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ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

THE TREATMENT OF LEAST DEVELOPING COUNTRIES (LDCs) IN AFRICAN
CONTINENTAL FREE TRADE AREA (AfCFTA)

A thesis Submitted in Partial Fulfillment of the Requirements of the Degree of Master of Laws
(LL.M in Public International Law) to the School of Law, Addis Ababa University

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TO:-FIKREMARKOS MERSE (PhD)

July, 2021

Addis Ababa, Ethiopia

Declaration

I, Haymanot Asrat G/sillasey, hereby declare that this thesis is my original work and has not been submitted for a degree in any other academic and research institution. And all sources used in this thesis have been duly acknowledged and cited.

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Approval Sheet

Addis Ababa University

School of Law

Graduate Program

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Acknowledgment

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Abbreviations and Acronyms

AfCFTA	African continental free trade area
OAU	Organization of Africa Unity
AU	African Union
EU	European Union
LDCs	List Developed Countries
LLDCs	Landlocked Developed countries
SMEs	Small and Medium Sized Enterprises
SRTB	Sub Regional Trade Blocks
TFA	WTO Trade Facilitation Agreement
AGOA	Africa Growth and Opportunity Act
GSP	General System of Preferences
EPA	Economic partnership agreements
ITC	International Trade Center
DC	Developing Countries
MFN	Most Favored Nation
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nation Development program
World Bank	World Bank
IMF	International Monetary Fund
TSMA	Trademark Southern Africa
AfDB	African Development Bank
COMESA	Common Market for Eastern and Southern Africa
STDF	Standard and Trade Development Facility
TFF	Trade Facilitation Facility
ECOWAS	Economic Community of West African States
SADC	Southern African Development Community
WTO	World Trade Organization
RECs	Regional Economic Communities
MFN	Most Favored Nations Treatment
AEC	African Economic Community

GATT General Agreement on Trade and Tariffs
DSB Dispute settlement body

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Abstract

AfCFTA is a trade agreement between AU member states, aiming at creating a single continental market for goods and services as well as a customs union with free movement of persons and capital. Among its expected key benefits is the promise to create a single continental market for goods and services with free movement of people and investments, thus expanding intra-African trade across the continent, enhancing competitiveness and supporting economic transformation in Africa. However, intra-African trade remains dominated by a few big economic powers in the region. To this end, there have been growing fears that countries with large productive capacities in manufacturing or stronger supply capacities in non-manufactured products may gain more rewards than fragile landlocked and smaller economies, particularly LDCs. These concerns have led those countries to pushing for SDT in the implementation of the AfCFTA's provisions concerning goods, services and dispute settlement. Thus; this paper assesses the case for SDT in the AfCFTA and analyzes the particular provisions provided for it in the AfCFTA. It concludes with recommendations to ensure that, in implementing the AfCFTA, Africa's LDCs can be supported to gain significantly from the AfCFTA and gain from its provisions on SDT.

Key words: - AfCFTA, LDCs, Special and differential treatment (SDT),

Chapter one

INTRODUCTION

1.1. Background of the study

Africa is a vast and diverse continent where discussions of trade integration, as a driver of sustained growth and poverty reduction, have been long standing. Perhaps unlike other regions that have pursued deeper trade integration, Africa stands out in at least four areas: heterogeneity in country size, development, and trade openness.¹

The question of Africa's regional integration has preoccupied many African leaders since the early years of independence. Many have viewed it as a tool for promoting economic growth and sustainable development and improving the living standards of the African people. The overall strategic objective of regrouping African countries was to fight the impact of colonialism and build a united Africa.² It is indisputable that Africa's development will be achieved through the unity of its people. The formation of the Organization of Africa Unity (OAU), now the African Union (AU) was the first step towards promoting continental unity.³ However, Africa has comparatively few success stories to tell with respect to regional integration. Africa's delayed progress toward this goal has been attributed in large part to the continent's various extraordinary obstacles, which include inadequate financial resources, macroeconomic instability, poor governance, conflicts and war, and numerous sub-groupings.⁴ In addition, African member States' multiple memberships to different RECs have contributed significantly to the slow pace of Africa's integration.⁵

¹ Lisandro Abrego and others, The African Continental Free Trade Agreement: Welfare Gains Estimates from a General Equilibrium Model (IMF working Paper, WP/19/124, 2019) 8

² Assessing Regional Integration in Africa IV Enhancing Intra-African Trade (United Nations Economic Commission for Africa and, United Nations Economic Commission for Africa May 2010) 7

³ *ibid*

⁴ *ibid*

⁵ *ibid*

A diverse range of trade regimes and policies characterize the continent. Three broad elements characterize the trade regimes on the continent.⁶ First, there are preferential trade agreements between individual African countries and countries outside the continent. These include agreements under the general system of preferences (GSP) and duty-free treatment for least-developed countries (LDCs), and preferential access to the US market under the African Growth and Opportunity Act (AGOA).⁷ Second, there are regional trade agreements between African and non-African countries. This grouping includes the various economic partnership agreements (EPAs) that the EU has negotiated with different countries and regional groupings on the continent, which also call for the partial and gradual opening of African markets to EU imports.⁸ Third, there is a web of intra-African trade agreements, including eight RECs, and four sub-regional groupings.⁹

The adoption of the African Continental Free Trade Area (AfCFTA) Agreement by African Heads of State and Government in March 2018 marks a significant step forward in the continent's economic integration.¹⁰ The African Union (AU) has signed an agreement, leaving Eritrea as the only non-signatory among the 55 African Union member states.¹¹ As of December 12, 2020, 28 countries have deposited their instruments of AfCFTA ratification.¹² The agreement went into force on May 30, 2019, 30 days after the entry of 22 ratifying states on April 29.¹³

⁶ Lisandro Abrego and others (n.1)

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*

¹⁰ AfCFTA Phase 1 Negotiations: Issues and Challenges for Eastern Africa, Third World Network-Africa, 2019, 3 <<http://twnafrica.org/wp/2017/?p=1703>>, accessed March 8, 2020

¹¹ Africa Union, 'List of countries which have signed, ratified/acceded to the agreement establishing The African continental free trade area' (Africa Union, 08/10/2019) [https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA\(2\).pdf](https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA(2).pdf) accessed 28 October 2020

¹² *ibid* - Ghana, Kenya, Rwanda, Niger, ,, Djibouti, Guinea, eSwatini (former Swaziland), Mali, Mauritania, Namibia, South Africa, Uganda,, Senegal, Togo, Egypt, Ethiopia, The Gambia, Sierra Leone, Sahrawi Republic, Zimbabwe, Burkina Faso, Chad, Cote d'Ivoire, Gabon, Equatorial Guinea, Mauritius and Sao Tome & Principe

