

ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES, SCHOOL OF LAW

**African Continental Free Trade Area and Consideration for
Environmental Protection**

By

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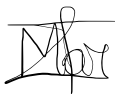
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DECLARATION

I Yared Gabru, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name: Yared Gabru

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Confirmed By:

Name: Mellese Damtie (PhD)

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Date: _____

ACRONYMS

AB	Appellate body
AU	African Union
AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AUC	African Union Commission
ASEAN	Association of South East Asian Nations
AMCEN	African Ministerial Conference on the Environment
CEC	Commission on Environmental Cooperation
CFTA	Continental Free Trade Area
CTE	Committee on Trade and Environment
CITIES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
DSB	Dispute Settlement Body
EAC	East African Community
ECA	Economic Commission for Africa
EEC	European Economic Community
EIA	Environmental Impact Assessment
EU	European Union
EKC	Environmental Kuznets Curve
FTA	Free Trade Areas

FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Goods
GMOs	Genetically Modified Organisms
ITC	International Trade Center
LDC	Least Developed Countries
MEAs	Multilateral Environmental Agreements
NAFTA	North American Free Trade Area
NAEEC	North American Agreement on the Environmental Cooperation
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
OAU	Organization of African Unity
PPM	Process and Production Methods
REC	Regional Economic Communities
SADC	Southern African Development Community
SEA	Single European Act
SPS	Sanitary and Phyto- Sanitary
TBT	Technical Barriers to Trade
TRIPS	Trade Related Intellectual Properties
UN	United Nations
UNCE	United Nations Conference on Environment

UNEP	United Nations Environmental Program
UNCTAD	United Nations Conference on Trade and Development
US	United States
USMCA	United States Mexico Canada
WTO	World Trade Organization

ABSTRACT

Members of the African Union have adopted AfCFTA in 2018. The thesis analyses how and to what extent the agreement has integrated environmental matters. It argues that the members have followed a short-sighted path of economic growth which neglects environmental consideration in a continent which is suffering from severe ecological stress. To that end the study recommends the amendment of the agreement itself and the adoption of environmental cooperative agreement within its framework with the objective of making it greener.

Keywords: AfCFTA, Africa, Economic Growth, Environmental Protection, Sustainable Development

Chapter-1

Introduction

1.1 Background of the Study

Africa is the second largest continent with abundant resources and characterized by various climate areas. It is also the second largest populated continent in the world of which 19 of the world's 20 youngest countries are within it.¹ Though it has these and other opportunities, it is the poorest continent. We can mention different reasons for this. The existence of persistent conflicts is taken as a major impediment to the socio-economic development and integration agenda in Africa.² There were different attempts by RECs and the then OAU/AU to foster economic integration in the continent. Most of the RECs in Africa were established in between 1963-1980 with the aim of creating economic integration within their respective areas. The Lagos Plan of Action (1980-2000), was launched to enhance intra trade and making the establishment of additional RECs possible with the ultimate objective of establishing African Common Market. But, the idea was revitalized when the AEC Treaty was adopted in 1991 and came into force in 1994. It provided 6-stage integration plan for the establishment of AEC by 2028. The third stage aspired by the treaty was the establishment of FTA by 2017 in the continent. AU and Agenda 2063 made economic integration their main objective.³ As a result, AfCFTA was negotiated and came into force on 30 May 2019.⁴ The main objective of AfCFTA is to create a single market for goods and services facilitated by free movement of persons in order to deepen the economic integration of African continent in accordance with the pan African vision of 'an integrated, prosperous and peaceful Africa'. This could be achieved through trade liberalization which basically necessitates gradual reduction and elimination of tariff and non-tariff barriers.⁵ It is

¹ Joe Myres, '19 of the world's 20 youngest countries are in Africa' (30 august 2019) <[https://www.weforum.org.html](https://www.weforum.org/html), accessed on 3rd September 2020

² Constitutive Act of the AU(2000) Para.9 of the Preamble

³ Dr. Bell IHUA and others, 'An Independent Study on the Potential Benefits of AFCFTA on Nigeria'(2018), 10-11

⁴ 'AfCFTA Agreement enters into force', <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>, accessed on 5 may 2019

⁵ Agreement Establishing African Continental Free Trade Area(2018) Art 3(AfCFTA)

expected that AfCFTA will double intra-Africa trade by 2022 and ensure Africa's common interest at global trade negotiations.⁶ Before the adoption of AfCFTA, the tariff protection faced by African exports to the outside world was estimated at 2.5% compared to 13.6% protection by which Africans on imports from the rest of the world. However, higher protectionism exists among African countries with average estimated tariff protection rate of 8.7%.⁷ Due to this, intra-trade in Africa is very low. Some estimates the value of intra-African trade between 13% – 15% of total trade flows. This compares to 25% in ASEAN countries, and 60% in the EU. The expectation is that the adoption of AfCFTA will increase intra-African trade to 25% over the next decade.⁸ A study also showed that AfCFTA will create a continental free trade zone with a combined GDP of \$3.4 trillion.⁹ It has a potential to increase in annual intra-African trade of \$5.7 billion - 8.7 billion in the long run.¹⁰ Its benefit is not only limited to the projection of intra-trade. But, it is multi-facial. The African business community will be also benefited as it potentially increases 'economies of scale and access to cheaper raw materials and intermediate inputs; better conditions for regional and global value chains; catalyzing the transformation of African economies towards greater utilization of technology and knowledge; facilitating both intra-African and external direct capital flows to African countries, and creating a labor market and a demand pull throughout the continent.'¹¹

Likewise, it promotes industrialization, since it will require the establishment of cross-border value chains and increases the flow of investments. It will 'also promote employment, social

⁶ Agenda 2063(2015) 17

⁷ IHUA and others(n 3) 12

⁸ European Commission (2018) Africa-Europe Alliance: EU supports African Continental Free Trade Area with EUR 50 million: https://ec.europa.eu/europeaid/news-and-events/africa-europe-alliance-eu-supports-african-continental-free-trade-area-eu50-million_en

⁹ African Union (2019) CFTA – Continental Free Trade Area: <https://au.int/en/ti/cfta/about>

¹⁰ Ethan McCormac, Aaron Tam and Dan Aylward-Mills, 'What Africa Stands to Gain from the AfCFTA: Country Level-Impacts'(2019), Vivid Economics,3

¹¹ International Trade Centre (2018), 'A Business Guide to the African Continental Free Trade Area Agreement', ITC, Geneva, iii

advancement, consumer choice, and a range of other objectives closely associated with the Sustainable Development Goals.’¹²

These all benefits are good. But, it will be meaningless without taking environmental protection into consideration. Specially, for Africa which is very exposed for environmental problems, its adoption will exacerbate the problem as all members are developing and least developed countries known for least environmental standards.¹³ Developing countries with lenient environmental regulations are likely to specialize and export ‘pollution-intensive industries.’ In such cases, trade liberalization could lead to environmental degradation.¹⁴ Likewise here the ‘race to bottom hypothesis’ came into picture. Even as per Environmental Kuznets Curve (EKC)¹⁵, till the ‘critical level of growth’ reach, substantial environmental degradation will be sustained by African states as it will take long time for them to attain this limit. Even with attaining maximum growth, no decline will be noticed with some pollutants like CO₂.¹⁶

Taking all the above facts into consideration, the AfCFTA has not given due regard to environmental protection except some provisions in general exception clauses in the GATT, GATS, SPS and TBT agreements. This is a complete departure from recent trends in FTAs which incorporate environmental protection provisions or environmental cooperation agreements to balance or remedy the negative effects of trade liberalization. It is also completely ignorant of the Agenda 2063 which envisages a prosperous Africa based on inclusive and sustainable development.¹⁷

¹² *ibid* ix

¹³ Xing Yao and others, ‘Free Trade Agreement and Environment for Sustainable Development :A gravity Model Analysis’, *Sustainability*, Vol. 11(2019),1

¹⁴ Hing Vutha and Hossein Jalilian, ‘Environmental impacts of the ASEAN-China free trade agreement on the greater Mekong sub-region’(2008), Cambodia Development Resource Institute, 13

¹⁵ “The EKC depicts the relationship between income and environmental quality along a development curve, and predicts that environmental damage will increase at lower income levels (known as environmental decay), reach a maximum level (known as turning point income) and decline thereafter (known as environmental improvement)” *ibid* 11

¹⁶ Jeffrey Frankel, ‘Environmental Effects of International Trade (2009)’, EXPERT REPORT NO. 31 TO SWEDEN’S GLOBALISATION COUNCIL, 6-7

¹⁷ Agenda 2063(n 6) 2

Majority of the member states have ratified regional as well as multilateral environmental treaties. But, they are known for poor compliance to them. So, this paper will argue that AfCFTA should adopt an additional environmental agreement to it as the current AU environmental regimens are not able and sufficient to handle the environmental problems potentially could intensified as a result of its creation.

1.2 Statement of the Problem

As discussed above, AfCFTA is expected to boost the economy of the continent significantly. But, to make the development sustainable ‘changes in production processes and consumption behavior are fundamental.’¹⁸ Unfortunately, in Africa the structural growth aspired by AfCFTA is heavily relied on the extraction of natural resources which badly results in the deterioration of the environment.

AfCFTA is very ignorant of the environmental issues. Only its Protocol on Trade in Services in its preamble acknowledged environmental protection and sustainable development. But, this cannot be enforced as it is not converted into binding commitments. Article 3 of the agreement totally neglected the issue of environmental protection as it makes economic growth the main objective. Even in Article 3(e), the expression ‘sustainable and inclusive socio-economic development’ seems to decouple environmental protection from economic development. The specific objectives under Article 4 substantiate the above position. They call cooperation only on trade issues. Had it not aimed to trade off economic growth and environmental protection, at least, it would provide a single specific environmental objective. More importantly, the issue of sustainable development is not mentioned under the principles that govern member states while applying the provisions under the convention.¹⁹ Article 19 of the agreement addresses the issue of inconsistency between RECs and the agreement but not with other MEAs. For instance, a problem could arise when a state apply precautionary principle in fulfilling its treaty obligation under other MEA.

Likewise, the Protocol on Trade in Goods under its preamble and Article 2, totally overlooked environmental issue by stressing on boosting intra-trade through elimination of tariff and non-

¹⁸ United Nations Economic Commission for Africa(2015), ‘African Regional Report on the Sustainable Development Goals’, 35(UNECA)

¹⁹ AfCFTA (n 5) Art 5

tariff barriers as its principal objective. The General Exceptions Clauses in these protocols and in the SPS, TBT agreements are not sufficient to protect environmental interests since member states cannot ‘unilaterally’ exclude the tradability of a good based on its PPM.

Having all the above deficiencies in AfCFTA, the existing environmental problems in the continent would be intensified.²⁰ Most African nations ratify MEA and regional environmental instruments. But they have evidenced a lack of political will to domestically enforce these conventions where they have ended up as ‘paper tigers’. Sometimes, they are not even willing to ratify environmental agreements. The need to promote economic growth and poverty reduction are cited as an excuse for the above problem.²¹

The other important problem in Africa’s environmental protection is attributed to lack of effective institution which ensures compliance. AU has acknowledged that ‘current institutional structures do not fully address Africa’s environmental, sustainable development and climate change needs’.²² Moreover, in a continent where the culture of participating the public is very low and judicial review of environmental matters is almost non-existent, the adoption of AfCFTA will exacerbate transboundary pollution and waste disposal at boarder areas as nothing is included in the agreement whereby member states would cooperate to minimize such problems and established institutions which seriously follow its impact on the environment. Likewise, there is no provision which empowers one member state to oversee the implementation of other member’s national environmental law and take actions in case of persistent breach of it.²³ In the name of free trade some states could try to make the environment in their jurisdiction cleaner and consumes the products produced in other countries, where production techniques are actually

²⁰ “Expanded trade tends to increase the scale of production for the world as a whole, meaning that the total volume of pollution and environmental damage is likely to increase. Trade also necessarily involves energy use for transportation, with resulting air pollution and other environmental impacts.” (Jonathan M. Harris, ‘Trade and the Environment’(2004), Tufts University Global Development and Environment Institute, 5)

²¹ Emeka Polycarp Amechi, ‘Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection’, *6/2 Law, Environment and Development Journal* (2010) 128-129

²² AU, ‘Decision on Africa Consensus Statement to the United Nations Conference on Sustainable Development (Rio +20) - Doc. Assembly/AU/10(XVIII)’, Assembly/AU/Dec.400(XVIII) Para 5

²³ See Chapter Five of North American Agreement on Environmental Cooperation (1993) on this matter.

more environmentally damaging, by shifting the location of production to other countries.²⁴ Thus, such problems should be handled seriously as between AfCFTA member states.

1.3 Research Questions

The main research question of the thesis is:

- What environmental issues should be considered to make the AfCFTA adequately green?

In order to answer the main question the following specific questions will be asked:

- What are the environmental provisions of AfCFTA? Are they sufficient enough to balance trade and environment?
- Why is it necessary to make AfCFTA greener while there are different conventions on environmental protection under AU system?
- How other FTAs i.e. WTO, EU and NAFTA responded to environmental issues and what lessons should AfCFTA derive from them?

1.4 Objectives of the Study

The following are the objectives of the study:

- To show the level of environmental concerns of AfCFTA in relation to its concern to trade aspects
- To analyze the environmental regimes under AU and their effectiveness
- To show how other FTAs intrinsically adopted environmental provisions in the agreement itself or adopted a sideline environmental agreement.
- To recommend the way how AfCFTA member states properly ensure environmental protection within the agreement

1.5 Significance of the Study

I strongly believe that this study will have a significant importance for AU, AfCFTA member states and other stakeholders to reconsider their failure to ensure that the agreement has sufficiently incorporated environmental provisions and established an environmental institutions

²⁴ Tim Everett and others, 'Economic Growth and the Environment'(2010), Defra Evidence and Analysis Series, Paper 2, 8

which ensure sustainable development which is the basic goal aspired by many instruments of AU including Agenda 2063.

