross border.

4.3.1.5 Customs cooperation

Article 12 of the TFA deals with custom cooperation and exchanges of information, notably for the purpose of verifying an import or export declaration in identified cases.³⁵⁹ It covers several provisions such as exchange of information; verification after inspecting the available relevant information; Protection and confidentiality of the information or documents provided by one of the members.³⁶⁰

Border inefficiencies, complex customs rules, corruption and other trade barriers, as discussed above, make it harder for businesses of all sizes to trade across African borders, hurting the most ICBTs. Traders go through numerous border agencies and other officials such as customs, immigration, police, army, and spend many hours/days at the border. They are also required to produce and complete numerous documents regarding importation or exportation of goods and required to bribe officials or else their goods will be confiscated or not cross the border.

Implementation of the TFA measures as seen above may lower both direct trade transaction costs arising from compliance with trade-related regulations and the payment of fees and charges, and indirect costs arising from waiting times at the border and lack of predictability of the trading environment across the continent. The TFA has also, the potential to enhance both cross-border trade between African countries and trade with other WTO members.³⁶¹ In addition, research done by the World Economic Forum suggests the full TFA implementation could trigger a 60% to 80% increase in cross-border Micro Small and Medium Enterprises (MSMEs) sales in some economies.³⁶² Full implementation is also estimated to reduce global trade costs by an average of 14.3%, with African countries and least-developed countries forecast

³⁵⁹ TFA Article 12.

³⁶⁰ TFA Article 12 (1-5).

³⁶¹ Tralac 'Trade facilitation agreement: an African perspective' available at: <https://www.tralac.org/blog/article/13680-wto-trade-facilitation-agreement-an-african-perspective.html> (accessed 13 March 2023).

³⁶² Global Alliance for Trade Facilitation 'Trade facilitation agreement: a simple guide' available at: <https://www.tradefacilitation.org/what-we-have-learned/the-trade-facilitation-agreement-a-simple-guide> (accessed 13 March 2023).

to enjoy the biggest average reduction in trade costs.³⁶³ Furthermore, it is envisaged that the agreement will help improve transparency, reduce the procedural and documentary requirements for traders, and reduce the scope of corruption.³⁶⁴ However, out of 44 African countries that are members of the WTO, 40 have ratified the TFA and are in the process of implementing their trade facilitation commitments.³⁶⁵ Therefore, it must be noted that the Agreement only has a legal force on the African states that have ratified it.

If African countries want to increase trade across the continent, countries should prioritise implementing such kind of measures as seen above. This in turn will contribute to the success of the current AfCFTA, as the agreement borrows heavily from the WTO TFA. The following section assesses the measures adopted by the AfCFTA, which constitutes the focus of this mini thesis.

4.3.2 Analysis of the opportunities presented by the African Continental Free Trade Area for the informal cross border traders

As discussed in chapter 1, the AfCFTA signals the beginning of a new chapter for mega-regional trade relations on the African continent and enhanced efforts at regional integration.³⁶⁶ It has been described as history's largest free trade agreement as it connects 1.3 billion people across 55 countries with a combined GDP valued at \$3.4 trillion.³⁶⁷ While not explicitly reflected in the AfCFTA, ICBT is a prominent feature of intra-Africa trade, and the agreement that establishes the AfCFTA recognises the need to improve the export capacity of both formal and informal traders, with particular focus on MSMEs.³⁶⁸

³⁶³ The WTO 'Trade Facilitation agreement' available at:

https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 13 March 2023).

³⁶⁴ Taku f 'Informal Cross Border Trading, review of the simplified trade regimes in East and Southern Africa' available at: <https://www.tralac.org/documents/publications/trade-briefs/2018-1/1816-us18tb032018> (accessed 13 March 2023).

³⁶⁵ The WTO 'Trade Facilitation Agreement Ratification list' available at:

<https://www.tfafacility.org/notifications-ratifications/ratifications-list> (accessed 13 March 2023).

³⁶⁶ Parshotam A 'Can the African Continental Free Trade Area offer a new beginning for trade in Africa?' (2018) 5.

³⁶⁷ Dushime A 'The role of the AfCFTA in improving Informal Cross Border Trade in Africa' available at: <https://futureafricaforum.org/the-role-of-the-afcfta-in-improving-informal-cross-border-trade-in-africa-2/> (accessed 13 March 2023).