¹³ González Anabel, 'The African Continental Free Trade Area Is Coming into Force Is It Really?' (<https://www.piie.com/>, May 31, 2019) <<https://www.piie.com/blogs/trade-investment-policy-watch/african-continental-free-trade-area-coming-force-it-really/>> accessed 15 October 2020

Many ambitious reforms are outlined in the AfCFTA and will be implemented gradually. There are general objectives and specific ones. The main goal is to create a single market for goods and services, facilitated by the movement of persons. This aims to deepen the African continent's economic integration and is in line with Agenda 2063's Pan-African Vision of "an integrated, prosperous, and peaceful Africa."¹⁴ However, the full realization of the AfCFTA's potential benefits will necessitate speedy ratification and implementation of the Agreement, as well as a variety of supportive policies to eliminate other trade, investment, and industrialization hurdles. To this end, we need to build on the current political momentum to ensure the AfCFTA is implemented fully and effectively throughout the continent and is adequately anchored on appropriate institutions at national and continental levels.¹⁵

There are a wide range of countries in Africa's member states that may demand special attention and care. The 55 African member states are made up of 32 least developed countries (LDCs)¹⁶, and 6 landlocked developed countries (LLDCs).¹⁷ This Africa's LDCs continue to struggle with

¹⁴Théophile Albert, Ralf Peters and Christian Knebel, 'The African Continental Free Trade Agreement: Opportunities and Challenges'(2019) CUTS International, 10<<https://www.tralac.org/documents/resources/cfta/3181-afcfta-opportunities-and-challenges-cuts-international-study-2019/file.html>> accessed October 11, 2020 (AGENDA 2063 is Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan- Africanism and African Renaissance)

¹⁵ United nations economic commission for Africa, 'AfCFTA Implementation: Breaking Down Geographical, Logistical and Regulatory Barriers to Trade and Investment in the Horn to Boost Industrialization: A Focus on the Pharmaceutical Industry'" (United Nations Economic Commission for Africa, 2019) <<https://www.uneca.org/afcfta-regional-trade-forum-horn-africa> > accessed 8 November 2020

¹⁶ UNCTAD,'UN list of Least Developed Countries'(UN,28 October 2020) <<https://unctad.org/topic/vulnerable-economies/least-developed-countries/list> > accessed 28 October 2020 (LDCs: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, the Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, the Sudan, Togo, Uganda, United Republic of Tanzania, and Zambia.

¹⁷ ibid (Ethiopia, Madagascar, Malawi, Sudan, Zambia, Zimbabwe)

increases in extreme poverty and employment opportunities are largely unavailable for these countries' predominantly young population. Massive poverty and underdevelopment, poor soft and hard infrastructure, weak supply capacities, lack of institutional and technological capabilities, low labor productivity, brain drain, low savings, lack of domestic resources, and ill health are some of the characteristics that characterize LDCs, particularly those in Africa.¹⁸ The LDCs are confronting major challenges while making serious efforts to put their countries on the path to development and prosperity.¹⁹

Even though the AfCFTA provides benefits, some of its difficulties must be addressed. One of the greatest impediments to the continent's integration is the fear of huge tariff revenue losses and an unequal allocation of costs and benefits. Small economies and LDCs may face major fiscal revenue losses and risks to local industry, while countries with large industrial production capacities may achieve major economic growth and welfare gains.²⁰ Most African LDCs are also landlocked, resulting in high transit-transport costs, which aggravate African LDCs' ability to produce and trade on regional and worldwide markets, reducing their international competitiveness.²¹ An unequal allocation of benefits and expenses across member states could cause the negotiations to go on and the implementation to be delayed. To enable the redistribution of benefits and a fair sharing of expenses across member states, sufficient flanking measures and flexibilities are required.²²

¹⁸ UNCTAD, 'Trade and Development for African-LDCs' Prosperity Actions and Directions' (2008) Report based on the High-Level Workshop in Preparation for UNCTAD XII, 2,<
https://unctad.org/system/files/official-document/aldc20082_en.pdf > accessed 29 October 2020

¹⁹ *ibid* IV

²⁰ Mensut Saygill, Ralf Peters and Chrstian Knebel, African Continental Free Trade Area: Challenges and opportunities of Tariff Reductions (UNCTAD Research Paper No.15 2018) 6

²¹ UNCTAD,(n.18)

²² Mesut Saygili and others (n.20)

The principle of SDT is important for developing countries, more so for the LDCs for their effective integration in the multilateral trading system.²³ SDT would be one way to address different levels of development, especially regarding LDCs.²⁴

For those provisions that minimize free riding but create implementation difficulties for LDCs—for instance, provisions on competition and IP—the SDT provisions in the WTO Trade Facilitation Agreement (TFA)²⁵ may serve as a model. Applying the TFA model would enable LDCs to identify (i) obligations they commit to comply with upon entry into force, (ii) obligations they commit to comply with after a period of time, and (iii) obligations that would be contingent upon receiving technical assistance.²⁶ By contrast, for other provisions that have raised concerns around infant industry protection and policy space, temporary exemptions from certain disciplines would be a more suitable approach.²⁷

1.2. Literature review

Several authors have written on the challenges and opportunities of AfCFTA, but only few wrote about LDCs treatment under AfCFTA. Since the topic AfCFTA is relatively recent issue the focus of many writers is addressing and giving awareness about the goals, challenges and potentials of the agreement.

²³ Julian Mukiibi, 'LDC Interests in the WTO' (CUTS International, November, 2017),2 <https://cuts-citee.org/pdf/Viewpoint_Paper_LDC_Interests.pdf> accessed 29 October 2020

²⁴ C.VAN DER VEN, “Special and Differential Treatment in the Context of the Digital Era”(2018) CUTS International,6 <http://www.cuts-geneva.org/pdf/KP2018-Paper-SDT_in_Digital_Era.pdf> accessed march 9,2020)

²⁵ World trade organization, 'Trade facilitation' (World Trade Organization, 2019) <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> accessed 29 October 2020 (The TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area.)