1.6 Literature Review

There are several literatures written on AfCFTA only emphasizing on the trade and general human rights perspective of the agreement. These literatures analyze the *pros and cons* of liberalizing trade in Africa. To the best knowledge of this researcher, there are no authors who comprehensively scrutinize the effect of AfCFTA on the environment. It is only UNCTAD (*UNCTAD/WEB/DITC/2016/7*) which commends member states in the creation process of the FTA ‘to work together to foster more environmentally and climate friendly development paths’ in order to minimize negative environmental impacts of the agreement. It further stressed the need to consult environmental NGOs in the process of negotiating the agreement. Thus, this research paper will explore this “overlooked” area of the agreement.

1.7 Scope and Limitations of the Study

The study is basically limited to the environmental aspect of AfCFTA. It does not analyze the technical trade aspect of the agreement. The lack of free access to some books and articles was a difficulty initially faced by the researcher.

1.8 Research Methodology

This thesis is doctrinal. Relevant legal instruments will be analyzed using basic rules of legal interpretations. I will also consult books, journal articles, researches and reports on the area. Some comparative analysis is also employed to address and clarify some issues.

1.9 Structure of the Paper

This paper will have five chapters. The first chapter will be introduction. The second chapter shortly tries to show the effect economic growth has on the environment. It will discuss some of the theories and hypothesis on the area. The third chapter is devoted to the discussion on how WTO, EU and NAFTA responded to environmental matters. The fourth chapter will explore AfCFTA and its environmental provisions. It also briefly examines AU’s environmental regimes. The final chapter is the conclusions and recommendations part of the study.

Chapter- 2

Some Conceptual Issues on the Relationship between Free Trade and Environmental Protection

2.1 Free Trade vs. Environmental Protection

Sustainable development²⁵ is at the center of free trade and environmental protection. It can be achieved only if growth in the economy and population are in ‘harmony with the changing production potential of the ecosystem’.²⁶ The desire to liberalize trade should at the same time integrate and balance environmental concerns to sustain the growth.²⁷ The measure to protect the environment should also be least trade restrictive. It is undeniable that economic growth always causes an ecological stress, as it enhances the pressure on environmental resources.²⁸ There is hot debate on the issue whether free trade is good or bad for environmental protection. There are some who argue that it is good for the environment. But, environmentalists are very skeptical on it. Let us see some of these competitive arguments.

The following three ways explain how the change in trade and foreign investment policies will impact pollution and deteriorate natural resources.²⁹ The first one is the ‘scale effect’. It provides that liberations in trade and investment will bring a growth in the economy. This growth subsequently will require more inputs which lead to the deterioration of the environment. Similarly, the growing industry will require more energy which mainly depends on the prevalent

²⁵ Sustainable development defined as a ‘development that seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs.’ (World Commission on Environment and Development, Our Common Future (1987) Chapter 1, Para.49) (Our Common Future). The present and future needs here require consistent change in the process of ‘the exploitation of resources, the direction of investments, the reorientation of technological development and institutional’. (See the same report. Chapter-2 Para.15)

²⁶ *ibid* part I, Para 29

²⁷ Rio Declaration on Environment and Development (1992), Principle 4 and 12

²⁸ Our common future(n 25) Chapter-1, Para 51

²⁹ M. Grossman and Alan B. Krueger, ‘Environmental Impacts of a North American Free Trade Agreement’(1991), NBER Working Paper No.3914, 3-5 and Matthew A. Cole and Eric Neumayer, ‘19 Environmental Policy and the Environmental Kuznets Curve: Can Developing Countries Escape the Detrimental Consequences of Economic Growth?(2005)’, Handbook of Global Environmental, 303

method i.e. energy derived from fossil fuels. This will lead to environmental pollution proportional to the growth in the economy. Likewise, the growth in cross border transportation as the result of free trade will highly results in air pollution. The second one is the ‘composition effect’. When trade is liberalized countries tend to specialize on those sectors where they have a comparative advantage. If this advantage emanates from lenient environmental regulation, which mainly tolerates pollution, then the composition effect of trade liberalization will badly harm the environment. Other countries take the same path by shifting out from production in industries where the local costs of pollution abatement are relatively very high. The composition effect will also encourage countries to shift resources into the sectors that make intensive use of its abundant factors that leads to depletion in environmental resources.³⁰ Thirdly, positive attributes of free trade are found in the ‘technique effect’. It shows how free trade results in reduction of pollution. Firstly, producers will transfer modern clean technologies to local communities with free trade. Second, the growth in the wealth will increase the demand to live in a clean environment. To achieve this government will be urged to adopt more stringent environmental regulations and set up effective environmental institutions. Definitely, trade liberalization could encourage innovation beneficial to environmental protection.³¹ There are also others who argue that economic growth will reduce pollution as countries transfer from more pollutant sectors i.e. agriculture and industry to cleaner one i.e. service sector.³²

There are certain areas where we encounter inconsistencies between trade and environment.³³ The first area of conflict is related with an attempt by the two regimes to regulate waste. Free trade recognizes some wastes as a good whose free movement may be protected by law. But, environmental law wants to protect the environment from those wastes when they are dangerous

³⁰ Harris (n 20) 5

³¹ Frankel (n 16) 7. “Freer trade may facilitate the spread of environmentally friendly technology, and the tendency of trade to promote more efficient production will tend to reduce materials and energy use per unit of output. In addition, trading nations may come under pressure to improve environmental standards when product quality or transboundary impacts are at issue. (Harris (n 20) 5)

³² James Van Alstine and Eric Neumayer, ‘The Environmental Kuznets Curve’, in Kevin P. Gallagher (ed), *Handbook on Trade and the Environment* (Edward Elgar Publishing Limited 2008) 50

³³ Damien Geradin as cited in M. Morales-Gomez, Pedro, ‘The Nafta Package and the Environment: A Green Analysis of its Origins and Effects’. (*LLM Theses and Essays*, University of Georgia 2000, https://digitalcommons.law.uga.edu/stu_llm/251, 3

to humans, animals and plant life and health. A second area of conflict would be the area of product standards. A conflict may arise when environmental standards are imposed on a product and that is considered as 'green protectionism' by producers. The final conflict would be related to area of process standards. Lack of harmonization of process standards between countries may distort free trade, since they differ the costs of production, creating unequal conditions of competition which will lead pollution havens. Some also raise the potential problem free trade could impose on governments on the domestic regulation of the environment. They thought that trade liberalization rules undermine national governments effort to enact domestic environmental laws as they fear that their action breaches the trade rules. Trade rules also prevent or makes difficult for states to rely on environmental justifications to exclude a product from entering into their market. Free trade also makes impossible the implementation of MEAs that use trade restrictions to protect the environment. The rules in multilateral trading system hinder efforts to compel other countries to adopt high environmental standards that prevent or reduce trans-boundary pollution, remove competitive advantages in attracting investment and in selling products and services, or to conserve natural resources. Lack of transparency in trade negotiations and its potential to make small local industries known for their sound use of natural resources out of market are other reasons.³⁴

2.2 Pollution Haven Hypothesis

This hypothesis states that pollution intensive industries will relocate /shift to countries with lenient environmental policies. According to this hypothesis countries with relatively weak environmental policy will have a comparative advantage in pollution-intensive production.³⁵ The assumption is that, when countries are open to international trade and investment, some will specialize in producing dirty products, and export them to other countries. Such countries could be said to exploit a comparative advantage in pollution. Though they do have this advantage, their environment will be severely damaged, as compared to what would have been without free trade. But, the environment will be cleaner in the importing countries.³⁶ Based on this

³⁴ *ibid* 3-4 and Patricia Birnie, Alan Boyle, Catherine Redgwell , *International Law and the Environment* (3rd edn, Oxford University Press 2009) 754

³⁵ Brian R. Copeland, 'The Pollution Haven Hypothesis', in Kevin P. Gallagher (ed), *Handbook on Trade and the Environment* (Edward Elgar Publishing Limited 2008) 64

³⁶ Frankel (n 16) 31

hypothesis, developing countries will have a comparative advantage over the developed countries as less stringent regulation overwhelmingly exist in developing countries that would attract pollution intensive industries. Therefore, the developed countries will specialize in clean production but the developing countries in pollution-intensive production.³⁷

The pollution haven hypothesis will lead to the ‘race to the bottom’. In order to attract trade and investment, countries in FTAs will tend to adopt soft environmental standards.³⁸

2.3 Environmental Kuznets Curve (EKC)

EKC explains the relationship between income and environmental protection. It dictates that there is an inverted U-shape pattern of relationship between growth in income and environmental protection. The idea behind the Environmental Kuznets Curve is that growth is bad for air and water pollution at the initial stages of industrialization. But, later on it reduces pollution as countries become rich enough to pay to clean up their environments.³⁹ As per an empirical research conducted by Grossman and Kruger, by ‘holding constant the identifiable geographic characteristics of different cities, a common global time trend in the levels of pollution, and the location and type of the pollution measurement device’, the result shows that the levels of both sulfur dioxide and dark matter suspended in the air increase at low levels of national income, but decrease when the economic growth reaches at higher levels of income.⁴⁰ The turning point comes somewhere between \$4,000 and \$5,000, measured in 1985 U.S. dollars. For a third measure of air quality, namely the mass of suspended particles found in a given volume of air,

³⁷ Van Alstine and Neumayer (n 32) 55

³⁸ Frankel (n 16) 18-19. Concerns have arisen of a ‘race to the bottom’ in which nations reduce environmental and social standards in order to gain competitive advantage. “Producers located in member states enforcing strict process standards will suffer a competitive disadvantage compared with producers located in member states enforcing less strict standards. All things being equal, this may result in increased sales, market share and profitability for those producers located in low-standard member states . . . faced with the prospect of their industries suffering a competitive disadvantage when compared with companies located in low-standard jurisdictions, member states may choose not to elevate environmental standards or may even relax current standards.”(Brack, 1998, p. 113, As cited in Harris (n 20) 8)

³⁹ Frankel (n 16) 16

⁴⁰ This will not work for all kinds of pollutants. CO2 emissions and municipal wastes continued to increase with economic growth. (Harris (n 20) 10)

the relationship between pollution and economic growth is monotonically decreasing.⁴¹ According to Cole and Neumayer, EKC results reveal that the environment in Africa will sustain an increasing long-term pollution even with all growth scenarios.⁴² This is because, predicted per capita income for African countries in 2100 is 1508\$. To reach the EKC turning point where by pollution dramatically falls i.e. US\$ 5000, it will take a long period of time. Till that time, the environment will be increasingly polluted.⁴³ There are methodological critics forwarded against the end results of EKC. Some argue that the rich countries showed reduction in air pollution not as a result of growth in their economy. Rather, they attained it ‘partly by exporting the dirty production to the poor countries’.⁴⁴ LDCs especially, those countries in Africa are not advised to follow the EKC pathway i.e. to achieve initially economic growth while disregarding environmental problems. Because the costs of environmental resilience and adaptation would be unbearable for them even after they have achieved economic growth. Some environmental damages are also irreversible. Moreover, they ‘will have no-one to whom they can pass their pollution-intensive industries’ though economic growth is achieved later. As a solution, they have to employ the technique effect that results from increased environmental regulations together with greater access to new technology.⁴⁵ They should also follow the precautionary approach during earliest stages of economic development and ‘alternative socioeconomic factors that would induce increased demand for environmental regulations should be given incentives, along with measures to spur economic growth.’⁴⁶

Conclusion

In this chapter the relationship between free trade and environmental protection is discussed from different theoretical perspectives taking sustainable development at the center. It is undeniable that economic growth will lead to ecological stress. The ‘scale effect’ and ‘composition effect’ analyses show that trade liberalization will result in deterioration of natural

⁴¹ Grossman and Krueger (n 29), 5

⁴² Cole and Neumayer (n 29), 309

⁴³ *ibid* 310 and 312

⁴⁴ *ibid* 298

⁴⁵ *ibid* 303

⁴⁶ Van Alstine and Neumayer (n 32), 57

resources and increase in pollution. The ‘technique effect’, on the other hand , provides that free trade is good for environmental protection as it enhances transfer of environmentally clean technologies and endures states to adopt more stringent environmental regulations as the demand to live in a clean environment will increases with wealth. It is discussed that free trade agreements make domestic environmental regulations difficult as there are very few stances that allow member states to restrict trade in favor of environmental objectives. The discussion on pollution haven hypothesis revealed the fact that states will relocate their dirty productions to those countries with lenient environmental regulations. It is indicated that it is very erroneous for African states to exploit the comparative advantage they have with regard to this issue at the expense of environmental protection. Finally, the EKC which was discussed in this chapter is not the correct growth path to be followed by African states as it will take longer for them to reach the critical level of growth where environmental protection shows an improvement. Moreover, there are no other countries to which they relocate their pollution intensive industries as the developed countries will not allow that to happen. Thus, it is must for African countries to make their economic growth sustainable by adopting precautionary principle in developmental programs and policies and employing the technique effect that results from increased environmental regulations together with greater access to new technology.

Chapter-3

Major FTA's and Their Consideration for the Environment

3.1 Introduction

Trends in making multilateral trade agreements are showing attempts to balance the negative effect of trade have on environmental protection since 1972's UN conference on the environment.⁴⁷ They discharge this objective by integrating environmental provision in the trade agreement itself or by adopting another environmental agreement within that trade area. This means, the adoption of environmental issues could happen simultaneously with the trade negotiation or subsequent to its adoption. The greening of trade areas are made in a response to achieving sustainable development. The following part will discuss some selected FTAs and their environmental regimes.