³⁶⁸ Article 27(2) (d) of the AfCFTA Protocol trade on trade in service.

The AfCFTA therefore presents a good opportunity for governments in African countries to regulate ICBT on the continent for the purpose of increasing the level of intra-African trade, which remains at low levels compared to other integrated regions.³⁶⁹ Among the opportunities contained within the AfCFTA Agreement and its accompanying instruments, this section discusses those are crucial to support ICBTs and promote their participation in trade. These include the free movement of people, the Protocol on free movement of Goods with measures on Customs Co-Operation and mutual administrative assistance, trade facilitation in cross-border trade procedures, elimination of NTBs and tariff reduction, which are discussed below.

4.3.2.1 Free Movement of People

It must be noted that, at the same time as the signing of the agreement for the establishment of the AfCFTA, African Union member states also signed the AU Protocol on Free Movement of People Right of Residence and Right of Establishment, which was opened for signature in January 2018 in Kigali.³⁷⁰

The Protocol Relating to Free Movement of Persons is a crucial element in ensuring that the AfCFTA is more inclusive. The overall objective of the protocol is to facilitate the implementation of the African Economic Community by providing for the progressive implementation of free movement of persons, the right of residency and rights of establishment.³⁷¹ Included in its provisions are the intention to abolish visa requirements, introduce the African Passport, and oblige State Parties to mutually recognise academic, professional and technical qualifications.³⁷² Once adopted by the majority of AU member states, the protocol has the potential to generate significant benefits for ICBTs; in a sense, it can reduce the vulnerabilities associated with illegal border crossings and income losses due to lengthy visa applications.³⁷³ For instance,

³⁶⁹ See chapter 4.2.1.

³⁷⁰ African Union 'the Protocol to the treaty establishing the African Economic Community relating to free movement of persons, right of residence and right of establishment' available at: <https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons> (accessed 13 March 2023).

³⁷¹ Article 2 of the Protocol to the treaty establishing the African Economic Community relating to free movement of persons, right of residence and right of establishment.

³⁷² Preamble of the Protocol to the treaty establishing the African economic community relating to free movement of persons, right of residence and right.

³⁷³ UNCTAD 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' available at: https://unctad.org/system/files/official-document/aldcafrica2021_en.pdf (accessed 13 March 2023).

traders require business permits from governments to engage in trading activities, but informal traders usually travel without such permits as to get a visitor's permit, they are required to submit paper work and/or to pay relatively costly visa fees.³⁷⁴ For example, a single-entry visa to Eastern African countries costs USD 50 and a single-entry visa to South Africa costs USD 167.³⁷⁵ Moreover, sometimes they must provide documents such as bank statements or invitation letters. In this context, implementation of the AU Free Movement Protocol might greatly benefit the ICBTs across the continent, as it will make it simpler for them to carry out their trade.

In addition, the facilitation of the free movement of people between countries in Africa could have significant implications for women and young people, including their ability to pursue job prospects within Africa.³⁷⁶ The opportunities that could stem from implementation of a Protocol on the Free Movement of Persons for essential services sectors, such as health and education, could be particularly important for girls and women who work in the medical field, teachers and students.

The AU Free Movement of People Protocol is essential to fully capitalise on the advantages of intra-African trade and economic integration. However, It is important to highlight that, while many African countries have ratified or signed the AfCFTA, since January 2018, ratification of the AU Protocol on the free movement of people has not made good progress.³⁷⁷ Up to date, the Protocol has been signed only by 32 countries and ratified by 4 countries.³⁷⁸ Some countries, envisage removing labour market restrictions only for the movement of certain categories of workers, such as truck drivers, due to concerns about sovereignty and the ability to regulate the entry,

³⁷⁴ UNCTAD 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' available at: https://unctad.org/system/files/official-document/aldcafrica2021_intro_en.pdf (accessed 13 March 2023).

³⁷⁵ Nakayama Y 'Why Do Informal Cross Border Traders (ICBTs) Operate Informally? The Paradox of the Formalisation of ICBTs in Africa' (2022) *ASC-TUFS Working Papers*, 2, 71.

³⁷⁶ UNCTAD 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' available at https://unctad.org/system/files/official-document/aldcafrica2021_Ch2_en.pdf (accessed 13 March 2023).

³⁷⁷ UNCTAD 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' available at https://unctad.org/system/files/official-document/aldcafrica2021_en.pdf (accessed 13 March 2023).