²⁶ Landry Signe and Colette Van der Ven, Key to Success for the AfCFTA Negotiations(African Growth Initiative at Brookings 2019) 8

²⁷ Ibid

Trudi Hartzenberg pointed out that the matter of tariff concessions is a sensitive matter for the LDCs. He noted that “despite low levels of intra-Africa trade, tariff revenue is still an important source of government revenue, and the tariff remains an important measure to reduce import competition and so protect domestic industry.”²⁸The author's main focus is tariff and he did not address other issues such as service and dispute settlements which are relevant to this research. Mesut Saygili, Ralf Peters and Christian Knebel have attempted to analyze the potential adjustment costs and potential benefits of the AfCFTA tariff reductions under different scenarios.²⁹ Théophile Albert has discussed in the journal about Opportunities and Challenges of AfCFTA.³⁰ He basically focused what African countries could gain from the implementation of the agreement and the challenges that are expected to occur.³¹

As I have stated herein above, the work of many writers, including the above two, mainly focused on AfCFTA in general not addressing the treatment of LDCs under AfCFTA specifically. Thus, this research work, unlike previous research work on this area, focuses on the special and differential treatments accessible to LDCs under AfCFTA. And takes a look at their adequacy and propose potential changes that will help LDCs engage completely within the African market.

1.3. Statement of the problem

What are the key obligations of AfCFTA in relation to trade in goods and services?

The AfCFTA is expected to drive economic growth, industrialization and sustainable development in Africa. Trade liberalization in AfCFTA lowers trade costs and a variety of

²⁸ Trudi Hartzenberge, ‘AfCFTA:What is Expected of LDCs in Terms of Trade Liberalization’ <<https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/>> accessed 29 October 2020

²⁹ Mesut Saygili and others(n.20)

³⁰ Théophile.A, ‘The African Continental Free Trade Agreement Opportunities and Challenges’(2019) CUTS INTERNATIONAL, < [https://www.tralac.org/documents/resources/cfta/3181-afcfta-opportunities-and-challenges-cuts-international-study-2019/](https://www.tralac.org/documents/resources/cfta/3181-afcfta-opportunities-and-challenges-cuts-international-study-2019/file.html) file.html > accessed 25 December 2019

³¹ Ibid

products at a lower price, in the long run.³² However, significant tariff revenue losses, the consequence of the uneven distribution of costs & benefits and potentially lose if sectors are exempted that are important for export growth opportunities are among the main obstacles mostly for the LDCs that are members of AfCFTA.³³ Because of their structural handicaps reflected in low-income levels, high economic vulnerability and weak 'human assets; LDCs face particular challenges in integrating into the regional economy.³⁴

Most of AfCFTA members are LDCs that are heavily reliant on income generated from tariffs to supplement their domestic fiascos. They are concerned about the impact that increasing trade liberalization could have on their national income. Inadequate infrastructure, an over-reliance on commodities, the rise of non-tariff barriers and a poor manufacturing basis is also a cause for concern for most African LDCs inhibiting their ability to participate in international trade.³⁵

Tariff elimination under the AfCFTA might cause unemployment and lower wages in certain sectors and involve increased health care costs and costs for retraining. This may create social tensions and problems unless compensatory or 'flanking' measures are set in place.³⁶ Besides labor costs, other adjustment costs can include the lower utilization of productive assets and the need to make new investments to respond to new competitive conditions.³⁷

³² Mesut Saygili and others(n.20)

³³ Ibid

³⁴ Christophe Bellmann, 'Challenges facing LDCs in Bali and Beyond' (International center for trade and sustainable development, 15 November 2013) <<https://ictsd.iisd.org/bridges-news/bridges-africa/news/challenges-facing-ldcs-in-bali-and-beyond>> accessed march 8,2020

³⁵ Asmita Parshotam,' South Africa, Nigeria and the AfCFTA: 6 key questions answered' (Africaportal, 03 May 2018) <<https://www.africaportal.org/features/south-africa-nigeria-and-afcfta-6-key-questions-answered/>> accessed 30 October 2020

³⁶Lunenburg Peter,“Phase 1B’ of the African Continental Free Trade Area (AfCFTA) negotiations’ (Jun 2019) ,South Centre policy brief No. 63, 3< https://www.southcentre.int/wp-content/uploads/2019/06/PB63_Phase-1B-of-the-AfCFTA-negotiations_EN-1.pdf> accessed 30 October 2020

³⁷ Ibid

The main challenges facing the African continent is that most of the African states are LDCs and most of these countries are suffering trade supply constraints. It is needless to say liberalizing trade is necessary to condition for economic development; however, it is not a sufficient condition.³⁸For liberalizing trade to produce fruits, African states must overcome the trade supply constraints. These supply constraints include weak infrastructure, long time consumed procedures at customs borders, and the locked land states.³⁹ The benefits of the free trade area may not be shared equally if the financial and institutional capacity of countries is insufficient in dealing with adverse effects on labor force and small enterprises. In particular, a lack of labor mobility between sectors is a key challenge for many developing countries.⁴⁰During a transition period, adjustment costs in the form of falling tariff revenues, temporarily rising unemployment and decreasing economic activities in some sub-sectors are likely to occur due to a reallocation of resources.⁴¹Many developing countries, particularly LDCs are lacking necessary funding and expertise to deal with all components of adjustment costs.⁴²LDCs will require adjustment cost because of structural change through the relocation of labor, capital and other factors of production. The 32 LDCs will face challenges to create jobs, develop their industrial sectors and diversify their production capacity.⁴³

In the absence of agreed substantive rules of origin under the AfCFTA, the ongoing Rules of origin discussions centre on the level of restrictiveness of the rules.⁴⁴The more advanced African countries advocate for stricter rules of origin in the form of product-specific rules. They are worried about trade deflection: The weaker the rules of origin, the easier it is for non-AfCFTA

³⁸Sayed attia , ' AfCFTA: Opportunities and challenges ' (CGTN, 29-May-2019)

<<https://news.cgtn.com/news/3d3d774e7863544f34457a6333566d54/index.html> > accessed March 8, 2020

³⁹Ibid

⁴⁰ Mesut Saygili and others (n 20),p.4

⁴¹ Mesut Saygili and others (n 20),p.19

⁴² Mesut Saygili and others (n 20),p.9

⁴³ Ibid.(n 27)

⁴⁴Tatira Zwinoira, 'Rules of origin stall AfCFTA ' (Newsday, March 29, 2018)

<<https://www.newsday.co.zw/2018/03/rules-of-origin-stall-afcfta/> > accessed 30 October 2020

countries to benefit from this African trade agreement.⁴⁵ Yet, the stricter the rules, the more difficult it will be for companies, especially small- and medium-sized enterprises (SMEs) in LDCs, to meet the value-added threshold, and thus receive AfCFTA tariff preferences.⁴⁶ So the end result of this unfinished agreement may result unexpected burden for member LDCs.