3.2 World Trade Organization (WTO)

WTO is the largest global multilateral free trade organization with 164 members. It is adopted in 1995 at Marrakesh. One of the main objectives of the WTO is to liberalize trade that will uplift the standard of living, ensures full employment and brings steady growth in the volume of real income. At the same time, it wants to protect and preserve the environment by allowing the optimal exploitation of resources in accordance with the objectives of sustainable development.⁴⁸ From this, it is clear that WTO has tried to balance the two objectives i.e. liberalizing trade and environmental protection by recognizing the potential conflict that could exist between them.⁴⁹ WTO agreements have also adopted provisions that can be used to protect the environmental. GATT under Article XX (b) contains an exception for measures 'necessary to protect human, animal or plant life or health'. Similarly under Article XX (g) of the same a state can exceptionally take a trade measure to protect exhaustible natural resources. GATS contains an exception for measures 'necessary to protect human, animal or plant life, or health' under Article

⁴⁷ Our Common Future (n 25) Chapter 12, Para.19

⁴⁸ Agreement Establishing WTO (1994) Preamble, Para 1

⁴⁹ Birnie, Boyle, Redgwell (n 34) 755

XIV (b).⁵⁰ Pursuant to Article 27.2 of TRIPS, states are also at liberty to deny the patentability of an invention where it is essential to protect human, animal, or plant life or health or to avoid serious prejudice to the environment.⁵¹ Under Article 5.2 of the SPS Agreement ‘ecological and environmental conditions’ is taken as one risk-assessment criterion. Article 6.2 of the same takes ‘ecosystems’ as one factor members should consider in determining pest or disease free areas.⁵² Likewise, under Article 2.2 of the TBT agreement, the Protection of the environment is a recognized a legitimate objective to restrict trade. The Agreement on Agriculture also has certain exceptions that relieve members from their subsidy reduction obligations for environmental measures.⁵³

But WTO is not free from critics on issues relating to environmental protection. From the WTO perspective, the responsibility for environmental policy should remain at the national level. This argument, placing the responsibility for environmental policies on national governments, has been criticized on several grounds. It fails to consider the competitive pressures that may encourage trading nations to reduce environmental protections, as well as the inadequate institutional structures in many developing countries. It is also inadequate for dealing with environmental problems which are truly transboundary or global.⁵⁴ In 1999 in Seattle many environmental groups protested WTO for its stand on environmental matters. This event is known as ‘the battle of Seattle’. They call member states to challenge each other’s environmental standards and a non-trade barrier.⁵⁵

The application of the above exceptions usually poses a difficulty. WTO has not provided a clear mechanism by which such conflicts would be resolved. For instance, ‘under the GATT, although countries could use import barriers to protect themselves against environmental damage that would otherwise occur within their own borders, they could not use them in efforts to affect how

⁵⁰ *ibid*, see footnote 12 on 756 and Steve Charnovitz, ‘An introduction to the trade and environment debate’, in Kevin P. Gallagher (ed), *Handbook on Trade and the Environment* (Edward Elgar Publishing Limited 2008) 243

⁵¹ Birnie, Boyle, Redgwell (n 34) See footnote 12 on 756 and Charnovitz (n 50) 242

⁵² Birnie, Boyle, Redgwell (n 34) See footnote 12 on 756 and Charnovitz (n 50) 242-243

⁵³ Birnie, Boyle, Redgwell (n 34) See footnote 12 on 756-57 and Charnovitz (n 50) 242

⁵⁴ Harris (n 20) 12

⁵⁵ Carmen G. Gonzalez, ‘Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade’, 78 *DENV. U. L. REV.* 979 (2001). <https://digitalcommons.law.seattleu.edu/faculty/298> 979

goods are produced in foreign countries, PPMs'.⁵⁶ Similarly, the country relying on those exceptions will face a great difficulty to prove that its measure is consistent with the exceptional rules as the burden of showing that is placed upon the party asserting it as a defense. Members relying on these exceptions usually lose the case largely because of the strictness with which the provisions are interpreted by DSB of WTO.⁵⁷

WTO tries to resolve environmental issues using its two institutions. The first one is the CTE⁵⁸. It has basically two mandates. It is empowered to promote sustainable development by identifying the relationship between trade measures and environmental measures in all areas of the multilateral trading system. Second, it has to devise appropriate recommendations on 'whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system.'⁵⁹ The WTO at Doha in 2001 has called a negotiation on two areas to enhance the supportiveness of trade and environment. One area is to check the relationship between existing WTO rules and specific

⁵⁶ Birnie, Boyle, Redgwell (n 34), 769-772. "Under GATT and WTO rules, the *process* by which a product is produced is not an acceptable cause for trade restrictions. Only if the *product* itself is harmful can a country impose controls...This process and production methods (PPM) rule removes an important potential weapon for international environmental protection. If a nation fails to act to protect its own environment, other countries have no trade leverage to promote better environmental practices. Only if a MEA, such as the CITES, is in place are import restrictions permissible." (Harris (n 20) 7)

⁵⁷ Birnie, Boyle, Redgwell (n 34) 760. "Although the WTO recognizes a special exception to trade rules under Article XX for resource conservation and environmental protection, its panel rulings have interpreted this narrowly. WTO authorities tend to be suspicious of "green protectionism" – the use of trade barriers to protect domestic industry from competition under the guise of environmental regulation. They are also unsympathetic to efforts by nations to use trade measures to affect environmental policy outside their borders."(Harris (n 20) 12)

⁵⁸ CTE is established in 1995 under WTO. It is a political organ as its members are selected by their respective states and safeguard the interest of that member state. Its decisions are adopted by consensus just like under the WTO, a procedure which is prejudicial to pass decisions on environmental matters. (J. Samuel Barkin, 'Trade and environment institutions', in Kevin P. Gallagher (ed), *Handbook on Trade and the Environment* (Edward Elgar Publishing Limited 2008) 319)

⁵⁹ The Trade and Environment Committee, and Doha preparations, https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief11_e.htm, accessed on 2/22/2020 and Ved P. Nanda and George (Rock) Pring, *International Environmental Law and Policy for the 21st Century*, (2nd revised edn, Martinus Nijhoff Publishers 2013) 557 and Birnie, Boyle, Redgwell (n 34), 762

trade obligations set out in MEAs. But, still the problem is that this negotiation will only affect members who are parties to the MEA at issue. WTO members which are not parties to that MEA are not bound by the outcome of this negotiation.⁶⁰ This means ‘if one side is not a signatory to the environmental agreement then the only possible forum for settling the dispute is the WTO’.⁶¹ The Second area of negotiation is on the procedures that regulate regular information exchange between MEA Secretariats and the relevant WTO committees, and on the criteria of granting observer status to MEA Secretariats in works of WTO.⁶²

During the meeting, the CTE is instructed by the ministerial conference to give particular attention to the effects of environmental measures on market access and identify WTO rules that require modifications.⁶³ Still the negotiations on these matters are not concluded by WTO. There is no consensus among members which have paralyzed the progress in the CTE.⁶⁴ The developed nations require the adoption of clear environmental provision in trade agreements.⁶⁵ The developing countries considered this motion as a technique devised to deny a market access for their products. The growing disagreement between EU and US on some matters including the precautionary principle is the other deadlock. The procedure by which its decisions made through consensus had made its efforts unproductive.⁶⁶

The other institution which is capable of reconciling the two objectives is DSB. But, this body is not also very successful in addressing the issue. Most of its decisions favor trade. Had it resolved the problem in balancing the two objectives, it would not be as such satisfactory since the decisions cannot have a binding effect on subsequent similar cases. Rather it has to be clarified with the adoption of new legal rules through renegotiations.

⁶⁰ Doha Ministerial Declaration(2001) Art 31(i)

⁶¹ Nanda and Pring (n 60) 557

⁶² WTO (n 61) Art 31 (ii)

⁶³ *ibid*, Art 32

⁶⁴ Barkin (n 59) 322

⁶⁵ Developed countries generally prefer a rule that explicitly states that trade-distorting MEA rules constitute exceptions to WTO rules while developing countries do not prefer it. Since consensus is unlikely, the interpretation of the status of MEAs in WTO rules is likely to be made by the DSB, rather than the political mechanism. *ibid* 319

⁶⁶ Birnie, Boyle, Redgwell (n 34) 763

3.2.1 US-Shrimp Case

For most writers the decision of the appellate body in the US-shrimp case is considered as progressive since it takes into account some environment matters. The US enacted an act that required all foreign shrimp operators to employ a Turtle Excluder Devices (TEDs) wherever they harvested shrimp if they want to access the US market. India, Malaysia, Pakistan, and Thailand complained that US has breached the GATT provisions. US relied on article XX (b) and XX (g) of the GATT to defend the case. The AB decided the case against US as follows;

“although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.”⁶⁷

The relevance of the decision is seen from three points. One, it recognized discrimination based on PPM i.e. US's measure requiring the TED as a legitimate exception to fall under article XX(g) of GATT.⁶⁸ Second it accepted an *amicus* briefs from non-governmental organizations.⁶⁹ The AB in its decision ruled that there is no rule which prohibits the acceptance of non-requested information from non-governmental sources.⁷⁰ In this case three NGOs i.e. Center for Marine Conservation, the Center for International Environmental Law and World Wide Fund for Nature have attached their submission before the panel.⁷¹ Third, it takes note of the protections and the endangered status of Turtles as recognized in MEAs. It relied on CITIES to conclude that turtles are exhaustible natural resources.⁷² But, the same decision clearly shows how WTO dispute settlement bodies subordinate environmental matters while dealing issues

⁶⁷ *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998) (*US-Shrimp Case*) 75

⁶⁸ Charles Arden-Clarke, ‘The Impact of the Shrimp/Turtle Dispute’, in the Halina Ward and Duncan Brack (eds), *Trade, Investment and the Environment* (Taylor & Francis Group 2000) 183

⁶⁹ *ibid*, Nanda and Pring (n 60) 547 and James Cameron, ‘Conflict Resolution: The Shrimp/Turtle Dispute and the Future’, in the Halina ward and Duncan Brack (eds), *Trade, Investment and the Environment* (Taylor & Francis Group 2000) 204-205

⁷⁰ *US-Shrimp Case* (n 67)76

⁷¹ *ibid* 34-35

⁷² *ibid* 50

involving trade and environment. Although the AB considered the appropriateness of the US import ban directed at countries that the US government believed were not adequately protecting sea turtles it failed not consider whether the complaining governments were adequately protecting sea turtles. As such, it can be said ‘WTO dispute settlement may not be able to achieve a satisfactory solution to complex disputes regarding the ‘ecolonomy’ i.e. the overlay of the world ecology and economy.’⁷³

3.3 The European Union (EU)

EU is a single market area with 27 member states. It is currently becoming a standard setter at international environmental negotiations.⁷⁴ Before the Single European Act (SEA) of 1987, environmental protection was not recognized as a legal competence of the EEC. Enacting their own laws on the area was left to the member states.⁷⁵ Environmental protection was given a subsidiary consideration in the process of the European integration. The EEC was initially driven by ‘qualitative dimensions’ and not paid the necessary attention to its qualitative aspects. Harmonizing the environmental standard is seen as a way to accelerate the creation of a single market. But after 1972 UNCE, member states started to value environmental protection in itself. The first environmental law of the community was adopted in 1959 and the first environmental action program was adopted in 1973.⁷⁶ But there were different attempts by EEC institution to ensure environmental protection. They construed the meanings of the following provisions of EEC treaty to substantiate their stand. The preamble takes improving the ‘living and working conditions ‘of the people of member states as one of its basic aim. Article 2(i) of the same also recognized enhancing living standards of the citizens of the community as one objective. similarly, Article 100 empowers the Council acting ‘unanimously on a proposal from the Commission to issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or

⁷³ Charnovitz (n 50) 239

⁷⁴ Henrik Selin and Stacy D. VanDeveer , ‘The Politics of Trade and Environment in the European Union’, in Kevin P. Gallagher (ed), *HANDBOOK ON TRADE AND THE ENVIRONMENT* (Edward Elgar Publishing Limited 2008) 201 and John McCormick, *Environmental Policy in the European Union* (PALGRAVE 2001) 123

⁷⁵ Treaty Establishing the EEC (1957), Article 32 and 36

⁷⁶ Selin and VanDeveer (n 75) 196-97, McCormick (n 75) 1 and 43

functioning of the common market'. Article 235 also provides 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

But, with the adoption of the Single European Act in 1987, environmental matters became legally under the competence of the EU. It is recognized as one of the four European policy areas along consumer protection, culture, and health policies. It made Environmental protection requirements to be a component of the Community's other policies. Moreover; Article 130(r) of the SEA incorporated 'prudent and rational utilization of natural resources' i.e., sustainable development as its basic objective. Similarly, it recognized prevention, the polluter pays and cooperation principles on environmental sphere.