³⁷⁸ African Union 'Report on the implementation of Free Movement of Persons in Africa' available at: https://au.int/sites/default/files/newsevents/reports/40515-rp-hhs62469_e_original_report_on_the_implementation_of_free_movement_of_persons_in_africa.pdf (accessed 13 March 2023).

exit and stay of persons.³⁷⁹ This has hindered the ratification of the AU Protocol on the free movement of people. The next section deals with the Protocol on Trade in Goods.

4.3.2.2 Free Movement of Goods

The Protocol on Trade in Goods aims to create a liberalised market for Trade in Goods in accordance with Article 3 of the AfCFTA Agreement.³⁸⁰ The Protocol contains Nine annexes that cover a wide range of issues related to trade, including Customs Co-Operation and mutual administrative assistance (Annex 3), non-tariffs barriers (Annex 5), rules of origin (Annex 2), trade facilitation (Annex 4), Transit (Annex 8) and technical barriers to trade (Annex 6).³⁸¹ Three key annexes dedicated to trade are relevant to this study: Annexes 3, 4 and 5.

1. *Customs Co-Operation and mutual administrative assistance*

Annex 3 on Customs Co-Operation and mutual administrative assistance, covers state parties cooperation in all areas of customs administration and improve customs efficiency.³⁸² The Annex addresses trade facilitation in customs administration through the harmonisation of customs tariffs and statistical nomenclature, valuation systems and practices, simplification and harmonisation of customs procedures, automation of customs operations, and the adoption of information requests and exchange measures.³⁸³ State parties are urged to ensure that their respective customs authorities use internationally accepted standards, particularly those that have been endorsed by the WCO, and develop or adopt computerised customs clearance systems.³⁸⁴ This is commendable as it will provide consistency, predictability and transparency in customs operations, which will significantly benefit ICBTs.

2. *Trade facilitation in cross border trade procedures*

Annex 4 deals with trade facilitation in cross border trade procedures. It integrates many of the provisions of the WTO TFA. It provides for the simplification and

³⁷⁹ UNCTAD 'Reaping the potential benefits of the African Continental Free Trade Area for inclusive growth' available at https://unctad.org/system/files/official-document/aldcafrica2021_en.pdf (accessed 13 March 2023).

³⁸⁰ Article 2 of the AfCFTA Protocol on Trade in Goods.

³⁸¹ Article 3 of the AfCFTA Protocol on Trade in Goods.

³⁸² Annex 3 of the AfCFTA.

³⁸³ Annex 3 of Article 2,3,4,5 and 7 of the AfCFTA

³⁸⁴ Annex 3 of Article 6 of the AfCFTA.

harmonisation of international trade procedures and logistics to expedite importation, exportation and transit processes.³⁸⁵ It aims to expedite the movement, clearance and release of goods including goods in transit across borders within State parties. The Annex mandates the following: uniform import, export, and transit procedures and documents; pre-arrival processing; electronic payment; expedited shipments; use of information technology; single window; freedom of transit; execution of measures in international trade facilitation instruments, recommendations, and guidelines; and publication of trade and customs information and procedures.³⁸⁶ According to UNCTAD, implementation of such measures can play an important role in streamlining documentation requirements and enhancing the transparency and efficiency of customs procedures in Africa.³⁸⁷ This will also benefit ICBTs, as they tend to bear a disproportionately high cost when addressing administrative and regulatory obstacles as compared to larger operators.

3. *Elimination of Non-Tariff Barriers*

The AfCFTA Agreement defines NTBs as barriers that impede trade through mechanisms other than the imposition of tariffs.³⁸⁸ Across the continent, most NTBs encountered by informal traders include, among others, excessive delays, ad hoc fees at the border, cumbersome document requirements, restrictive product standards and unclear regulations.³⁸⁹ These all add to the problems and costs of importing or exporting goods hinder the smooth participation of ICBTs in trade and the potential for inclusive growth.

To begin deconstructing these barriers, the AU has adopted Annex 5 specifically dedicated to eliminating NTBs. Annex 5 particularly provides for the establishment of an institutional framework for the elimination of NTBs in the AfCFTA, the categorisation of NTBs, reporting and monitoring tools as well as the facilitation of

³⁸⁵ Annex 4 of Article 2 of the AfCFTA.

³⁸⁶ Annex 4 of Article 4,7,8,13,18 of the AfCFTA.