The study identifies the gaps in LDC capacities, and articulates the expected responsibilities or needs in terms of national and regional policies and capacity-building programs that will be called for to help them implement the AfCFTA agreement. Given that LDCs have major stakes in all these areas, the study will identify the special and differential treatments available to LDCs; examine their adequacy and propose potential reforms that may help LDCs integrate fully in the African market.

1.4. Research question

The research has identified the following key research questions:

1. How are LDCs treated under the AfCFTA?
2. What are the justifications for special and differential treatment for LDCs in trade relations?
3. What special treatments have been included under the AfCFTA in relation to trade in goods, trade in services and dispute settlement?
4. What are the arguments in favor and against special and differential treatment in the context of Africa?
5. What could be learned from African Economic Communities on special and differential treatment for LDCs?
6. What should be the way forward for AfCFTA in relation to special and differential treatment for LDCs?

1.5. Objective of the study

1.5.1. General objective

The general objective of this study is to assess the treatment of LDCs in the AfCFTA.

⁴⁵ Ibid

⁴⁶ Landry Signe and Colette Van der Ven, Key to Success for the AfCFTA Negotiations(African Growth Initiative at Brookings 2019) ,7

1.5.2. Specific objective

Within that general objective, the research has the following specific objectives:

- Identify the special and differential treatments for LDCs under the AfCFTA in relation to trade in goods, services and dispute settlement.
- Identify gaps in relation to special and differential treatment for LDCs under the AfCFTA.
- Analyze the advantages and disadvantages of including special and differential treatment for LDCs in the context of Africa.
- Examine the experience of African Regional Economic Communities in relation to special and differential treatment for LDCs.
- Provide recommendations on the improvement of treatment of LDCs under the AfCFTA.

1.6. Significance and Scope of the Study

The study will focus on the treatment of LDCs in AfCFTA and make recommendations. The area is new and negotiations are ongoing. The study will hopefully inform the negotiations and help in the implementation of the agreement.

It will also have certain contributions for the AU, the negotiating LDCs, and the member countries in creating awareness about the gaps in relation to SDT for LDCs under the AfCFTA. The study will also serve as a basis and may call the attention of those who want to conduct further research in the field. Finally, it may serve as a reference material in the academic sphere.

The scope of the study is only limited to the treatment of LDCs. It is also confined to the AfCFTA though reference will be made to the World Trade Organization (WTO) and African Regional Economic Communities (RECs) to draw lessons.

1.7. Research methodology

This research is principally based on assessment of existing literatures, legal and non-legal instruments pertaining to the treatment of LDCs in AfCFTA. Information will be gathered from various primary and secondary sources such as AfCFTA legal texts, books, publications, journals, reports and internet sources. In addition, interviews are conducted with relevant experts at the AU and Ministry of Trade and Industry (MoTI) who are engaged in the AfCFTA negotiations.

1.8. Limitation of the study

As noted, the AfCFTA is a new development and negotiations are ongoing. There are only few relevant published materials on the issue. Accordingly, in addition to the limited published works reliance is made on legal texts of the AfCFTA and electronic sources accessible to the author.

1.9. Organization of the Study

This work consists of six chapters each of which is further divided into sections and subsections. Chapter one is the introductory part of the thesis. It includes background to the problem, statement of the problem, research questions, objective of the study, research methodologies, significance of and limitations of the study.

Chapter two will briefly discuss the AfCFTA .This chapter briefly discuss the origin and historical background of the agreement, objectives of AfCFTA agreement and key obligations in relation to trade in goods and services. Chapter three discusses the concept of special and differential treatment in international trade law identified its rationale and limitations. Chapter four examines the treatment of LDCs under the AfCFTA. The chapter will analyze the need for special and differential treatment in the context of Africa, examine the special and differential treatments (if any) in relation to trade in goods, trade in services and dispute settlement. Chapter five makes proposals on how LDCs should be treated in the AfCFTA in relation to trade in goods, services and dispute settlement with clear justifications for each proposal. Chapter six forwards the conclusion and recommendations arising from the findings of the research.

Chapter Two

The General overview of AfCFTA

2. 1. The origin and historical background of the agreement

There have been failed attempts to industrialize efficiently through import substitution since independence, giving rise to the idea of regional integration as a strategy to facilitate Africa's structural development.⁴⁷ As a result, African countries have embraced regional integration as a key component of their development strategies, owing to the economic reasoning of overcoming the constraints of small and fractured economies operating in isolation.⁴⁸

It is indisputable that Africa's development will be achieved through the unity of its people. The desire for African unification clearly illustrates African leaders' commitment, which sparked the foundation of the Organization of African Unity (OAU) in 1963.⁴⁹ The African Union Commission (AUC), the Economic Commission for Africa (UNECA), the African Development Bank (AfDB), and the Regional Economic Communities (RECs) are among the key players of regional integration.⁵⁰

The OAU Abuja Treaty Establishing the African Economic Community was approved with the goal of resuming and beginning the continental integration project.⁵¹ It proposed the creation of a continental free trade agreement as a first step toward the establishment of the African Economic

⁴⁷ United nations economic commission for Africa, 'History of Africa's Regional Integration Efforts' (United Nations Economic Commission for Africa, 13,4,2017) <<https://www.uneca.org/oria/pages/history-africa%E2%80%99s-regional-integration-efforts> > accessed 25 December 2019

⁴⁸ Ibid

⁴⁹ Assessing Regional Integration in Africa IV Enhancing Intra-African Trade (United Nations Economic Commission for Africa May 2010) 7

⁵⁰ Ibid

⁵¹ Treaty Establishing the African economic community (signed June 3rd,1991)

Community.⁵² Momentum towards implementing this objective gathered speed with the formation of the African Union (AU) in 2000, replacing the OAU. AU member States paid greater attention to continental integration. In fact, the third objective of the AU is to “accelerate the political and socio-economic integration of the continent.”⁵³

Subsequently, the AU decided to concentrate fiercely on the cognitive process of fostering continental economic integration through trade integration. At the 2012 AU Summit, Heads of State and Government adopted a Decision on⁵⁴ the Establishment of AfCFTA by the indicative date of 2017 and endorsed the Action Plan on Boosting Intra Africa Trade (BIAT) which identifies seven areas of cooperation namely trade policy, trade facilitation, productive capacity, trade-related infrastructure, trade finance, trade information, and factor market integration.⁵⁵ Then, in June 2015, at the African Union's twenty-fifth Summit, African Heads of State and Government agreed to begin negotiations on the creation of the AfCFTA by 2017, through negotiations on goods and services liberalization.⁵⁶ This initiative presents major opportunities and challenges to boost intra-African trade.⁵⁷