The passage of the Maastricht treaty in 1993 added a 'number of evolutionary effects' on the union's environmental policy. First, Article 2 clearly made the promotion of harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment throughout the Community the main task of the community. Second, Article 3 of it made 'a policy in the sphere of the environment' one of 20 main activities of the community. Thirdly, Article 130r inscribed the Community policy on the environment to contribute towards 'promoting measures at international level to deal with regional or worldwide environmental problems.' Fourth, it abolished unanimous decision making procedure and adopted qualified majority voting system that makes the environmental decision making procedure relatively easier. Fifth, the precautionary principle is taken as a guiding principle in the works of the community. Member states are also allowed to adopt more stringent environmental standard than that of the community as far as it is non-discriminatory and proportional. Likewise, the adoption of derogative principle will allow states at lower level of development to take measures that are environmental to the best of their capacity rather than to be totally out of the system.⁷⁷

⁷⁷ Selin and VanDeveer (n 75) 198-201, McCormick (n 75) 42,44 and 85-87

Once the environmental policy is adopted by the community, member states are obliged to accept and implement it domestically. It follows the 'command and control approach'. They can only have a different environmental law on subsidiary areas not covered by the community like in a modern federal system. All important environmental decisions are made at the EU level. Consequently, we do have similar/ harmonized environmental standards between member states.⁷⁸

When we observe how its institutions work, the European council sets environmental objectives. Then the commission is required to prepare draft laws and policies. It is also mandated to ensure the implementation of EU laws through national bureaucracies. The council of ministers and the EU parliament by co-decision decide on the fate of proposed laws prepared by the commission. The European court of justice ensures the goals in the laws are met when a complaint is brought to it by the commission alleging breach of environmental obligation by a member state. It can impose a fine as a sanction for the failure by a state to observe the EU environmental law.⁷⁹

The European Environmental Agency is also established in 1990. It collects process and provides the commission with the information needed to identify, and develop a new legislative and policy proposals. It also prepares a report every three years concerning the state of the European environment. Though it is EU's agency, its reports covers the whole Europe.⁸⁰The EU is also known for its efforts in funding environmental management projects.⁸¹The commission usually creates a strong partnership with environmental NGOs in its policy-decision making. It also provides a strong assistance for them. ⁸²

Starting from 1960s the door is open for any government, an elected official, an interested group or individual, to lodge a complaint before the commission or to petition to the European parliament if they suspect that a member state is not meeting its obligation under European laws.⁸³ The Aarhus convention of the EU also requires member states to enact national

⁷⁸ McCormick (n 75) 9-10,67 and 83, Barkin (n 59) 323-324, Selin and VanDeveer (n 75) 197-98

⁷⁹ McCormick (n 75) 74, Selin and VanDeveer (n 75) 195

⁸⁰ McCormick (n 75) 58

⁸¹ *ibid* 60

⁸² *ibid* 59

⁸³ *ibid* 139

environmental laws which at minimum should guarantee access to information, public participation in decision making and access to administrative and judicial redress in environmental governance.⁸⁴These all are impetuses to protect the environment.

Till 1999, there were more than 800 environmental laws i.e. regulations, directives and decisions in EU.⁸⁵

3.4 North American Free Trade Area (NAFTA)⁸⁶

NAFTA is a free trade area between US, Mexico and Canada created in 1993. It wanted to address environmental protection by adopting rules within the agreement itself and by adopting a sideline environmental agreement called North American Agreement on the Environmental cooperation (NAAEC). At the time of its adoption it was thought the greenest free trade area.

⁸⁴ Carl Bruch , African Environmental Governance: Opportunities at the Regional, Sub regional and National Levels ,in Beatrice Chaytor and Kevin R. Gray (eds), *International Environmental Law and Policy in Africa* (Environment and policy,vol.36), Kluwer 2003) 223

⁸⁵ McCormick (n 75) 17-18 and 25

⁸⁶ The member states have agreed to replace NAFTA with USMCA which only awaits the ratification by Canada. The change is highly motivated by US desire to renegotiate it on the trade and labor aspect of NAFTA.USMCA maintains 72% of the environmental issues included under NAFTA. But, more detail environmental provisions than NAFTA are incorporated under chapters 19, 24 and 34 of the USMCA. It adopted the mode of cooperation adopted by NAFTA and NAAEC in very similar way. It has identical environmental exceptions that are found under NAFTA's agreement on goods, services, IP, SPS and TBT agreements.it maintained the institutional framework we do have in NAAEC. But, it is different in two ways.one it included a provision that allows the use of trade sanction to ensure compliance to environmental obligations. Second, like in the EU system, it incorporated 'issue-specific' provisions on water, coastal areas, plastic pollution, wetland, contaminated lands, fisheries, forest, GMOs, and ozone layer depletion, genetic resources, which were not explicitly addressed under NAFTA. the inclusion of rules on plastic pollution, wild life trafficking and food waste by USMCA makes it unique from any other FTAs.it has also excluded two provisions of NAFTA which were not environmentally friendly.it removed the possibility of a foreign investor to bring a suit against a host government for regulations that are targeted to protect the environment and excluded 'energy proportionality rule" which allows Canada to meet its emission reduction commitment under the Paris agreement. But it is not immune from critics from the environmentalists. The agreement has not addressed climate change issues, and included precautionary rule, it has not given prevalence of MEAs in case of conflicts with its provisions as it was a rule under NAFTA. *See generally*, Laurens, Noémie & Dove, Zachary & Morin, Jean-Frédéric & Jinnah, Sikina. (2019). NAFTA 2.0: The Greenest Trade Agreement Ever? *World Trade Review*. 18. 659–677. 10.1017/S1474745619000351.https://www.researchgate.net/publication/334593290_NAFTA_20_The_Greenest_Trade_Agreement_Ever.accessed on 28/2/202 at 4:05

This is because unlike other FTAs of the time, it contains numerous environmental provisions within the agreement itself.⁸⁷ The preamble clearly adopted the promotion of sustainable development as the basic goal of the agreement. It also requires trade negotiations to be undertaken in a manner consistent with environmental protection and conservation. It also taken the strengthening and enforcing of environmental law and regulations as its basic objective.⁸⁸ Chapter 7 of NAFTA has also adopted SPS provisions which could be used to protect the environment. Each party is free to adopt its own level of protection to safeguard human, animal and plant life and health which are not arbitrary and unjustifiable distinctions used to restrict trade against other parties. But, it cannot be used extraterritorially. The problem with this measure is that a party alleging the SPS measure has to base it in some scientific proof and risk assessment. Here, NAFTA does not recognize the precautionary principle. This ,failure makes it more friendly to trade liberalization since it does not recognize ‘some environmental issues that do not have a real ,totally demonstrated, scientific basis’ which makes difficult for party to rely on while making decisions or in defending environmental dispute lodged against them.⁸⁹ Similarly, Chapter 9 the agreement has adopted TBT. Article 904(1) allows parties to ban importing of good and services which are not in line with the prescribed environmental standards. Pursuant to Article 906(2) of the same, parties are not allowed to make downward harmonization. Likewise Article 907 allows parties to make prevailing environmental condition while conducting a risk assessment.⁹⁰

Most importantly, NAFTA has solved the problem of inconsistency or conflict it will have with MEA. Under Article 104, if a conflict happens to exist between the provisions of CITIES, Montreal protocol and Basel convention and the agreement, the provisions on the MEA will prevail.⁹¹

We can also see the unique provision adopted concerning the dispute mechanism. The arbitral panel while deciding cases under Chapter 20 of the agreement, it can ‘request a written report of

⁸⁷ *ibid*

⁸⁸ Pedro (n 33) 17

⁸⁹ *ibid* 18-20

⁹⁰ Nanda and Pring (n 60) 562 and Pedro (n 33) 20 and 29

⁹¹ Nanda and Pring (n 60) 561-562 and Pedro (n 33) 30

a scientific review board any factual issues concerning environmental matters raised by a disputing party'. We can't find similar provisions in other FTAs.⁹² Likewise a complaining party is free to choose between the GATT and NAFTA dispute settlement mechanism. But the responding party can invoke more environmentally friendly NAFTA system.⁹³ But, the problem with the dispute settlement procedure in NAFTA is that once the panel rendered a decision and the party against whom the decision is given failed to implement the judgment, then the other party is entitled to retaliate. This is very dangerous for disputes involving environment. For instance, if a given party is found at fault for relaxing environmental standards, then the party with the arbitral award is allowed to do the same when the prior failed to observe the decision of the panel. This will be absurd.⁹⁴

In addition to the environmental provision in text of the agreement, NAFTA also has a side line environmental agreement called NAAEC. The main objectives of the agreement are, *interalia*, to foster environmental protection, to promote sustainable development through cooperation and mutually supportive trade and environmental policies, to cooperate and work together on conservation and protection of the environment and in developing and improving environmental legal frame works and enhance compliance with and enforcement of environmental laws in the territories of the member states. Ensuring the environmental objectives of NAFTA is also one of the objectives recognized by NAAEC.⁹⁵ The agreement also imposes obligation on the states to prepare periodic public reports on the state of the environment in their territory, to create environmental awareness, to support researches on environmental matters and use economic instruments to integrate environmental objectives. Furthermore, states are required to implement environmental recommendations developed by the Council and refrain to export pesticides and toxic substances whose use is prohibited in the territories of the other state.⁹⁶ Interestingly, the agreement calls member states to enact environmental laws which provide for high levels of environmental protection and work to improve these laws with change in circumstances.⁹⁷

⁹² Nanda and Pring (n 60) 577-78

⁹³ *ibid* 578

⁹⁴ *ibid* 578-579

⁹⁵ North American Agreement on Environmental Cooperation (1993) Article 1

⁹⁶ *ibid* Article 2

⁹⁷ *ibid* Article 3

Article 5 of the agreement obliges member states to take governmental actions that effectively enforce their own environmental laws and regulations in order to attain high level of environmental protection. One of the governmental actions required to be taken by each party is to avail judicial, quasi-judicial or administrative enforcement proceedings under domestic law that sanction or remedy violations of its environmental laws and regulations. States are also under obligation to ensure private access to remedy for damages occurred as a result of breach of environmental laws.⁹⁸

When we see the institutional framework of NAAEC, it has established a Commission on Environmental Cooperation (CEC). The commission has a Council, a Secretariat and a Joint Public Advisory Committee.⁹⁹ The Council is the highest decision making organ composed of cabinet-level or equivalent representatives of the Parties, or their designees. It serves as a forum for the discussion of environmental matters within the scope of the agreement. It oversees the implementation and develops recommendations on the further elaboration of NAAEC and promotes and facilitates cooperation between the Parties with respect to environmental matters.¹⁰⁰ By virtue of Article 11(5) of NAAEC, the Secretariat provides ‘technical, administrative and operational support to the Council and to committees and groups established by the Council, and such other support as the Council may direct’. Under Article 12 of the same, the Secretariat has a mandate to prepare the annual report of the commission. With the authorization of the Council, it can prepare a report on any environmental matter. But, the report cannot include ‘issues related to whether a Party has failed to enforce its environmental laws and regulations.’¹⁰¹ The secretariat is bestowed with the power to receive a submission from any non-governmental organization or person which alleges that a party is failing to effectively enforce its environmental law.¹⁰² When the submission warrants the preparation of a factual record, the Secretariat can do that when the Council by 2/3 vote accept the proposal.¹⁰³ The Joint Public

⁹⁸ *ibid* Article 6

⁹⁹ *ibid* Article 8

¹⁰⁰ *ibid* Article 9 and 10

¹⁰¹ *ibid* Article 13(1)

¹⁰² *ibid* Article 14

¹⁰³ *ibid* Article 15

Advisory Committee is an advisory organ which provides advice to the council and technical, scientific and other information to the Secretariat.¹⁰⁴

Part five of NAAEC provides the procedures on how a dispute under the agreement could be solved. The first procedure provided in the agreement is consultation. Parties are required to solve the dispute through consultation. If the attempt failed to solve the problem, the Council will establish an arbitral panel that decides the case. If in its final report a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and then it will order that party to fully implement an action plan prepared by disputant parties. Accordingly, if the party fully implements the action plan there will be no imposition of monetary enforcement assessment. But, when the Party complained against is not fully implementing the action plan, and then the panel will impose a monetary enforcement assessment.¹⁰⁵ When the party fails to pay the monetary enforcement assessment within the time prescribed in the agreement, then any complaining party may suspend ‘the application to the party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment.’¹⁰⁶

Conclusion

This chapter has addressed the issue how other major FTAs i.e. WTO, EU and NAFTA responded to environmental issues. The World Commission on Environment and Development report and Agenda 21 have urged multilateral free trade agreements to balance and integrate economic and environmental objectives. The WTO is less responsive to this valuable recommendation. It only narrowly tried to protect environmental issues as an exception to economic liberalization. An ineffective attempt to balance the two objectives is also made through establishing CTE. The EU system is very effective in balancing the two objectives. Enacting environmental policies and rules are under the competence of the union. Member states are there to implement the harmonized environmental laws subject to the supervision of very strong institutions operating under the Union. NAFTA has tried to make respond to the problem

¹⁰⁴ *ibid* Article 5 and 16(4)

¹⁰⁵ *ibid* Article 34

¹⁰⁶ *ibid* Article 36

in different way. The NAFTA itself has incorporated a number of provisions that aimed to make the system greener. Moreover, member states have adopted a detailed sideline environmental agreement to NAFTA called NAAEC in order to ensure sustainable development.