³⁸⁷ UNCTAD 'Implications of the AfCFTA for trade and Biodiversity: Policy and Regulatory Recommendations' available at: https://unctad.org/system/files/official-document/ditctedinf2021d3_en.pdf (accessed 13 March 2023).

³⁸⁸ Article 1 (e) of the AfCFTA Protocol on Trade in Goods.

³⁸⁹ Kilsah consulting 'Removing Cross Border trade Barriers affecting Small-scale Women Entrepreneurs' available at: <https://kilsahconsulting.com/removing-cross-border-trade-barriers-affecting-women-business/> (accessed 13 March 2023).

NTBs.³⁹⁰ The mechanism provides an opportunity for member states to take part in the identification, reporting, monitoring, resolution and elimination of NTBs through an online portal (<https://www.tradebarriers.africa/>).³⁹¹ This mechanism allows people from all African business sectors, including informal traders, to report obstacles they encounter when trading goods across intra-African borders.³⁹² The system is similar to those developed in the Economic Community of West African States (ECOWAS) and in the Tripartite Free Trade Area.³⁹³ Once a complaint is lodged, the concerned government authorities are supposed to follow up and resolve the problem. The elimination of NTBs is critical to boosting intra-African trade and achieving the objectives of the AfCFTA. If State Parties efficiently manage and eliminate NTBs, this will reduce the costs of trading across borders and ease cross border movement of goods.

Furthermore, the Trade in Goods Protocol commits countries to remove tariffs on 90 percent of non-sensitive goods produced on the continent.³⁹⁴ In other words, under the AfCFTA, State Parties agreed to reduce and ultimately eliminate 90 percent of their tariff lines on goods of goods over 5 years for non-list-Least developed countries and 10 years for least developed countries, with future possibility of scrapping tariffs on 10 percent of sensitive goods.³⁹⁵

Goods that are eligible for trade are available through an exclusive list, and this list covers goods that are of interest to ICBTs in most African countries.³⁹⁶ For this purpose, member states are working progressively towards the elimination of tariffs

³⁹⁰ Annex 5 of Article 2 (2) of the AfCFTA.

³⁹¹ African Union 'AfCFTA Non-tariff barriers, Reporting, Monitoring and Eliminating Mechanism' available at: <https://www.tradebarriers.africa/> (accessed 13 March 2023).

³⁹² Kilsah Consulting 'Removing Cross Border trade Barriers affecting Small-scale Women Entrepreneurs' available at: <https://kilsahconsulting.com/removing-cross-border-trade-barriers-affecting-women-business/> (accessed 13 March 2023).

³⁹³ The Tripartite Free Trade Area is an umbrella organisation consisting of 3 of Africa's Regional Economic Communities, namely: the COMESA; the EAC and the SADC. The Tripartite consists of 26 member countries. It is aimed at promoting the rapid social and economic development of the region it covers through: trade liberalisation; establishment of a large single market with free movement of goods and services.

³⁹⁴ Africa Union 'Operational phase of the AfCFTA' available at: <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed 13 March 2023).

³⁹⁵ African Union 'Operational phase of the AfCFTA' available at: <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed 13 March 2023)

³⁹⁶ Bisong A 'Labour mobility as a key element of the AfCFTA: what role for the AU's free movement protocol' available at: <https://ecdpm.org/work/labour-mobility-key-element-afcfta-role-au-free-movement-protocol/> (accessed 13 March 2023).

for intra-African trade. It has been required that tariff concessions should be implemented through the AfCFTA.³⁹⁷ Each state should have a schedule of tariff concessions in accordance with the approved modalities for tariff liberalisation. These schedules, are adopted by the Assembly, and thereafter implemented by Annex 1 of the Protocol on Trade in Goods and used to apply between countries as they trade with each other in accordance with Article 23 of the Agreement.³⁹⁸ By reducing tariffs, the AfCFTA increase the affordability for informal traders to operate through formal channels, which offer them more protection.³⁹⁹ To date 46 of the 54 member states have submitted tariff reduction schedules.⁴⁰⁰ The following section discusses how the AfCFTA can help to regulate ICBT.