At the 10th Ordinary Session of the African Union (AU) Heads of State Summit in Kigali, Rwanda, on March 21, 2018, 44 African heads of state and government signed the historic African Continental Free Trade Agreement (AfCFTA). Since the World Trade Organization (WTO) was founded in 1995, the AfCFTA has become the world's largest free trade area..⁵⁸ The

⁵² Magdi A Farahat, ‘AFRICAN CONTINENTAL FREE TRADE AREA: Policy and Negotiation Options for Trade in Goods’ (2016) UNCTAD report, 1 < https://unctad.org/system/files/official-document/webditc2016d4_en.pdf > accessed 25 December 2019

⁵³ Constitutive Act of African Union(adopted June 11th, 2000) art 3

⁵⁴ Decision On Boosting Intra-African Trade And Fast Tracking The Continental Free Trade Area Doc. Ex.Cl/700(Xx) (From 29 November To 03 December 2011)

⁵⁵ Ibid

⁵⁶ Assembly Decision on the Launch of Continental Free Trade Area (CFTA) Negotiations Doc. Assembly/Au/11(Xxv) (Twenty-Fifth Ordinary Session14 –15 June 2015)

⁵⁷ Ibid

⁵⁸ Michael AsieduI, ‘AFRICAN CONTINENTAL FREE TRADE AGREEMENT (AfCFTA)’(2018) Global Political Trends (GPoT) PB No. 5, 1

Session was under the key theme: “Creating One African Market,” and falls under AU’s Agenda 2063 Initiative.⁵⁹

The negotiated AfCFTA agreement has three distinct layers. Its framework defines the purposes and intentions of the Agreement and provides primary definitions and outlines.⁶⁰

The second layer comprises the protocols regarding trade in goods and services and the rules and procedures for the settlement of disputes.⁶¹ These protocols constitute the main substantive and operative components of the agreement, including its obligations, intentions, objectives, exceptions and institutional provisions.⁶² The protocols on goods and services, and the rules and procedures on the settlement of disputes form an integral part of Phase I of the Agreement.⁶³ While investment, competition policy, and intellectual property rights belong to Phase II.⁶⁴

The third layer contains the annexes, guidelines, and step-by-step instructions of the protocols.⁶⁵ These articulate the provisions of the protocols in detail. For instance, while articles 7 and 8 of the protocol on trade in goods oblige countries to progressively eliminate import duties, annex 1 states the exact tariff plan that should be used for that tariff reduction.⁶⁶

Based on its structure, AfCFTA addresses six (6) broad areas, divided into two phases:

⁵⁹ Ibid

⁶⁰ Agreement Establishing The African Continental Free Trade Area,(adopted March21st,2018)

⁶¹ Ibid

⁶² Théophile Albert, ‘The African Continental Free Trade Agreement Opportunities and Challenges’(2019) CUTS INTERNATIONAL, 8

⁶³ Agreement Establishing The African Continental Free Trade Area (n.60), art 6

⁶⁴ Ibid, art 7

⁶⁵ Compiled Annexes To The On The Establishment Of The Continental Free Trade Area (adopted March,2018)

⁶⁶ Ibid

Phase 1: What goods are covered and how will they be liberalized? What services are covered and how will they be liberalized? How would disputes be resolved? ⁶⁷

Phase 2: How would intellectual property rights be protected? How will the intra-Africa investment be increased and/or facilitated? How would the competition be promoted? ⁶⁸ Whilst work on Phase 2 is still in its infancy, work on Phase 1 is well advanced, with the exception that final details expected to be completed ahead of the trading start date of July 2020. ⁶⁹ At the turn of the century, Africa was approaching a turning point in which the long-awaited AfCFTA would finally become a reality, with trading under the system set to begin on July 1st, 2020. ⁷⁰ However, due to the COVID 19 pandemic, the implementation was launched on the 1st of January 2021. ⁷¹

2. 2. Objective of AfCFTA

The AfCFTA has set out many ambitious measures that will be progressively implemented. There are general objectives and specific ones. ⁷² The first priority of AfCFTA is to expand Africa's economic and market space other priorities include addressing supply-side constraints, insufficient productive capacity, and infrastructure bottlenecks. ⁷³ It is viewed as a platform

⁶⁷ Chijioke Odo, The African Continental Free Trade Area Unfolding changes (2019) Deloitte, 1 <<https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/ng-The-African-Continental-Free-Trade-Area-Unfolding-Changes.pdf>> accessed 25 December 2019

⁶⁸ Ibid 59

⁶⁹ Ibid

⁷⁰ Price water house Coopers Limited , COVID-19 and the African Continental Free Trade Area Agreement (2020) ,1 <<https://www.pwc.com/ng/en/pdf/covid19-key-considerations-afcfta.pdf>> accessed 25 December 2019

⁷¹ Africa Union, ‘THIRTEEN EXTRA ORDINATY SESSION ON THE AfCFTA : THE ASSEMBLY OF THE UNION ADOPTS DECISION ON THE START OF TRADING’ (Press Release No: 156 /2020,5 December 2020)< https://au.int/sites/default/files/pressreleases/39731-pr-pr_156_-_13th_extraordinary_session_on_afcfta.pdf> accessed 8 December 2020

⁷² Agreement Establishing The African Continental Free Trade Area (n. 60), art 3 and 4

⁷³ ibid art 3

capable of facilitating a process of inclusive structural transformation in African countries, thereby contributing to Africa's Agenda 2063⁷⁴ vision and assisting Africa in moving closer to achieving the Sustainable Development Goals.⁷⁵ If well-designed, the AfCFTA will provide a once-in-a-lifetime opportunity for millions of African citizens to experience increased growth and opportunity. According to Mr. Million Habte, one of the main goals of the AfCFTA agreement is to encourage member countries to participate in the African market and to deepen the African continent's economic integration.⁷⁶ However, the AfCFTA will only be able to achieve this goal if it is properly implemented. To accomplish this, all AfCFTA members must be politically willing to develop and implement appropriate industrial policies to drive domestic industrialization and promote national industry growth.⁷⁷

- To achieve the general objectives, the following seven specific further objectives are included. Progressively eliminate tariffs and non-tariff barriers to trade in goods;
- Progressively liberalize trade in services;
- Cooperate on investment, intellectual property rights, and competition policy;
- Cooperate on all trade-related areas;
- Cooperate on customs matters and the implementation of trade facilitation measures;