Chapter-4

AfCFTA and Its Consideration for the Environment

4.1 Introduction

Environmental degradation in the past was considered as the problem of mainly the rich nations. But now-a-days it has become a survival issue for the developing countries. Sustainable development in Africa highly relies on goods and services derived from its environment and natural resource base. It is determined by the way these resources are consumed and produced.¹⁰⁷ The realities revealed that the continent is highly exposed to environmental degradation and climate change. According to Intergovernmental Panel on Climate Change (IPCC)'s 2007 report, Africa is one of the most vulnerable continents to climate variability due to change owing to multiple stresses and low adaptive capacity.¹⁰⁸ The geographical location of Africa strengthens this assertion. More than 65% of African landmass, which accounted for more than 30% of the global dry land, is located in North Africa, the Sahel and the Southern part of the continent. Meanwhile, this dry land is under threat from deforestation, soil erosion, nutrient mining, recurrent drought and climate change, potentially resulting in land degradation, desertification and aggravated poverty since over 400 million people live in this area and the majority of them are the rural poor, with an annual population growth rate of 3 per cent.¹⁰⁹ The agricultural sector also consumes 85% of the total annual water withdrawals in the continent. The high population growth rate and climate change have exacerbated the problem of water scarcity in the region.¹¹⁰ The biological diversity resources in the continent are also highly declining.¹¹¹ In 2010, the

¹⁰⁷ UNECA (n 18) 30

¹⁰⁸ Jo-Ansie van Wyk , 'The African Union's Response to Climate Change and Climate Security', (Institute for Security Studies, Monograph 170) 3

¹⁰⁹ UNECA (n 18) 31

¹¹⁰ *ibid* 32

¹¹¹ UNEP (2016), 'GEO-6 Regional Assessment for Africa', (Nairobi, Kenya) 73

exports of fuels and mining products accounted for about 58 per cent of total African exports.¹¹² This shows how much the economy of the region is dependent on the exploitation of primary products. Poverty is identified by the Environmental Action Plan of the New Partnership for Africa's Development as the main cause and consequence of man-made environmental degradation and resource depletion in Africa.¹¹³ The relationship between poverty and environmental degradation is like a 'vicious cycle' in which poverty causes the degradation of the environment and such degradation in turn perpetuates more poverty.¹¹⁴

Due to the above situation it is mandatory for African states to grow sustainably. There is no other option. If they only pursue with economic growth they will lose everything at the end of the day.¹¹⁵ The theme that goes to say 'let us pollute now and clean later' will lead to humanitarian crisis. Here it is essentially to borrow *Rasheed's* assertions;

"It is not wise to try to solve socio-economic crises, while neglecting the environmental dimension, for no strategy of growth and development which ignores environmental considerations can be successful or sustainable in the long run...Simply put, Africa has no choice but to transform itself economically, socially, politically and environmentally or slide deeper into the already unremitting crisis. The African countries must think strategically and take deliberate action to reorient development objectives and policies. They have to ensure that growth and development will proceed in an accelerated, sustained and environmentally sustainable manner; and help build diversified and resilient economies capable of withstanding external and internal shocks, and the

¹¹² UNECA (n 18) 32. According to the report of the World Commission on Environment and Development, Africa's export from primary commodities other than petroleum accounted 62% its total export earnings. (Our Common Future (n 25) Chapter-3 Para 42)

¹¹³ Amechi (n 21) 114 and Our Common Future (n 25) part-I Para 14

¹¹⁴ Amechi (n 21) According to World Commission on Environment and Development, report "no other region than the Sahel region in Africa tragically suffers the vicious cycle of poverty leading to environmental degradation, which leads in turn to even greater poverty (Our Common Future (n 25) Chapter 1 Para.17)

¹¹⁵ Cole and Neumayer (n 29) 309. The report of World Commission on Environment and Development revealed that the national environmental policies of African states which gave little attention to the environment and distinctly observe it from the economics, coupled with draught, rapid population growth and excessive debt burden resulted in humanitarian tragedy in the region. (Our Common Future, Part-I Para.19)

undesirable economic and human costs of such shocks..... The economic fortunes and the environmental fate of Africa are closely intertwined, and both must be reckoned with in tandem. The challenge is a formidable one. If that challenge is unmet, Africa will have no future to speak of. Growth and development will continue to be illusive, human conditions will worsen, environmental degradation will accelerate and the self-reinforcing negative interactions between mass poverty and environmental damage will intensify”¹¹⁶

African states have created AfCFTA in order to create steady economic growth in the continent.¹¹⁷ As we have seen in Chapter three it has become a must for FTAs to balance free trade and sustainable development since the 1972 UNCE and the adoption of Agenda 21. They require FTA negotiations to be made in a way that ensure trade and environmental objectives are mutually supportive. Multilateral trading systems are required to efficiently allocate and use natural resources in maximizing production and income. This will minimize the damage on the environment. A well conserved environment in turn will provide ‘ecological and other resources’ that make the economic growth sustainable. Thus, ‘an open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.’¹¹⁸ The discussion in the preceding chapter shows that other FTAs have tried to integrate, with different model and extent, this suggestion in their respective trade agreement.

Thus, the economic benefits and growth that are aimed to be reaped from AfCFTA has to consider this basic fact into consideration. The question to be asked here is that to what extent the AfCFTA has integrated environmental matters.

¹¹⁶ Sadig Rasheed, ‘Sustainable Development in Africa in the 1990s and Beyond: Meeting the Challenge’ in Abdul Ghaffar and Wilfred Mlay (eds), *Environment and Sustainable Development in Eastern and Southern Africa: Some Critical Issues* (Macmillan Press Ltd 1998) 12 and 22

¹¹⁷ The preamble of the agreement establishing the AfCFTA under paragraph 5 provides the ‘ need to create an expanded and secure market for the goods and services of State Parties through adequate infrastructure and the reduction or progressive elimination of tariffs and elimination of non-tariff barriers to trade and investment’ as the main reason for its adoption.

¹¹⁸ Nanda and Pring (n 60) 529 and Our Common Future (n 25), Chapter-3, Para 55

4.2 History of AfCFTA

Since 1963, there was a strong desire between African states to create an integrated continental economic block. With this motive different RECs are created in the continent.¹¹⁹ The OAU adopted the Lagos Plan of Action 1980-2000, an economic development blueprint for the African continent in 1980. It takes the establishment of additional RECs and the strengthening of existing ones, as a stepping -stone for the establishment of an African Common Market.¹²⁰ Lack of incorporation of the plans by states into their development strategies and failure of the Plan to provide an effective monitoring and follow-up mechanism for its implementation rendered the plan ineffective.¹²¹ Another attempt was made by OAU to attain continental economic integration with the adoption of the Abuja treaty in the 1991 which came into force in 1994.¹²² This treaty contains 6-stage integration plan¹²³ for the establishment of AEC by 2028, based on specific milestones and timelines. The third stage of the plan was targeted towards the establishment of a continental FTA by eliminating tariff and non-tariff barriers and the creation of custom union among African states by 2017.¹²⁴ Three important developments have stimulated an interest in fast-tracking the integration agenda. The first one is the formation of AU in 2002. The constitutive act of the AU under Article 3 has made economic integration one of its basic objectives. Second, the signing of a tripartite FTA between COMESA, EAC and SADC in 2011 revealed the strong desire of continental integration. Third, a study by AUC and ECA in 2012 identified the major causes affecting intra-trade in Africa and suggested the immediate

¹¹⁹ There are eight RECs in Africa recognized as the building blocks of the African Union. These are: Arab Maghreb Union, Community of Sahel-Saharan States, Common Market for Eastern and Southern Africa, East African Community, Economic Community of Central African States, Economic Community of West African States, Intergovernmental Authority on Development and Southern African Development Community.

¹²⁰ Lagos Plan of Action for the Economic Development of Africa 1980-2000(1980) 68

¹²¹ IHUA and others(n 3) 11

¹²² The Abuja treaty among other objectives contains the following. One, it wants to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development. Two, it aspires to coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the Community. (Treaty Establishing the African Economic Community(1991) Article 4)

¹²³ *ibid* Article 6

¹²⁴ IHUA and others (n 3) 12

need to create a continental free trade area.¹²⁵ Following these developments, the AU head of states at AU summit in 2012 urged member states and RECs to speed up the integration process and creation of African Common Market.¹²⁶ It also has endorsed the action plan on Boosting Intra-African Trade (BIAT)¹²⁷ that contains four steps to realize the establishment of a CFTA by 2017.¹²⁸ Likewise, Agenda 2063 which was adopted in 2013, takes the establishment of AfCFTA as one of its seven main aspirations.¹²⁹ Finally, on 21 March 2018, the African Continental Free Trade Agreement establishing the AfCFTA was signed in Kigali, Rwanda by forty-four of the fifty-five African Union member states at the 10th Extraordinary Session of the Assembly of the AU.¹³⁰

The AfCFTA negotiation has two phases.¹³¹ The first phase of the negotiation has been done with the adoption of the agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes.¹³² But, the second phase of negotiation which includes Protocols on Investment, Intellectual Property Rights and Competition Policy is not yet concluded. Thus, this part of the discussion basically deals with phase I negotiations.

¹²⁵ *ibid*

¹²⁶ AU, ‘Assembly/AU/Dec.392(XVIII),’Decision on African Integration’ Doc: EX.CL/693(XX)’, Para.4,5 and 7

¹²⁷ The Plan identified seven action clusters, namely trade policy, trade facilitation, improving productive capacity, trade-related infrastructure, trade finance, trade information, and factor market integration.(ITC (n 11) 3)

¹²⁸ The steps involved are; the finalization of the tripartite FTA between COMESA-EAC-SADC by 2014, the establishment of regional FTAs by non-tripartite RECs that reflect the preferences of member states between 2012 and 2014,the consolidation of the tripartite and FTA and other regional FTAs into a CFTA initiative between 2015 and 2016and the establishment of the CFTA by 2017.(AU, Assembly/AU/Dec.394(XVIII), ‘Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area’ Doc. EX.CL/700(XX), Para.4)

¹²⁹ Agenda 2063, ‘The Africa We Want’ Final Edition(African Union Commission 2015) 6

¹³⁰ Legal Aspects of World and Regional Trade 842 (2018) (Research Paper), ‘Barriers to Intra-African Trade and the African Continental Free Trade Agreement’ 1

¹³¹ Andrea Cofelice , ‘African Continental Free Trade Area: Opportunities and Challenges’, The Federalist Debate Year XXXI, No.3, November 2018, DOI: 10.2478/tfd-2018-0032, 32 and AfCFTA (n 5) Article 23

¹³² n 4

The agreement has entered into force on 30th May 2019. Fifty four AU Member States have signed the Agreement so far and 27 of them have ratified and deposited their instruments of ratification.¹³³

4.3 Benefits of the AfCFTA

The main benefits of the AfCFTA are expected to come out of its reduction and gradual elimination of tariff and non-tariff barriers. Before its adoption, intra-African trade in goods remains low, at around 10 per cent of total trade of Africa in 2010. Such trade is limited by a relatively high applied tariff protection rate, at about 8.7 per cent, with heterogeneous tariff structures that range much higher in many cases.¹³⁴ Once implemented, the Agreement is expected to cut tariffs on 90%¹³⁵ of goods traded within the continent within five years (or 10 years for LDCs). This is expected to increase intra-African trade, which is disappointingly low when compared Association of South East Asian Nations or the European Union (EU). In 2016, for example, intra-African exports accounted for 18% of total exports, compared to 59% and 69% respectively for intra-Asian and intra-European exports.¹³⁶ The world-class infrastructure, accompanied by trade facilitation, will see intra African trade growing from less than 12% in 2013 to nearly 50% by 2045. And Africa's share of global trade will rise from 2% to 12%.¹³⁷ With the adoption of it, it is expected that intra-African trade will increase by \$5.7 billion - 8.7 billion annually.¹³⁸ This means it will create a continental free trade zone with a combined GDP of \$3.4 trillion.¹³⁹ Intra-African trade in agricultural and food products would increase by US\$ 5.7 billion (53.3 per cent over the 2022 baseline), with services rising by US\$ 1 billion (31.9 per

¹³³ AU, 'First Continental Report on the Implementation of Agenda 2063', 2020, 31

¹³⁴ UNCTD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods', 2016, 13

¹³⁵ IMF (2019) concludes that eliminating tariffs on 90% of existing intra-Africa trade flows – the most ambitious target under the AfCFTA – would increase regional trade by about \$16 billion. (History of acfta, p.7)

¹³⁶ ITC (n 11) 3

¹³⁷ Agenda 2063(n 129) 5

¹³⁸ McCormac, Tam and Mills (n 10) 3

¹³⁹ *ibid* 2

cent over the 2022 baseline) and industrial goods growing with US\$ 27.9 billion (52.3 per cent above the 2022 baseline).¹⁴⁰

However, there are additional dynamic benefits. The AfCFTA will lead to export diversification which in turn produces more sustainable growth, an enlarged regional market which better attracts FDI, and the promotion of industrial exports that help to bring a rapid structural transformation.¹⁴¹ The growth in trade and investment that comes as a result of AfCFTA will positively impact the lives of its ordinary citizens by solving the unemployment problem prevalent in the region. The business community will get greater access to cheaper raw materials, better condition for regional and global value chains, transfer of technology and knowledge and direct flow of capital from external and intra African sources.¹⁴²

Generally, the African regional economic integration will enhance the region's negotiating power with other commercial partners, such as the EU and China, globally and enables African companies to compete on international markets.¹⁴³

4.4 AfCFTA and Its Consideration for the Environment

When we see the AfCFTA, its preamble generally focuses on quantitative issues. It basically wants to bring trade liberalization through gradual elimination of tariff barriers and non-tariff barriers and attract investment. It has made environmental regulation a domestic affair of member states. It doesn't call cooperation on environmental areas.¹⁴⁴ Out of the eight general objectives provided under Article 3 of the agreement, it is only under Sub-Article 'e' of the same that 'sustainable and inclusive socio-economic development' is mentioned. The wording 'sustainable and inclusive socio-economic development' itself seems try to trade off economic interests over environmental protection. It wants to sustain only the economic growth and social development by including every member of the society as its beneficiaries. Had it not wanted to

¹⁴⁰ UNCTD (n 134) 14

¹⁴¹ IHUA and others(n 3)14

¹⁴² ITC (n 11) iii

¹⁴³ Cofelice (n 132) 33

¹⁴⁴ AfCFTA (n 5) Preamble, Para.10

take this path the drafters can simply employ the term ‘sustainable development’.¹⁴⁵ It seems this has emanated from the member states believe that environmental considerations could hinder the economic growth aspired by the agreement. What makes this argument viable is that the agreement under Article 4 adopted specific obligations with a view to achieve the general objectives listed in Article 3. All the specific objectives call cooperation on trade aspect of the agreement. No environmental measure is included in the specific objectives list. Likewise, while Article 5 lists principles by which the agreement is guided, it has never mentioned sustainable development or environmental consideration as a guiding principle.

AfCFTA comprise of the Assembly, the Council of Ministers, Committee of Senior Trade Officials and the Secretariat.¹⁴⁶ But, none of these institutions are mandate to oversee the effect the agreement will have on the state of the environment in Africa.