4.3.3 AfCFTA presents an opportunity to regulate the informal cross border trade

As noted earlier, ICBTs are often at the mercy of customs and border officials implementing various tariffs and requirements while importing goods.⁴⁰¹ This situation creates a high incidence of informality in Africa's trade systems in all its characterisation and poses a major challenge for traders in the informal sector. Therefore, based on several measures about trade liberalisation as seen above. The AfCFTA and its accompanying instruments have the potential to regulate ICBT and gradually encouraging traders into the formal economy. For instance, by reducing NTBs and tariffs the AfCFTA will make it more affordable for informal traders to operate through formal channels that offer more protection. In addition, the AfCFTA proposes to simplify and harmonise trade procedures required to process goods. It aims to expedite the movement, clearance and release of goods including goods in transit across borders within State parties. It also calls for full publication of all the necessary procedures to ensure increased compliance.⁴⁰²

³⁹⁷ African Union 'AfCFTA E-tariff book' available at: <https://au-afcfta.org/etariff/> (accessed 13 March 2023).

³⁹⁸ Article 23 of the AfCFTA.

³⁹⁹ African Union 'The AfCFTA promises to unlock the potential for African women to move from micro to macro business' available at: <https://au.int/en/articles/afcfta-promises-unlock-potential-african-women-move-micro-macro-businesses-0> (accessed 13 March 2023)

⁴⁰⁰ United Nations 'AU Summit powering 2023: Powering trade through AfCFTA' available at: <https://www.un.org/africarenewal/magazine/february-2023/au-summit-2023-powering-trade-through-afcfta> (accessed 20 February 2023).

⁴⁰¹ See chapter 3.6.5.

⁴⁰² See chapter 4.3.2.1.

Further, in order to harness the potential benefits of the AfCFTA, it is necessary certain measures should be considered by policymakers. This can be by introducing a Continental Simplified Trade Regime (CSTR) for informal traders, which can help to reduce the bureaucratic processes at the customs and border ports of entry, reduce trade costs and help to improve the performance of traders.⁴⁰³ By introducing the CSTR, the AfCFTA would provide an umbrella and high threshold under which respective RECs and member states could negotiate specific goods and services to be exchanged under the common list as dictated by local conditions. Such lists should aim to be more extensive than the common lists of EAC STRs, which only cover a relatively small number of products and should apply reasonably high thresholds. In addition, in order to benefit from such CSTR, government should encourage awareness campaigns and training on specific trade regulations.

Furthermore, policymakers should adequately consider issues likely to affect effective implementation including lack of consultation with ICBTs as stakeholders and low consideration for ICBTs in trade policy issues. It can also be argued that because of the oversight of ICBTs in the regional integration framework, some of the issues faced by these traders are due to the deficient implementation of regional trading protocols. Therefore, the AfCFTA framework is an opportunity to harmonise ICBT policies, bring the issue of ICBTs to the forefront, address poor implementation of trade facilitation mechanisms, and address constraints to facilitating trade for this group.

Moreover, there is a need to establish ICBT data collection and improve the knowledge base regarding ICBT, in order to support both the policy making, advocacy and lobbying activities. Despite its importance to the livelihoods of millions of Africans, ICBT is not well understood on the continent due to lack of quality data. It imperative, any policy decision, if it is to be relevant and effective, must be based on reliable and robust data. Also, the inclusion of an ICBT chapter in AfCFTA can help address some of the key concerns in the ICBT sector. This means that, the AfCFTA policies designed with the realities of informal cross border trade in mind could help to eradicate the tag of illegality around these traders, leading to better treatment and alleviating the

⁴⁰³ Mudzingwa M 'Small-scale trade and simplified trade regime' available at: <https://www.tralac.org/blog/article/15847-small-scale-trade-and-the-simplified-trade-regime.html> (accessed 13 March 2023).

problems of violence and harassment, limited access to finance and corruption they face.

In conclusion, by regulating the ICBT sector, both traders and governments stand to benefit. According to UNCTAD study, for traders, a more secure operating environment will likely lead to a number of benefits such as greater trade and higher incomes, lower risks associated with ICBT particularly for women, facility to get credit as they are regarded as high-risk customers.⁴⁰⁴ Additionally, it will give them the possibility to access social protection, health coverage and other social security benefits accessible in the formal economy, and access to adequate facilities where exist, as they will no longer use secondary routes to cross border.⁴⁰⁵ For governments, revenues accrued by integrating informal traders into the formal sector would, in the long run, allow governments to increase public spending on essential services and to invest in facilitation of formal cross border trade through the improvement of border facilities and business environment.⁴⁰⁶