⁷⁴ AU, 'Agenda 2063: The Africa We Want', (AU.int) < <https://au.int/en/agenda2063/overview> > accessed on 28 April, 2021 (AGENDA 2063 is Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance)

⁷⁵ Emilie Dairon, ' African Continental Free Trade Area: Developing and Strengthening Regional Value Chains in Agricultural Commodities and Processed Food Products'(2016) UNCTAD, http://unctad.org/en/PublicationsLibrary/webditc2016d4_en.pdf (accessed 10 March 2017)

⁷⁶ Interview with Mr. Million Habte , Trade in service expert at AU, December 9, 2020

⁷⁷ Ibid

- Establish a mechanism for the settlement of disputes concerning their rights and obligations,
- Establish and maintain an institutional framework for the implementation and administration of the AfCFTA.⁷⁸

The AfCFTA has the potential to empower African countries in their trade relations. Over time, trade agreements have shifted away from the WTO and toward 21 bilateral and mega-regional agreements.⁷⁹ This shift risks Africa being excluded from important decisions that frame international trade since Africa is not a party to many of the emerging mega-regional agreements.⁸⁰ The AfCFTA provides the continent with the opportunity to address the continent's economic vulnerabilities within the global economic order, which manifest in and are aggravated by WTO imbalances and other multilateral and bilateral trade agreements.⁸¹

2.3 key obligations in relation to trade in goods and services of AfCFTA

2.3.1. Key obligations in goods

The key obligations and disciplines in goods, which are to be followed by all State Parties to the AfCFTA are:

2.3.1.1. Most-favored nation (MFN) treatment

One of the key obligations under AfCFTA is that of most-favored nation (MFN) treatment.⁸² Concerning the Protocol on Trade in Goods, the aim is to extend preferences between State Parties on the African continent. Hence, states are obligated to extend benefits to all state parties if they provide any measure that benefits any third country.⁸³ The essential MFN obligation

⁷⁸ Agreement Establishing The African Continental Free Trade Area (n.60), art 4

⁷⁹ James Thuo Gathii and others, The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective (United Nations Economic Commission for Africa July 2017) 21

⁸⁰ Ibid

⁸¹ Ibid

⁸² Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Goods (signed March 21, 2018) art 4

⁸³ Ibid (A third country is any country that is not party to an agreement between two other countries)

under the protocol also provides for treatment in relation to pre-existing and new preferential agreements.⁸⁴

With respect to pre-existing preferences, a State Party is not required to extend preferences agreed with any third party prior to the Protocol's entry into force, of which that State Party was a member or beneficiary. However, the State Party may give the other State Parties the opportunity to negotiate the preferences granted therein, as long as this is done on a reciprocal basis.⁸⁵

Concerning new preferential agreements, the Protocol states that any State Party may enter into such an agreement with a third country, provided that such agreements do not impede or frustrate the Protocol's objectives. It also states that such preferential treatment must be extended to all State Parties in a reciprocal and non-discriminatory manner.⁸⁶

2.3.1.2. National Treatment

Another fundamental principle underlying the AfCFTA is national treatment. According to this principle, all AfCFTA State Parties are required to treat products imported from other AfCFTA State Parties in the same way that they treat products produced domestically.⁸⁷ This implies that governments may not segregate against imported products in the domestic market simply because they are imported.

⁸⁴ James Thuo Gathii and others (n. 77)

⁸⁵ International Trade Centre, 'A Business guide to the African Continental Free Trade Area Agreement' (September 2018) ITC, 33
<https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AfCFTA%20Business%20Guide_final_Low-res.pdf> accessed September 6, 2020

⁸⁶ Agreement Establishing the African Continental Free Trade Area (n. 60)

⁸⁷ *ibid*

2.3.1.3. Special and differential treatment

Under the agreement, special and differential treatment is incorporated as general obligation.⁸⁸ In order to increase beneficial participation in goods trade, the agreements include special provisions that grant developing countries special rights and allow other members to treat them more favorably.⁸⁹

2.3.1.4. Liberalization of Trade

The key provision relating to liberalization of trade concerns, the provision⁹⁰ obligating State Parties to 'progressively eliminate' import duties or charges having identical impact on goods originating from the territory of any other State Party in agreement with their Schedules of Tariff Concessions which will be attached to the Protocol under Annex 1 and will become an integral part of the Protocol.⁹¹

Tariff concessions schedules, tariff modalities adopted and outstanding work on tariff modalities to be negotiated and adopted are to be an integral part of this Protocol.⁹² The Protocol allows for certain exceptions, notably those goods subject to trade remedies, which are governed by the Annex.⁹³ It also allows State Parties to modify their tariff concession schedules, but only if they maintain a "general level of commitments that is not less favorable than the initial commitments."⁹⁴ This ensures that there will be no backsliding on liberalization commitments, despite the fact that the balance of concessions may change over time. However, it should be

⁸⁸ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Goods (n.82), art 6

⁸⁹ Ibid

⁹⁰ Ibid, art 7

⁹¹ ibid

⁹² Ibid ,art 8

⁹³ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Goods, Annex 9 on Trade Remedies (signed March 21,2018)

⁹⁴ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Goods (n.82), art 11

noted that the procedures and methods for determining whether the overall balance of concessions has been maintained are not specified.

2.3.1.5. Quantitative restrictions

The State Parties shall not impose quantitative restrictions on imports from or exports to other State Parties except as otherwise provided in Protocol trade in goods, its Annexes and Article XI of GATT 1994 and other relevant WTO Agreements.⁹⁵ In addition, State Parties may regulate export duties or charges having equivalent effect on goods originating from their territories, which must be notified to the AfCFTA Secretariat.⁹⁶

2.3.1.6. International transfers and payments

The Protocol obliges State Parties not to apply restrictions on international transfers and payments for current transactions relating to its specific commitments.⁹⁷

2.3.1.7. Trade facilitation

State Parties shall take appropriate measures including arrangements regarding trade facilitation in accordance with the provisions of Annex 4 on Trade Facilitation.⁹⁸ Each State Party should promptly publish the following information on the internet in a non-discriminatory and easily accessible manner so that governments, traders, and other interested State Parties can become acquainted with them.⁹⁹

2. 3.2 Key obligations in services

The general obligations and disciplines, which are to be followed by all State Parties to the AfCFTA are:-

⁹⁵ Ibid, art 9

⁹⁶ Ibid, art 10

⁹⁷ Ibid, art 13

⁹⁸ Ibid ,art 14

⁹⁹ Agreement Establishing the African Continental Free Trade Area: Annex 4 (signed March 21,2018)