The other evident lack of adequate consideration for environmental protection consideration is found in Article 19(1) of the agreement. It provides that in the event of any conflict or inconsistency between the agreement and any regional agreement, the text of the agreement will prevail. The literal interpretation of this provision provides that if a conflict exists between the environmental treaties adopted under the auspices of the AU and the agreement, then the later will prevail. Likewise, this provision says nothing where a conflict exists between obligations of member states under international MEA and the agreement. Some MEAs with the aim of protecting the environment have adopted legal provisions that restrict trade ‘in ways that

¹⁴⁵ The four objectives of AfCFTA provided under the official website of AU are all targeted to achieve economic growth. The listed objectives are the following;

- Create a single continental market for goods and services, as a precondition to fasten the track for the establishment of the Continental Customs Union and the African customs union.
- Expand intra African trade through better harmonization and coordination of trade liberalization and facilitation regimes and instruments across RECs and across Africa in general.
- Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.
- Enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.(Available at <https://au.int/en/ti/cfta/about>, accessed on 3rd March 2020)

¹⁴⁶ AfCFTA (n 5) Article 9

contradict the WTO's basic rule of non-discrimination.¹⁴⁷ They may prohibit the tradability of certain goods all together or with states not member to that agreement. They could also allow trade restrictive measures ensure compliance in that specific MEA.¹⁴⁸ If a dispute arises among AfCFTA members on the applicability of MEAs to which both are parties, the problem could be resolved with lesser difficulty. But a great problem will happen when one of the disputant parties is not a party to a given MEA. For instance, Ethiopia is a party to the Montreal protocol on substances that deplete the ozone layer and CITIES. Assume that, Ethiopia banned an import of controlled substances by virtue of Article 4 of the Montreal Protocol from an AfCFTA member who is not a party to the Montreal protocol. Here the agreement provides no solution. Likewise, similar problem will emerge if Ethiopia, for instance, bans or restricts the import of an endangered species from Gambia, a state that had ratified AfCFTA but not party to CITIES, in order to discharge its duty under CITIES. The conflict is not only related with international treaties. A difficulty could also arise domestically when a member state wants to ensure environmental objectives. The Ethiopian environmental policy as its guiding principle has stated that 'when a compromise between short-term economic growth and long-term environmental protection is necessary, the compromise should be in favor of protection of the environment, and environmental protection should be made an integral part of development planning'.¹⁴⁹ The AfCFTA will not give a remedy for such kinds of problems and no flexibility is available for member states.

Let us see what is adopted by the Protocols to the AfCFTA agreement on the issue. The Protocol on Trade in Goods under Article 26 (b) allows states to limit trade for the sake of protecting human, animal and plant life and health. But, the most relevant exception is found under Article 26 (g) of the Protocol. It provides that member states can restrict trade to conserve exhaustible natural resources if the trade measures are made effective in conjunction with restrictions on domestic production and consumption. Still this exception is not sufficient in resolving PPMs not directly relating to exhaustible natural resources. For instance, it is not clearly provided whether

¹⁴⁷ Barkin (n 59) 321

¹⁴⁸ *ibid*

¹⁴⁹ Fikremarkos Merso, 'Green Growth, Investment, Environment and Sustainable Development in Ethiopia', 5 *IUCNAEL EJournal*, 163, 164-165

a member state is authorized to restrict trade if a product is produced by extremely polluting the environment or utilized substances which leave hazardous waste to the environment. There are also rules under Annex 6 on Technical Barriers to Trade Agreement (TBTs) and annex 7 on Sanitary and Phyto-Sanitary Agreement (SPS) which safeguards environmental objectives. They incorporated WTO's TBT and SPS agreements by reference.¹⁵⁰ This means AfCFTA members which are not members of WTO are expected to observe WTO's TBT and SPS agreements.¹⁵¹ The environmental provisions in these two annexes are discussed in chapter 3 of this paper.¹⁵²

The Protocol on Trade in Services under its preamble recognized sustainable development and environmental protection as legitimate policy objectives in liberalizing a service sector. Article 15 (b) of the same also authorizes member states to take environmental measures that legitimately restrict trade for the purpose of protecting human, animal, plant life and health.

The AfCFTA phase II negotiation is also on progress. Agreements including investment and intellectual rights are expected to be finalized during this stage. Here the agreement on the investment part has to put a principle that clearly prohibits member states from adopting less stringent environmental standards that aimed at attracting more investment. Moreover, African states should respond to the criticism that bilateral investment treaties in the continent are weighted too heavily in favor of investors by ensuring that new treaties impose obligations on investors, in particular with regards to the protection of environmental and corporate social responsibility obligations.¹⁵³ Similarly, under the intellectual property right the second phase negotiation should come with a rule which empowers states to deny the patentability of an invention which causes harm to the environment.

¹⁵⁰ AfCFTA (n 5), Protocol on Trade in Goods, Article 1(k), 21 and 22

¹⁵¹ ITC (n 11) 33

¹⁵² See the discussions under footnotes 46 and 47

¹⁵³ Théobald Naud, Ben Sanderson and Andrea Lapunzina Veronelli, 'Recent Trends in Investment Arbitration in Africa' (11 April 2019) <https://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2019/1190119/recent-trends-in-investment-arbitration-in-africa,12/20/2012,5:28,9>

4.5 AfCFTA's Environmental Regime and Other Free Trade Areas: A Comparative Analysis

There are two ways through which FTAs make their agreements greener. The first model takes the environment as an exception to the rules. WTO followed this model. The second model adopts 'explicit rules delimiting members' freedom of action in changing their environmental rules'. NAFTA is a good example of this model.¹⁵⁴ But, we also have the EU model. Environmental issue is a policy matter for the EU. All environmental legislations are enacted at the EU level. Member states are there to implement the enacted laws domestically. Here environmental standards are harmonized using the EU system. When we scrutinize the trend chosen by AfCFTA, it resembles with the WTO's model. Because, it copied almost all rules from it and incorporated *few* environmental matters as an exceptions to the trade rules. It is less environmental even when compared to WTO as it has not attempted to create a committee within it which evaluates the relationship of the agreement with environmental protection.

NAFTA only established a free trade area. It has not created a custom union and free movement of persons within that framework. The EU integration is far broader, as it has created a free market area, with free movement of workers and persons, institutions that elaborate common legislation and a zone of external customs.¹⁵⁵ But, AfCFTA is a free trade area like WTO and NAFTA where states retain their sovereignty. Like in NAFTA, AfCFTA member states retained their power to enact their own environmental legislations. Discussions on environmental issues *simultaneously* made during the negotiations of NAFTA which consequently lead to the incorporation of an elaborated environmental side agreement. The EU incorporated environmental issues *subsequent* to the economic integration. Though ACFTA came long after all these free trade areas, it was not willing to take lessons from them. If we take a look at the general objectives of both the EU Treaty and the NAFTA documents, both have recognized environmental protection or sustainable development as a main objective.¹⁵⁶ But, the EU system is *greener* in that it established a specific title on the environment, incorporated progressive environmental principles such as the precautionary, prevention and the polluter-pays principles.

¹⁵⁴ Barkin (n 59) 319

¹⁵⁵ Harris (n 20) 13

¹⁵⁶ Pedro (n 33) 56

These basic environmental principles are not found within the NAFTA documents.¹⁵⁷ When we look at AfCFTA, it has *not even clearly* taken sustainable development as its objective. This makes it even less green than the WTO, which at least in preamble, clearly incorporated the objective of balancing free trade with sustainable development. Both in NAFTA and the EU Treaty we have seen efforts to harmonize environmental measures of the nations involved, though in somehow different fashion.¹⁵⁸ Both FTAs prohibit downward harmonization of environmental standard to avert the possibilities of creating pollution havens. They rather encourage their members to adopt more stringent environmental standards.¹⁵⁹ But, as ACFTA is a direct copy of WTO on the area, it only seeks harmonization of standards towards the international standard system. It doesn't *clearly* prohibits the adoption by members lesser environmental standards in order to attract trade and investment. This even makes it less environmentally friendly when compared to its building blocks SADC and EAC which are working to harmonize environmental standards within their sub-region.¹⁶⁰

The recognition of the precautionary principle by the EU will make easy for its members to rely on it to defend environmental interests. 'This is of the uttermost importance for environmental goals, since many of the environmental damages cannot be totally proved, due to an absence of scientific certainty.'¹⁶¹ Similar to NAFTA, under ACFTA precautionary rule is not a defense. So it will make the effort more burdensome for a member to ensure environment protection in a dispute involving such matters. The other area of difference lies on the effectiveness and powers of institutional framework adopted by each free trade areas. The EU is institutionally effective as the Council of Ministers and the EU Commission have a decision making power that enables them to create binding common environmental legal instruments. But, NAFTA's CEC have no power to enact a common binding environmental legal instrument that brings harmonized standards in its member states.¹⁶² No institution is established by AfCFTA which oversee the state of the environment of member states as in EU and NAFTA. Similarly, there is no forum

¹⁵⁷ *ibid* 56-57

¹⁵⁸ *ibid* 58

¹⁵⁹ *ibid* 59

¹⁶⁰ Bruch (n 85) 238-241

¹⁶¹ Pedro (n 33) 60

¹⁶² *ibid* 61

within its framework which allows individual submission when damage is occurred on the environment. Furthermore, there is no mechanism whereby a state oversees and brings a case on another member where it persistently failed to enforce its domestic environmental laws. In NAFTA and EU, there is a procedure that allows a party to sue another when the latter is not willing to enforce its environmental laws. Moreover, both in EU and NAFTA there is a possibility whereby a state will be sanctioned with fine or trade measures for breach of its environmental obligation.

AfCFTA has not selected environmental priority areas that require primary concern and cooperation during its implementation. As we will see it in the next topic, Africa is a continent facing the problems of desertification, water insecurity, soil degradation, deforestation, and loss of biodiversity. Climate change and high population growth are exacerbating these problems. The adoption of the agreement without doubt will be another catalyst for these problems, it will additionally create more wastes and increases the amount of pollution released to the environment. Trends in FTAs reveal that, it has become a rule to identify environmental areas that should be handled with greater caution and concern within that economic area in order to ensure the agreement will not lead to uncontrolled environmental tragedy. For instance, under Chapter 24 of USMCA, we find detailed rules on Protection of the Ozone Layer, Protection of the Marine Environment from Ship Pollution, Air Quality, Water Pollution, Corporate Social Responsibility and Responsible Business Conduct, Trade and Biodiversity, Invasive Alien Species, Fisheries, Conservation of Marine Species and Sustainable Forest Management need to be observed equally with the trade rules in the agreement. But, AfCFTA haven't taken the realities in the continent relating to the environment that are causing serious crisis in the continent.

4.6 Why to Make AfCFTA Greener While We Have the AU Environmental Regime?

Before dealing with this sub-topic, let us see the AU's environmental regime briefly. African states have responded to environmental problems in many ways. They are parties to different MEAs. For instance, all African states have ratified the 1992 Climate Change Convention.¹⁶³ All member states of the AU also have signed the Paris agreement. Except four states, all have

¹⁶³ Van Wyk (n 109) 5

ratified it.¹⁶⁴ They have also adopted different legal, institutional and policy mechanisms at regional, sub-regional and national level to address environmental matters. The OAU has not given an explicit recognition for environmental protection. But, it can be construed from the preamble that imposes a duty on African leaders to ‘harness the natural and human resources of the continent for the total advancement of African peoples in all spheres of human endeavors’ and from its objective that wants to ‘achieve a better life for the peoples of Africa’ through coordination among member states.¹⁶⁵ But, the OUA has strived to address this problem subsequently by adopting different legal, institutional and policy frameworks. It has adopted African Convention on the Conservation of Nature and Natural Resources in Algiers in 1968 which came into force on June 16, 1969 and later amended in 2017 at Maputo with a view to ‘foster the conservation and sustainable use of natural resources’ located in the jurisdiction of member states.¹⁶⁶ It has also adopted African Charter on Human and Peoples Right in 1981, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in 2003 and the Bamako Convention which bans the *import* into Africa and control the transboundary movement and management of hazardous wastes within Africa in 1991 which are very instrumental for environmental protection.

The AU has made the Promotion of ‘sustainable development at the economic, social and cultural levels as well as the integration of African economies’ one of its basic objective.¹⁶⁷ Under AU, different environmental policies, decisions and declarations are adopted. It has adopted NEPAD which incorporated sustainable development and its base document which has identified environment as one of the six sectorial priorities.¹⁶⁸ Recently, we have Agenda 2063 which aspires to see sustainable development in the continent.