4.4 Conclusion

In response to the challenges faced by ICBTs as seen in the previous chapter,⁴⁰⁷ this chapter has discussed the implications of the AfCFTA alongside the WTO TFA in regulating ICBT. The chapter has first shed some light on the current state of intra-Africa trade, in order to understand the level of intra-African trade achieved by African countries in terms of official statistics. It was highlighted that intra-African trade remained low at 18 percent and is significantly low compared to the level of intra-regional trade of other integrated regions.⁴⁰⁸

Secondly, the chapter has discussed the role played by ICBTs in the African economy. It was highlighted that the ICBT plays a huge role in the absence of sufficient formal

⁴⁰⁴ UNCTAD 'Women in informal cross border trader in Zambia' available at: https://unctad.org/system/files/official-document/unda2023W-ICBTguide_zambia_en.pdf (accessed 12 April 2023).

⁴⁰⁵ Women in informal cross border trader in Zambia available at: https://unctad.org/system/files/official-document/unda2023W-ICBTguide_zambia_en.pdf (accessed 12 April 2023).

⁴⁰⁶ Women in informal cross border trader in Zambia available at: https://unctad.org/system/files/official-document/unda2023W-ICBTguide_zambia_en.pdf (accessed 12 April 2023).

⁴⁰⁷ See chapter 3.6.

⁴⁰⁸ See chapter 4.2.1.

economic opportunities, ICBT constitutes a key player in poverty reduction, food security and income, especially for women who constitute the majority of actors in the sector. Subsequently, the chapter has extensively discussed the measures negotiated within the AfCFTA alongside the WTO TFA as they complement each other. The chapter has begun examining the measures negotiated in the WTO TFA including the publication and availability of information, reduction of fees and charges for imports, simplification and reduction of documentation requirements and formalities. It was highlighted that these measures specifically address challenges faced by ICBTs, as they aim to improve transparency, reduce the scope of corruption, reduce the procedural and documentary requirements for traders, and the waiting period at the border posts. If fully put in place, these measures will contribute to the success of the AfCFTA.

The chapter has concluded with the measures negotiated in the AfCFTA, which was our focus in this mini thesis. It was noted that the AfCFTA presents a good opportunity for governments in African continent to regulate ICBT. The AfCFTA and its accompanying instruments include a number of measures that are expected to reduce the costs and enhance the efficiency of ICBT. These opportunities include the Protocol on free movement of people, the Protocol on Trade in Goods with measures such as Customs Co-Operation and mutual administrative assistance, trade facilitation in cross border trade procedures, NTBs and tariff reduction.

If African countries want to increase intra-African trade, it is important that informal forms of trade must be considered and regulated. Implementation of the AfCFTA and its accompanying instruments can improve trade, promote employment and facilitate economic growth across the continent. The next chapter will summarise the main points of this mini thesis chapters and make final recommendations.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes this mini thesis and makes recommendations. The chapter is divided into two sections. The first section summarises the findings of the study, the second section provides recommendations on what should be included in the next African Continental Free Trade Area (AfCFTA) phase of negotiations to better integrate the Informal Cross Border Trade (ICBT) into intra-African trade framework.

5.2 Summary of chapters

This mini thesis has looked at regulating ICBT as a solution to increase intra-African trade with the implications of the AfCFTA. It has been noted that ICBT has an important role to play in Africa's development. However, there is work to be done at the policy level to ensure that if well-regulated, ICBT is a major tool in increasing the intra-African trade. With the arrival of the AfCFTA, which aims to boost intra-African trade as a whole, the study has shown that this is well positioned to address some of the key challenges faced by ICBTs to ensure the full developmental potential of ICBT and to improve intra-African trade.

Chapter Two discussed the background to the establishment of the AfCFTA as well as the objectives and institutional architecture of the continental free trade area. It has been noted that the agreement establishing AfCFTA was signed by the African Union(AU) Heads of State and Government in Kigali, Rwanda on 21 March 2018,⁴⁰⁹ as one of the flagship projects of the AU Agenda 2063 identified as central to accelerating Africa's economic growth and development.⁴¹⁰ The AfCFTA entered into force on 30 May 2019 following the deposit of the required minimum number of 22 instruments of ratification deposited by AU member states. Trading under the AfCFTA commenced on 1 January 2021.⁴¹¹ Among the primary objectives of AfCFTA is to

⁴⁰⁹ See chapter 2.6.1.