2.3.2.1. Most-favored nation (MFN) treatment

As with the Protocol on Trade in Goods, the aim is to extend preferences between State Parties on the African continent.¹⁰⁰ If a measure introduced by one State Party provides a benefit to services and service suppliers of any third country that benefit should be extended to all State Parties.¹⁰¹ It also provides for treatment in relation to pre-existing and new preferential agreements.¹⁰²

In the case of pre-existing preferences, the Protocol recognizes that a State Party is not obligated to extend preferences agreed with any third party prior to the Protocol's entry into force, of which that State Party was a member or beneficiary. However, the State Party may give the other State Parties the opportunity to negotiate the preferences granted therein, as long as this is done on a reciprocal basis.¹⁰³

Concerning new preferential agreements, the Protocol states that any State Party may enter into such an agreement with a third country if such agreements do not impede or frustrate the Protocol's objectives.¹⁰⁴ It also states that such preferential treatment must be extended to all State Parties in a reciprocal and non-discriminatory manner.¹⁰⁵

2.3.2.2. Transparency

In general, transparency obligations require state parties to publish promptly all relevant measures in a medium that is accessible.¹⁰⁶ Furthermore, States Parties shall promptly and at least annually notify the Secretariat of any new or changes to existing laws, regulations, or administrative guidelines that have a significant impact on trade in services under this Protocol.¹⁰⁷

¹⁰⁰ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Service (signed March 21,2018) art 4

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Ibid, art 5

¹⁰⁷ Ibid

2.3.2.3. Special and differential treatment

The Protocol obliges State Parties, in the interest of increasing beneficial participation in trade in services, to provide special consideration to the progressive liberalization of service sectors commitments and modes of supply that will promote critical sectors of growth, social and sustainable economic development.¹⁰⁸ To take into account the challenges that State Parties may face and may grant flexibilities such as transitional periods, on a case-by-case basis, within the framework of action plans, to accommodate special economic situations and development, trade and financial needs in implementing this Protocol for the establishment of an integrated and liberalized single market for trade in services.¹⁰⁹ Moreover, accord special consideration to the provision of technical assistance and capacity building through continental support programs.¹¹⁰

2.3.2.4. Domestic regulation and the right to regulate

Each State Party may regulate and introduce new regulations on services and services supplier within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol.¹¹¹

The Protocol also provides that in sectors where specific commitments are undertaken each State Party shall ensure that all ‘measures of general application’ affecting trade in services are administered in a reasonable, objective, transparent and impartial manner.¹¹²

2.3.2.5. Mutual recognition

State Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in another State Party, so long as this is not recognized in a manner that would constitute a means of discrimination between State Parties.¹¹³

¹⁰⁸ Ibid, art 7

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid, art 8

¹¹² Ibid, art 9

¹¹³ Ibid, art 10

2.3.2.6. Anti-competitive practices

State Parties are obliged to ensure monopoly and exclusive service suppliers do not engage in anti-competitive practices, and to open consultation channels with other State Parties with a view to eliminating such practices.¹¹⁴

2.3.2.7. International transfers and payments

The Protocol obliges State Parties not to apply restrictions on international transfers and payments for current transactions relating to its specific commitments.¹¹⁵ This is qualified by allowing State Parties to take measures that may restrict trade in services, in the event of serious balance of payments and external financial difficulties or threat thereof.¹¹⁶

2.3.2.8. Progressive liberalization

State Parties are obliged to undertake successive rounds of negotiations leading progressively towards liberalization.¹¹⁷

¹¹⁴ Ibid, art 11

¹¹⁵ Ibid, art 13

¹¹⁶ Ibid, art 14

¹¹⁷ Ibid, art 18

Chapter Three

Overview of Special and Differential treatment in international trade law

3. 1. General concept of special and differential treatment

Special and differential treatment (SDT) has been a defining feature of the multilateral trading system for most of the post-war period. The battle to establish the principle that a set of uniform multilateral rights and obligations among a highly diverse group of nations could not serve the best interests of all parties was long won.¹¹⁸

Overall, the logic behind SDT stems from the “principle that a set of uniform multilateral rights and obligations among a deeply diverse set of nations could not serve the best interests of all parties,” especially given the inherent disadvantages that ‘developing’, and particularly ‘least-developed’ (LDC) countries, have..¹¹⁹ Hence, under the premise that equal treatment could not secure equality, unequal treatment was therefore required to correct the inequalities.¹²⁰

The term SDT has a narrow meaning in the WTO that only apply to DCs and LDCs.¹²¹ WTO members are officially classified into three groups: developed countries, developing countries, and least developed countries (LDCs), with only the LDCs fully defined.¹²² There are currently thirty-five LDCs members of the WTO, accounting for approximately a quarter of all members,

¹¹⁸ Alexander Keck and Patrick Low, ‘Special and Differential Treatment in the WTO: Why, When and How?’ (May,2004) World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2004-03, 3

¹¹⁹ Ibid

¹²⁰ Akiko Yanai, ‘Rethinking Special and Differential Treatment in the WTO’ (2013) Institute of Developing Economies DISCUSSION PAPER No. 435, 1

¹²¹ MDMEHEDI Hasan, ‘SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO: ITS CONTENT AND COMPETENCE FOR FACILITATION OF DEVELOPMENT’ [05-30-2016] 7(Vol 7 (2016)) NAUJILJ 44

¹²² Helen Hawthorne, ‘LDCs in the WTO – The Institutionalization of a norm’ (February 20 2010) Centre for International Politics City University, 30

and several LDCs are currently in the process of accession talks with the WTO.¹²³ SDT allows developing countries to deviate from the core principle of MFN treatment obligation that makes up the multilateral agreements of the World Trade Organization (WTO).¹²⁴ Special and differential treatment takes a range of forms throughout the WTO agreements. The WTO secretariat has identified six categories of SDTs in the WTO agreements, which provide a useful way of classifying and assessing the provisions.¹²⁵ The categories are:

1. Provisions aimed at increasing developing country members' trade opportunities, such as exemption from the most favored nation rule for developed country members and preferential tariff treatment for products from developing country members under Generalized System of Preferences (GSP) schemes.¹²⁶
2. Provisions under which WTO members should safeguard the interests of developing country members, such as the requirement that members explore the possibility of constructive remedies¹²⁷ before imposing antidumping duties on developing country members.¹²⁸
3. Flexibility of commitments and actions, as well as the use of policy instruments, such as the understanding that developed country members "do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade" of developing country members (so called non reciprocity).¹²⁹
4. Transitional time periods. For example, the prohibition on import substitution subsidies does not apply to developing countries for five years or to Least Developed Countries (LDCs) for

¹²³ Ibid

¹²⁴ Emilie Dairon (n. 75)

¹²⁵ Mitchell Andrew d and Voon tania , 'Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over? (July–Sept. 2009) Global Governance ,1

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid

eight years after the WTO was established.¹³⁰

5. Technical assistance, such as assistance from the WTO secretariat and developed country WTO members in implementing WTO rules.