¹⁶⁴ Théobald Naud, Ben Sanderson and Andrea Lapunzina Veronelli (n 153) 7

¹⁶⁵ Amechi, (n 21) 8

¹⁶⁶ The Revised African Convention on the Conservation of Nature and Natural Resources, Article 2

¹⁶⁷ Constitutive Act of the AU (n 2) Article 3(j)

¹⁶⁸ Van Wyk (n 109) 9. In 2003 the Summit of the AU adopted the ‘Action Plan for the Environment Initiative of NEPAD’, with the objective of complementing relevant African processes, with a view to improving environmental conditions in Africa in order to contribute to the achievement of economic growth and poverty eradication. It also

The implementation of the environmental agreements and programs are entrusted on the African Union through its New Partnership for Africa's Development (NEPAD) agenda, and the African Ministerial Conference on the Environment (AMCEN).¹⁶⁹ As provided under Article 9 of the AU Constitutive Act, the Assembly has the power to determine common policies including environmental matters. Moreover, it has the power to monitor the implementation of environmental policies and decisions of the Union as well as ensure compliance by all Member States. The Executive Council of the AU, which is composed of ministers of foreign affairs or such other ministers or authorities as designated its member states, is mandated by Article 13(e) the same, to co-ordinate and take decisions on environmental protection. Seven Specialized Technical Committees which are responsible to the Executive Council of the AU are established. Environmental issues are addressed by the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment.¹⁷⁰ This committee is entrusted with the functions of preparing policies and programs on the area that should be submitted to the Executive Council. It also has the power to supervise, follow-up and evaluate the implementation of decisions taken by the organs of the Union and ensure the coordination and harmonization of projects and programs of the Union.¹⁷¹ The Peace and Security Council of the Union has predominantly responded to issues of 'high politics', but has the instruments to respond to the security concerns arising from environmental crises.¹⁷² An Economic, Social and Cultural Council (ECOSOCC) is established under Article 22 of the AU Constitutive Act which is composed of various social and professional groups of AU member states representing different interests. It serves as an advisory organ intended to be a major institution for civil society participation in the AU processes. But, its role in responding to the impact of climate change on

seeks to build Africa's capacity to implement regional and international environmental agreements and to effectively address African environmental challenges in the overall context of implementing NEPAD. (Environment and Development Decision Making in Africa 2006–2008, <http://www.iisd.ca/africa/>, accessed on 21 February 2020)

¹⁶⁹ UNECA(n 18) 34-35

¹⁷⁰ Van Wyk (n 109) 7

¹⁷¹ Constitutive Act of the AU (n 2) Article 15

¹⁷² Van Wyk (n 109) 8

Africa is found to be minimal. Moreover, none of its eight sectorial cluster committees focuses on climate change.¹⁷³

There is also an environmental institution in the continent established outside of the AU structure. It is called AMCEN. It was founded in December 1985 following a conference of African ministers of environment held in Cairo, Egypt. Its main objective is to promote regional cooperation in addressing environmental issues confronting the region. Providing advocacy on environmental protection in Africa and ensuring that basic human needs were met adequately and in a sustainable manner were some of its initial mandates.¹⁷⁴ In addition to this mandate, AMCEN has the role of ‘monitoring the implementation of regional and global conventions and agreements of relevance to the African region and also on facilitating the harmonization of Africa’s position and encouraging active participation in all major negotiations’.¹⁷⁵

Although all these normative and institutional frameworks exist under AU, it was/is essential to make ACFTA greener for the following reasons. One, member states are required and advised by different instruments such as Agenda 21¹⁷⁶ and Agenda 2063¹⁷⁷ to integrate environmental protection concerns into the trade policies of African states in general and the AU in particular. Second, free trade usually requires harmonization of environmental standards to avoid unnecessary trade restriction. The adoption of AfCFTA will necessarily induce member states to harmonize their environmental standards like what happened in some of its building RECs and the EU. This will serve as a factor to boost cooperation on both trade and environment that could not be imagined before the creation of FTA. As such, it will serve as an additional forum between African states even for those countries that don’t share boundaries and are not within the same RECs. The Cooperation could enhance their capabilities for dealing with environmental

¹⁷³ *ibid* 9

¹⁷⁴ Environment and Development Decision Making in Africa (n 168) 5

¹⁷⁵ History of the African Ministerial Conference on the Environment 1985 – 2005(2006) 3

¹⁷⁶ It requires states to give a special attention to the delicate balance between environmental and developmental concerns while making multilateral and bilateral treaties.(Agenda 21(n129) Para.39(3)(d)).The same suggestion is also provided by UNCED.(See Our Common Future(n 25) Chapter-3 Para 55)

¹⁷⁷ Agenda 2063 provides that ‘Africa’s unique natural endowments, its environment and ecosystems, including its wildlife and wild lands are healthy, valued and protected, with climate resilient economies and communities’.(Agenda 2063(n 129) Para.10, 3)

issues and projects which improve the environment.¹⁷⁸ Thirdly, it will solve the problems that are common in AU environmental governance. Africa ‘has little capacity to mitigate the effects of climate change or adapt to them’.¹⁷⁹ Lack of comprehensive environmental regulatory frameworks is a common problem of African states.¹⁸⁰ In Ethiopia most private and governmental mega-projects pass without conducting environmental impact assessment process due to the absence of developed regulatory framework arising from different reasons.¹⁸¹ Even the AU long before recognized that the ‘current institutional structures do not fully address Africa’s environmental, sustainable development and climate change needs, in the context of consideration of the institutional frameworks of sustainable development’.¹⁸² There is no significant subsequent reform made on this area. The institutions in Africa responsible for managing the natural resources and protecting the environment are institutionally separated from those responsible for managing the economy while the challenges on both areas are inherently interdependent and integrated. They want to achieve their respective objective while ignoring the other. Likewise, AMCEN, as discussed above the main environmental institution in Africa, is characterized for its financial, political and structural problems. It largely depends on the support from UNEP. Member states are not willing to contribute to the trust fund established under it.¹⁸³ It also has a Structural problem in that there is no possible linkage between its programs and

¹⁷⁸ Dale Colyer, ‘Environmental Provisions in Free Trade Agreements’ (West Virginia University) 6. (Developing countries like African states are mandated to work individually and together to build up their technological capabilities in order to address ecological stresses that could come as a result of economic growth. The problems also could be better handled if these countries cooperate, create and enhance infrastructure for research and technology to work together on areas of dry land agriculture, tropical forestry and pollution control.(Our Common Future,Chapter-3,Para.71)

¹⁷⁹ Van Wyk (n 109) 5

¹⁸⁰ Amechi, (n 21) 8

¹⁸¹ Mellese Damtie and Mesfin Bayou, ‘Overview of Environmental Impact in Ethiopia’, 2008, MELCA-Ethiopia, 41-50

¹⁸² African Union, Assembly/AU/Dec.400(XVIII), ‘Decision on Africa Consensus Statement to the United Nations Conference on Sustainable Development (RIO +20)’ Doc. Assembly/AU/10(XVIII)

¹⁸³ History of the African Ministerial Conference on the Environment (n 174) 41

policies and in other counterpart ministries like planning and finance, foreign affairs, agriculture, education, health, industry and labor.¹⁸⁴

African states also lack a political will to integrate AMCEN priority concerns into their national environmental programs.¹⁸⁵ AMCEN also cannot bind members with its decision. It is devoid of the power to ensure compliance on environmental matters. So we can't respond to the more demanding environmental problems by assigning them to these ill-equipped institutions.

But, we can reduce/address the aforementioned problems by including more environmental provisions in the AfCFTA agreement, *interalia*, establishing an institution which regulate member states are observing their domestic environmental laws and sanction their failure; establishing a procedure which allows citizen participation¹⁸⁶ in planning and carrying out proposed activities; enabling citizens and other states to initiate submissions complaints where a member state failed to enforce its environmental laws.¹⁸⁷ It could also solve the financial

¹⁸⁴ *ibid*

¹⁸⁵ *ibid* 42. This lack of political commitment is very common in Ethiopia. The countries desire to trade of environmental problem in favor of economic growth is manifested in different areas. For instance an investment permit is issued for project owners without conducting EIA. See Damtie and Bayou (n 181) 53

¹⁸⁶ According to David Harary, AfCFTA's goal 'to [develop and promote regional and continental value-chains](#) can help the agricultural, water, and energy industries transfer infrastructure, technology, and financial tools across boundaries to build resilience to withstand climate change'.(David Harary, 'African Free Trade Could Increase Resilience to Climate Change and Conflict', <https://www.newsecuritybeat.org/2018/10/african-free-trade-increase-resilience-climate-change-conflict/>, accessed on December 20, 2019). There are also who argue that with growth in per-capital income 'people begin to care about the environment and become intolerant of pollution' and states will be more 'more able to set up and enforce environmental regulations'. (Fritz Carrapatoso, A. (2007). The Integration of Trade and Environmental Policies in Free Trade Agreements in Southeast-Asia. *Südostasien aktuell : journal of current Southeast Asian affairs*, 26(1), 80)

¹⁸⁷ For instance, the Ethiopian EIA lawmaking process has not been participatory. The law was enacted without the sufficient participation of all stakeholders. 'Local communities who can be directly affected by a development project have never been consulted during the lawmaking process that finally resulted in Proclamation № 299/2002'. Likewise except Ethiopian charities, other NGOs were excluded from participating in policy making. And except for pollution cases public interest litigation are legally prohibited by Ethiopian laws. See Damtie and Bayou (n 181) 39 and 49, see also Adenew Taffa Ariti, Jasper van Vliet, Peter H. Verburg. 'What restrains Ethiopian NGOs to

problem recurrent in AU's environmental institutions by establishing a trust fund where member states out of obligation contribute for common environmental projects to be implemented within its framework. As noted earlier in this chapter, AfCFTA will boost the economy of both member states and the wealth in the continent as a whole. The increases in financial resources will ultimately enable nations and individuals to spend more on environmental protection.¹⁸⁸

participate in the development of policies for natural resource management?, *Environmental Science and Policy* 89 (2018), 294-298 and see generally Yenehun Birlie, 'Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features', *MIZAN LAW REVIEW*, Vol. 11, No.2(2017)

¹⁸⁸ Carrapatoso (n 185) 79

Chapter-5

Conclusions and Recommendations

5.1 Conclusions

Throughout the paper, based on existing literatures on the area, I have tried to show the relationships that exist between free trade and environmental protection under the concept of sustainable development. With free trade the assumption is that the economy will rapidly shows growth. This economic growth will inevitably will cause a great environmental stress. This is due to the fact that at initial stage of economic growth most countries rely on the over exploitation of natural resources that relies on environmentally damaging method of production. But such kinds of growth will not sustain in the long run as any kind of development cannot subsist upon a deteriorating environmental resource bases. Thus a balance should be made between the economic growth and environmental protection at initial stage of all kinds of trade negotiations.

It is indicated that a new era of economic growth should be pursued by African states. African states should not follow an economic growth path provided in the EKC which supports the theme *'let us pollute the environment now and clean latter'*. This is because they cannot attain in short period of time the peak of the growth threshold where the environment will show better quality. And there are no other countries to which they can relocate heavily pollutant industries. Surprisingly, AfCFTA member states preferred this short-sighted way to bring economic prosperity. The agreement wants only to ensure economic growth through gradual elimination of tariff and nontariff barriers. It totally failed to integrate environmental protections. This can be deducted from the preamble and the objective parts of the agreement establishing AfCFTA.

The main bodies of the research paper which are dealt under Chapters 3 and 4 have tried to shed a light how AfCFTA responded to environmental protection. Now a day, it is customary to make multilateral and bilateral trade agreements greener mainly after the adoption of the report of UNCED on trade and environment in 1987 and Agenda 21. These international documents urge the need of complete integration of trade and environment in decision making and law making processes not just to protect the environment, but also to promote and sustain development. Based on this stand most FTAs have tried to integrate environmental provision into their respective trade regimes. Basically there are three ways of doing this. The first model tries to

safeguard environmental matters through the inclusion of general exception clauses in the main trade agreement. This model is followed by WTO. Here environmental matters are totally left for member states as national issues. The second model tries to balance the competing interests by providing detailed environmental matters in the main agreement itself. NAFTA and USMCA, which is prepared to replace the former, are good examples of the second model. But besides the environmental provisions in trade agreement itself, NAFTA has a detailed environmental sideline agreement called NAAEC which purports to ensure that member states are implementing their domestic environmental laws and serve as a form for environmental cooperation. Here the mandate to enact environmental laws is left to members domestically. In these two models there exist different environmental regulations as each state party enacts its own environmental regulations. But the third model, which is adopted by the EU, makes environmental matter the competence of the economic community. Here, environmental regulations are set by FTA not by members. Members are expected to implement the environmental regulation set at the center. So in this model harmonization of environmental regulations will be easily achieved.

In the analysis, we have concluded that AfCFTA has followed the first model. It has tried to protect environmental concerns through the exceptional rules in the protocol to the main agreement and their annexes. The paper has found AfCFTA to be the least green FTA in integrating environmental matters. The agreement establishing the AfCFTA has nowhere mentioned environmental considerations. Second, there is no clause which gives primacy of MEA in case of conflict with its provisions. Thirdly, none of the institutions established by the agreement is mandated to observe the effect of trade measures will have on environmental protection. The agreement also failed to incorporate mechanisms where members could cooperate on environmental matters. It also has not provided a rule where one member state oversees the proper implementation of environmental regulation of the other. No compliance mechanism is devised where a member state persistently fails to enforce its environmental laws. Moreover, no room is left for NGOs and interested groups to challenge trade decisions and bring submission in case a member state violates environmental regulations.

The AfCFTA has failed to take the advantage from its predecessors. Though it followed the WTO model and takes many parts of the agreements from it, it is found even less green than the

WTO. The latter who is heavily criticized for its ignorance for environmental issues has at least established a Committee on Trade and Environment to resolve some crosscutting issues. Likewise, the agreement has not adopted a precautionary principle and prohibits downward harmonization of environmental regulations which are significant to get environmental problems at the source and avert relocation of pollution haven industries towards areas with lenient environmental regulations.

There is no reason given why member states failed to adequately integrate environmental matters in the agreement. But it seems they considered the AU environmental regime will sufficiently address the problem. But, the paper has shown this assertion both erroneous and dangerous. It is true that there are normative and institutional frameworks in the region. But they are not in a position to respond an existing environmental stress let alone to handle intensified ecological problem that will follow from growth that comes as a result of the adoption of AfCFTA. The normative frameworks in Africa are not able to safeguard the position of member states that want to restrict trade with the view to conserve and protect the environment as the agreement gives precedence over all treaties within the AU regime. The institutions in Africa responsible for managing the natural resources and protecting the environment are institutionally separated from those responsible for managing the economy while the challenges on both areas are inherently interdependent and integrated. They want to achieve their respective objective while ignoring the other. The problems cannot be treated separately by fragmented institution and policies as both interests are interconnected with a complex system of cause and effect. Moreover, environmental institutions in Africa are ill-equipped, characterized by financial, political and structural problems. Hence, making the AfCFTA greener is not a matter of choice. Rather it is a must. The normative e rules that will be added in the agreement will foster the confidence of member states who really wants to ensure environmental protection within the FTA. Likewise, the business relationship that is created by the trade agreement will also boost the relation and cooperation among its members including on environmental concerns. The economic growth led by AfCFTA will also make people to care more about the environment and intolerant of pollution. It also enables states to set up and better enforce environmental regulations. It could also come up with a procedural guarantee that empowers NGOs, indigenous peoples and even states to oversee the compliance of environmental laws in a given state's domestic territory.