⁴¹⁰ See chapter 2.6.3.

⁴¹¹ See chapter 2.6.3.

create a single market for goods and services aided by the free movement of persons as stated under Article 3 of the Agreement.⁴¹²

Chapter Three of this mini thesis examined the ICBT sector in the African continent with all its aspects. The study looked at the definition of ICBT, the goods traded by the ICBTs, and motives and origins of ICBT. In assessing ICBT in Africa, it was found that ICBT is not a new phenomenon in Africa.⁴¹³ Over the years, ICBT has played an invaluable role in the African countries economy by employing the vast majority of Africans, especially women, who are the majority in ICBT.⁴¹⁴ However, it was noted that while this sector provides solutions to poor households, the trade facilitation needs of ICBT are often not readily accounted for in the formation of trade policy by governments of the region as well as regional organisations across the continent. Consequently, ICBTs face challenges that prevent the full developmental potential of ICBT from being realised.

To showcase the challenging trade policy environment in which ICBTs operate across the continent, Chapter Three has further provided an analysis on policy instruments and protocols that are relevant to the informal trade sector existing in the two selected Regional Economic Communities (RECs) namely the Southern African Development Community (SADC) and the East African Community (EAC) regions. The research showed that several trade instruments and protocols have been adopted, these included the SADC trade Protocol, the Southern African Development Community Regional Indicative Strategic Development Plan (RISDP), the Protocol on the Facilitation of Movement of Persons in the SADC region and the Simplified Trade Regimes (STRs) and the One-Stop Border Post (OSBP) in the EAC.⁴¹⁵ In assessing these instruments, it has been noted that although these provisions are relevant and important for informal economy in general in the two RECs, they do not seem to take the ICBT sector seriously and, therefore, do not respond to its needs effectively. As a result, ICBTs face several obstacles when doing business. These obstacles included

⁴¹² See chapter 2.6.3.

⁴¹³ See chapter 3.3.

⁴¹⁴ See chapter 3.

⁴¹⁵ See chapter 3.5.

high transactions and delays at the border posts; inadequate border infrastructure; limited access to finance; corruption; harassment and violence.⁴¹⁶

Chapter Four analysed the implications of the AfCFTA alongside complementary measures contained in the WTO Trade Facilitation Agreement (TFA). This was done concerning the objective of this mini thesis to regulate the ICBT sector in order to increase intra-African trade, which remains low at 18 percent.⁴¹⁷ First, the measures adopted in the WTO FTA were examined in detail. These included the publication and availability of information, reduction of fees and charges for imports, simplification and reduction of documentation requirements and formalities.⁴¹⁸ It was highlighted that these measures address the challenges faced by ICBTs and have the possibility to improve transparency, reduce the scope of corruption, reduce the procedural and documentary requirements for traders, and the waiting period at the border. The study submitted that African countries should prioritise implementing such kinds of measures stated above, these in turn will contribute to the success of the current AfCFTA.

Secondly, the chapter analysed the measures negotiated in the AfCFTA. It was noted that the AfCFTA and its accompanying instruments present a good opportunity for governments in African continent to regulate ICBT. These opportunities included the Protocol of Free Movement of Persons, the Protocol on Trade in Goods with measures on Customs Co-Operation and mutual administrative assistance, trade facilitation in cross border trade procedures, Non-Tariff Barriers (NTBs) and tariff reduction. It was highlighted that the AU Free Movement of Persons Protocol is essential to generate significant benefits for ICBT. In a sense, the Protocol confers visa-free travel, the right of residency and business or professional establishment for citizens of African countries which signed this Protocol.⁴¹⁹ This has the possibility to reduce the vulnerabilities associated with illegal border crossings and income losses due to lengthy visa applications.⁴²⁰

⁴¹⁶ See chapter 3.6.

⁴¹⁷ See chapter 4.2.1.

⁴¹⁸ See chapter 4.3.1.2.

⁴¹⁹ See chapter 4.3.2.1.

⁴²⁰ See chapter 4.3.2.1.

The chapter further analysed the Protocol on Trade in Goods. It was highlighted that the Protocol has the possibility to boost intra-African trade through several measures about trade liberalisation. Such as measures related to full publication of all the necessary procedures.⁴²¹ The simplification and harmonisation of customs procedures.⁴²² The progressive elimination of tariffs and non-tariff barriers.⁴²³ These measures have the possibility to reduce, if not eliminate, unnecessary barriers to trade, which in return will facilitate ICBTs to conduct business through formal channels.