5.2 Recommendations

As the lack of political will of African leaders to practically integrate environmental consideration into every developmental policies and decision making is very low, it is not an easy task to formulate rules that are aimed at making the AfCFTA greener. But given the vulnerability of the region to environmental stresses and lack of adaptive and resilient capacity of most of the countries involved, the following major recommendations are forwarded with the aim of making the development aspired by AfCFTA sustainable.

- ✓ The agreement establishing AfCFTA should be amended so as to make its preamble and basic objectives balance the economic growth and environmental considerations.
- ✓ The amendment proposed should incorporate new provisions that explicitly prohibit ‘harmonization down’ of environmental regulations. Likewise, a rule that give primacy of some MEAs over its provision, in case a conflict happens, should be included. Precautionary principle should also be adopted.
- ✓ The ongoing phase II negotiations of AfCFTA, especially the agreements involving TRIPS and investment, should sufficiently incorporate environmental objectives and substantive provisions.
- ✓ The AfCFTA member states should immediately adopt a cooperative agreement on the environment within the FTA framework. This agreement, *inter alia*, should include detailed provisions that:
 - ❖ Impose an obligation on member states to implement their environmental regulations properly. It shall also mandate each Party to ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations. And each party has to periodically report about the state of its environment and implement recommendations provided by an institution that will be established under the same agreement.
 - ❖ Ensure each party has taken government action, provided private access to remedies and procedural guarantees domestically with the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations.

- ❖ Ensure public participation, including NGOs and indigenous people, in conserving, protecting and enhancing the environment.
- ❖ Create institutions which ensure the implementation of the agreement.
- ❖ Identify and enhance cooperation among parties on environmental areas that require specific concern in the region and collective measures
- ❖ Adopt measures that allow both private and public submissions which ensure enforcement matters

References

Books

Alam Shawakat and others (eds), *International Environmental Law and the Global South* (CAMBRIDGE UNIVERSITY PRESS 2015)

Bretherton Charlotte and Vogler John, *The European Union as a Global Actor* (2nd edn) (Taylor & Francis Group 2006)

Birnie Patricia and others, *International Law and the Environment* (3rd edn) (Oxford University Press 2009)

Chaytor Beatrice and Gray R. Kevin (eds), *International Environmental Law and Policy in Africa*, Environment and policy, vol.36 (Kluwer 2003)

Damtie Mellese and Bayou Mesfin, 'Overview of Environmental Impact in Ethiopia' (MELCA-Ethiopia 2008)

Deere L. Carolyn and Esty C. Daniel (eds), *Greening the Americas NAFTA's Lessons for Hemispheric Trade* (MIT Press 2002)

__, *Environment and Trade - A Handbook* (International Institute for Sustainable Development 2000)

Esty C. Daniel and Ivanova H. Maria (eds), *Global Environmental Governance Options & Opportunities* (Yale school of forestry & environmental studies 2002)

Fitzmaurice Malgosia, *Contemporary Issues in International Environmental Law* (Edward Elgar 2009)

Fitzmaurice Malgosia, Ong M. David and Merkouris Panos(eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010)

Freestone David, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009)

Ghaffar Abdul and Mlay Wilfred (eds), *Environment and Sustainable Development in Eastern and Southern Africa: Some Critical Issues* (Macmillan Press Ltd 1998)

Holder Jane and Maria Lee, *Environmental Protection, Law and Policy* (2nd edn) (CAMBRIDGE UNIVERSITY PRESS 2007)

Kevin P. Gallagher (ed), *HANDBOOK ON TRADE AND THE ENVIRONMENT* (Edward Elgar 2008)

McCormick John, *Environmental Policy in the European Union* (PALGRAVE 2001)

Nanda P. Ved and Pring (Rock) George, *International Environmental Law and Policy for the 21st Century*, (2nd revised edn), Martinus Nijhoff Publishers, 2013

Rogers P. Peter, Jalal F. Kazi and Boyd A. John, *An Introduction to Sustainable Development* (Glen Educational Foundation 2008)

Sands Philippe, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2nd edn) (CAMBRIDGE UNIVERSITY PRESS 2003)

Ward Halina and Brack Duncan (eds), *Trade, Investment and the Environment*, Taylor & Francis Group, 2000

Articles, Reports and Research Papers

— —, *AFRICA ENVIRONMENT OUTLOOK INTEGRATED ENVIRONMENTAL ASSESSMENT REPORTING: AN UPDATE* (UNEP 2001)

African Union, *First Continental Report on the Implementation of Agenda 2063*, 2020

Ahn Dukgeun, *Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case*, 20 MICH. J. INT'L L. 819 (1999)

Amechi Emeka Polycarp, *Linking Environmental Protection and Poverty Reduction in Africa: An Analysis of the Regional Legal Responses to Environmental Protection*, 6/2 *Law, Environment and Development Journal* (2010)

Ariti Adenew Taffa and others, 'What restrains Ethiopian NGOs to participate in the development of policies for natural resource management? *Environmental Science and Policy* 89 (2018)

Bree Axel (1998), *Article XX GATT - QUO VADIS? The Environmental Exception After The Shrimp/Turtle Appellate Body Report*, Penn State International Law Review: Vol. 17: No. 1, Article 3: <http://elibrary.law.psu.edu/psilr/vol17/iss1/3>

Birlie Yenehun, 'Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features', MIZAN LAW REVIEW, Vol. 11, No.2 (2017)

Carrapatoso Fritz, A. (2007), *The Integration of Trade and Environmental Policies in Free Trade Agreements in Southeast-Asia*, *Südostasien aktuell: journal of current Southeast Asian affairs*, 26(1)

Cofelice Andrea, *African Continental Free Trade Area: Opportunities and Challenges*, The Federalist Debate Year XXXI, No.3, November 2018, DOI: 10.2478/tfd-2018-0032

Cole and Neumayer, *Environmental Policy and the Environmental Kuznets Curve: Can Developing Countries Escape the Detrimental Consequences of Economic Growth?* (2005)', Handbook of Global Environmental

Colyer Dale, *Environmental Provisions in Free Trade Agreements*, West Virginia University

Dr. IHUA Bell and others, *An Independent Study on the Potential Benefits of AFCFTA on Nigeria* (2018)

Everett Tim and others, *Economic Growth and the Environment* (2010), Defra Evidence and Analysis Series, Paper 2

Frankel Jeffrey, *Environmental Effects of International Trade* (2009), EXPERT REPORT NO. 31 TO SWEDEN'S GLOBALISATION COUNCIL

Gonzalez G. Carmen, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979 (2001). <https://digitalcommons.law.seattleu.edu/faculty/298>

Grossman and Krueger B. Alan, *Environmental Impacts of a North American Free Trade Agreement* (1991), NBER Working Paper No.3914

Harris M. Jonathan, *Trade and the Environment* (2004), Tufts University Global Development and Environment Institute

International Trade Centre (2018), *A Business Guide to the African Continental Free Trade Area Agreement*, ITC

Korves Nicolas and others, *Is Free Trade Good or Bad for the Environment? New Empirical Evidence*, <http://www.intechopen.com>

Kulesa Margareta E. (1992): *Free trade and protection of the environment: Is the GATT in need of reform?* *Intereconomics*, ISSN 0020-5346, Verlag Weltarchiv, Hamburg, Vol. 27, Iss. 4, pp. 165-173, <http://dx.doi.org/10.1007/BF02926373>

Laurens and others, 2019, *NAFTA 2.0: The Greenest Trade Agreement Ever?* *World Trade Review*, 18. https://www.researchgate.net/publication/334593290_NAFTA_20_The_Greenest_Trade_Agreement_Ever, accessed

Legal Aspects of World and Regional Trade 842 (2018) (Research Paper), *Barriers to Intra-African Trade and the African Continental Free Trade Agreement*

McCormac Ethan and others, *What Africa Stands to Gain from the AfCFTA: Country Level-Impacts* (2019), Vivid Economics

Parks David M., *GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation* (*UCLA Journal of Environmental Law and Policy*, 15(2) 1997)

Paruthipattu Anantha K., *Are Tuna and Dolphins the Same? A Rule of Reason Approach to Resolve the Trade and Environment Conflict* (1997). *LLM Theses and Essays*. 200 https://digitalcommons.law.uga.edu/stu_llm/200

Pedro M. Morales-Gomez, *The Nafta Package and the Environment: A Green Analysis of its Origins and Effects*, University of Georgia, 2000, https://digitalcommons.law.uga.edu/stu_llm/251

Scott Joanne, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO* (EJIL (2004), Vol.15 No.2, 307-354

Slachmuylders H. *Barriers to Intra-African Trade and the African Continental Free Trade Agreement (AfCFTA)*, LEGAL ASPECTS OF WORLD AND REGIONAL TRADE 842 (2018)

Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, the American Journal of International Law, Vol. 91, No. 2 (Apr., 1997), pp. 268 313 (Cambridge University Press)

United Nations Conference on Trade and Development, *TRADE AND ENVIRONMENT REVIEW, 2003*

UNEP (2016), *GEO-6 Regional Assessment for Africa*, Nairobi, Kenya

United Nations Conference on Trade and Development, *African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods*, 2016

United Nations Economic Commission for Africa (2015), *African Regional Report on the Sustainable Development Goals*

Van Wyk Jo-Ansie, *The African Union's Response to Climate Change and Climate Security*, Institute for Security Studies, Monograph 170

Vutha Hing and Jalilian Hossein, *Environmental impacts of the ASEAN-China free trade agreement on the greater Mekong sub-region* (2008), Cambodia Development Resource Institute

World Commission on Environment and Development, *Our Common Future* (1987)

Yao Xing and others, *Free Trade Agreement and Environment for Sustainable Development: A gravity Model Analysis*, Sustainability, Vol. 11(2019)

ZHU YUN, *Trade and Environmental Protection within the World Trade Organization Framework*, LLB, Fu Dan University 2007

Laws, Policies, Strategies and Plans

Ethiopian

Charities and Societies Proclamation No. 621/2009

Constitution of the Federal Democratic Republic of Ethiopia, 1995

Environmental Impact Assessment Proclamation No. 299/2002

Environmental Policy of Ethiopia, 1997

Ethiopian pollution control proclamation No. 300/2002

International

African Charter on Human and Peoples Right, 1981

African Convention on the Conservation of Nature and Natural Resources, 1968

Agenda 2063, 2015

Agreement Establishing African Continental Free Trade Area, 2018

Agreement Establishing WTO, 1994

Agreement on Agriculture, 1994

Agreement on the Application of Sanitary and Phytosanitary Measures, 1994

Agreement on Technical Barriers to Trade, 1994

Bamako Convention, 1991

Basel Convention, 1992

Constitutive Act of the African Union, 2000

Convention on International Trade in Endangered Species, 1975

General Agreement on Tariffs and Trade, 1994

General Agreement on Trade in Goods, 1994

Lagos Plan of Action for the Economic Development of Africa 1980-2000

Montreal Protocol to protect the ozone layer, 1989

North-American Free Trade Agreement, 1992

New Partnership for Africa's Development (NEPAD), 2002

North American Agreement on Environmental Cooperation, 1993

OAU Charter, 1963

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

Rio Declaration on Environment and Development, 1992

The Revised African Convention on the Conservation of Nature and Natural Resources, 2017

Single European Act, 1987

Treaty Establishing the African Economic Community, 1991

Treaty Establishing the European Economic Community, 1957

Treaty on European Union, 1992

Others

AfCFTA Agreement enters into force, <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>

African Union, Assembly/AU/Dec.392 (XVIII), *Decision on African Integration*, Doc: EX.CL/693(XX)

African Union, Assembly/AU/Dec.394(XVIII), *Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area*, Doc. EX.CL/700(XX)

African Union, Assembly/AU/Dec.400 (XVIII), *Decision on Africa Consensus Statement to the United Nations Conference on Sustainable Development (RIO +20)*, Doc. Assembly/AU/10(XVIII)

African Union (2019) *CFTA – Continental Free Trade Area*: <https://au.int/en/ti/cfta/about>

Environment and Development Decision Making in Africa 2006–2008,
1<http://www.iisd.ca/africa/>

European Commission (2018) *Africa-Europe Alliance: EU supports African Continental Free Trade Area with EUR 50 million*: https://ec.europa.eu/europeaid/news-and-events/africa-europe-alliance-eu-supports-african-continental-free-trade-area-eu50-million_en

African Union, *Decision on Africa Consensus Statement to the United Nations Conference on Sustainable Development (Rio +20) - Doc. Assembly/AU/10(XVIII)*, Assembly/AU/Dec.400 (XVIII)

Harary David, *African Free Trade Could Increase Resilience to Climate Change and Conflict*, <https://www.newsecuritybeat.org/2018/10/african-free-trade-increase-resilience-climate-change-conflict/>

<https://au.int/en/ti/cfta/about>

Kombo Brenda K., *Emerging Voices: Doing Regional Integration Better? The Possibility of Reinvigorating the Relationship Between International Human Rights Law and International Economic Law through the African Continental Free Trade Area*,

<http://opiniojuris.org/2019/08/12/emerging-voices-doing-regional-integration-better-the>

possibility-of-reinvigorating-the-relationship-between-international-human-rights-law-and-international-economic-law-through-the-african-contine

__, *Let them eat pollution*, The Economist February 15th 1993

Myres Joe, '19 of the world's 20 youngest countries are in Africa' (30 august 2019)

<<https://www.weforum.org.html>, accessed on 3rd September 2020

Naud Théobald and others, *Recent Trends in Investment Arbitration in Africa*, (11 April 2019)

<https://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2019/1190119/recent-trends-in-investment-arbitration-in-africa,12/20/2012,5:28>

__ The Trade and Environment Committee, and Doha preparations,

https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief11_e.htm, accessed

World Trade Organization, Doha Ministerial Declaration, 2001

US—*Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998)