In sum, the study's findings show that the AfCFTA and its accompanying instruments reflect significant and great opportunities for Africa to turn things around better for all types of trade across the continent including the ICBT. Therefore, it is essential to understand that if African countries want to increase intra-African trade, the success of the AfCFTA depends on African states not only ratifying it but fully implementing it and complying with it.

5.3 Recommendations

The AfCFTA Agreement as well as the TFA include a number of measures that are expected to reduce the costs and enhance the efficiency of ICBT. Therefore, it is important that these provisions are supported by complementary measures to facilitate the ICBT sector in order to accelerate the growth of intra-African trade. In this regard, this mini thesis structures recommendations as follows:

5.3.1 Implementation of the continental simplified trade regime

As discussed in Chapter 4, one legal way to overcome the lack of transparency connected to cross border trade and thus to protect informal economy workers is a Continental Simplified Trade Regime.⁴²⁴ By introducing the Continental Simplified Trade Regime (CSTR), the AfCFTA would provide an umbrella and high threshold under which respective RECs and member states could negotiate specific goods and services to be exchanged under the common list as dictated by local conditions. Such lists should aim to be more extensive than the common lists of the EAC STRs, which

⁴²¹ See chapter 4.3.2.2.

⁴²² See chapter 4.3.2.2.

⁴²³ See chapter 4.3.2.2.

⁴²⁴ See chapter 4.3.2.3.

only cover a relatively small number of products and should apply reasonably high thresholds. The implementation of the CSTR has the possibility to make trade by informal cross border traders easier and less costly.

5.3.2 Development of one stop border posts

Second, as most traders have been affected by NTBs such as obtaining the necessary licences or permits for trading their goods.⁴²⁵ The development of OSBP is very important to harmonise the export documentation process, expedite administrative processes and reduce transit times for traders. For this purpose, this mini thesis recommends that as several projects to implement OSBPs have been undertaken and more are planned to connect cross border infrastructure,⁴²⁶ the AfCFTA Secretariat should stipulate what minimum infrastructure should be established at the OSBP. For example, trade information desks that provide information on trade procedures, mediate on minor misunderstandings at the border and assist in filling the customs documents should at the very least be part of OSBP.

5.3.3 Infrastructure investment

Furthermore, the AU member states should ensure that infrastructure is available to facilitate the participation of all types of traders, including ICBTs in intra-African trade.⁴²⁷ Such infrastructures should include, road and rail transport, standardising border facilities and upgrading of technology such as vehicle scanners, weighbridges; warehousing facilities, and dedicated business parks, to improve operational efficiency at the border. In addition, as discussed in chapter 3, Africa's cross border trading is predominately among African women, there is a need to provide funding to establish the necessary infrastructure at border crossing appropriate for women. Apart from storage facilities like aggregation centres, ICBT traders require suitable sanitation facilities as well as daycare centres.

⁴²⁵ See chapter 4.3.2.2.

⁴²⁶ One Stop Border Post available at: <https://www.nepad.org/publication/one-stop-border-post-sourcebook> (accessed 12 July 2023).

⁴²⁷ See chapter 2.6.5.2.

5.3.4 Data collection

Moving forward, it will be critical for African countries to establish ICBT data collection and analytical capacities in order to effectively measure ICBT's contribution to their respective economies and design appropriate policy responses.⁴²⁸ Despite its importance to the livelihoods of millions of Africans, ICBT is not well understood on the continent due to lack of quality data. This has hampered the development of supporting policies for the sector. So, any policy decision, if it is to be relevant and effective, must be based on reliable and robust data.

5.3.5 Inclusion of an informal cross border trade chapter in the African Continental Free Trade Area

Lastly, the inclusion of an ICBT chapter in AfCFTA can help address some of the key concerns in the ICBT sector.⁴²⁹ In other words, the AfCFTA policies designed with the realities of ICBT in mind could help to eradicate the tag of illegality around these traders, leading to better treatment and alleviating the problems of violence and harassment, limited access to finance and corruption they face. As such, for the benefits of the AfCFTA to trickle down, policymakers should adequately consider ICBT when designing and implementing trade policies. This can contribute to fully attainment of the objectives of the AfCFTA.

⁴²⁸ See chapter 4.3.3.

⁴²⁹ See chapter 4.3.3.

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