6. Provisions relating to LDC members (which also fall within one of the other categories). For example, members agree to exercise "due restraint" in bringing dispute settlement actions against LDC members.¹³¹

The provisions found within the WTO agreements seek to provide SDT treatment and find a solution to issues such as the participation of developing countries in the decision-making process of the WTO.¹³²

3.2 Rational of special and differential treatment

SDT in the WTO is based on the idea that developing country members have different needs than developed country members, and that WTO disciplines should be changed to reflect those needs.¹³³ In particular, many developing countries face difficulties in implementing the WTO agreements, dealing with the adjustment costs of trade liberalization, and engaging in international trade to reap the full benefits of WTO membership.¹³⁴ Thus, the WTO acknowledged, "there is a need for positive efforts designed to ensure that developing countries, particularly the least developed among them, secure a share of the growth in international trade commensurate with their economic development needs."¹³⁵ It has also reiterated and confirmed

¹³⁰ Ibid

¹³¹ Ibid

¹³² Ibid

¹³³ Meredith Kolsky Lewis, 'WTO Winners and Losers: The Trade and Development Disconnect' [2007] 39(1) Georgetown Journal of International Law, 165

¹³⁴ Ibid

¹³⁵ The Marrakesh Agreement Establishing the World Trade Organization (signed April 15, 1994), Preamble

under Doha declaration¹³⁶ that enhanced market access, balanced rules, and well-targeted, sustainably financed technical assistance and capacity-building programs have important roles to play.¹³⁷

The original justification, reflected in the establishment of UNCTAD and the adoption of GATT Part IV, was that developing countries were unique.¹³⁸ As a result, the policies that were best for GATT's developed members were not always the best for the developing.¹³⁹ Rather than simply expanding an existing structure, they must transform the structure of their economies.¹⁴⁰ They may need to promote particular sectors to secure access to advanced technology.¹⁴¹

The key argument behind SDT is the fact that developing countries need to intervene more actively in directing their economies than do developed countries. Since they need to follow, different policies they requires significant support from WTO agreement in providing different kinds of preferential treatments. The developed member countries also have the responsibility in supporting the LDCs, so that they co equally participate and enjoy in the WTO agreement.

3.3 Limitation of special and differential treatment

The underlying reason for SDT is that temporary protection and preferential access to larger markets can foster infant industries and help developing countries diversify their industrial base,

¹³⁶ The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier. In Doha, ministers also approved a decision on how to address the problems developing countries face in implementing the current WTO agreements. WTO < https://www.wto.org/english/tratop_e/dda_e/dda_e.htm >accessed May 15,2021

¹³⁷ Declaration On The Trips Agreement And Public Health (adopted Doha, 9 - 14 November 2001), Paragraph 2

¹³⁸ Sheila Page and Peter Kleen, 'Special and Differential Treatment of Developing Countries in the World Trade Organization' (2005) Global Development Studies No. 2, 8

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid

ultimately leading to sustained, faster economic growth.¹⁴² However, the question that needs to be raised is “can this special treatments deliver on those promises?”

A precondition for developing countries to benefit from WTO membership is 'getting the rules right' - ensuring that they support development.¹⁴³ Most developing countries are latecomers to the multilateral trading system, which explains why many current WTO rules primarily reflect the interests of rich countries and the status quo disciplines that they have already established.¹⁴⁴ As a result, the WTO's much greater latitude for the use of agricultural subsidies, for example, reflects the use of such support policies in many developed countries. The same is true for the historically permissive approach to the use of import quotas on textile products, which are in principle prohibited by GAT rules.¹⁴⁵ More recently, the inclusion of rules on the protection of intellectual property rights has strengthened perceptions that the WTO contract is unbalanced.¹⁴⁶

The other problem is that large areas of "new" trade policy are without any legally enforceable SDT. In the same vein, many developing countries see a problem with the lack of "hard law".¹⁴⁷ SDT's legal foundation is also unclear. The SDT development process revealed that the codification of the principles was not intended to establish legal norms, but rather was the result of a political compromise between developed and developing countries.¹⁴⁸ Most of the time,

¹⁴² Emanuel Ornelas, 'Does special treatment in trade benefit developing countries?' (LSC US Centre, 13 August 2016) <<https://blogs.lse.ac.uk/usappblog/2016/08/13/does-special-treatment-in-trade-benefit-developing-countries/>> accessed 31 October 2020

¹⁴³ Bernard Hoekman, 'Developing Countries and the WTO Doha Round: Market Access, Rules and Differential Treatment ' [June 2004] 19(2) Journal of Economic Integration, 221

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ IISD, 'Special and Differential Treatment ' (2003) IISD Trade and Development Brief No. 2 of a series, 2 <https://www.iisd.org/system/files/publications/investment_sdc_may_2003_2.pdf > accessed 31 October 2020

¹⁴⁸ A Jayagovind, 'Special and Differential Treatment in International Trade: A Developing Country Perspective' [2008] 20(1) National Law School of India Review ,105

SDT has enabled the developing countries to continue with their autonomy regarding policy space while enjoy the benefits of an open multilateral trading system. However, very rarely has been SDT in the sense of coordinated efforts to help developing countries positively.¹⁴⁹

Due to the shortcomings of the preference systems, developing countries demand not only the removal of existing tariff and non-tariff barriers, but also that the agreements themselves become more permanent, transparent, and predictable.¹⁵⁰ As a result, it was proposed that the preference agreements, as well as their specific provisions, be incorporated into the WTO agreements.¹⁵¹ Moreover, the LDCs fear erosion of their preferences. In the long run, the erosion of preferences can weaken the relevance of the GSP and other trade-political preference systems.¹⁵² To the extent to which the most-favored tariffs are being generally decreased and the preference tariffs will lose significance.¹⁵³

There is a fairly consensus that the past approach to SDT based on the concept of non-reciprocity was disappointing ,as it legitimized the free riding on the part of developing countries and provide little incentives for them to participate more fully in the multilateral trading system.¹⁵⁴ The Single - undertaking approach adapted at the Uruguay Round has ratified this problem to a certain extent but largely ignored the problem of domestic capacity constraints facing many developing countries in implementing the WTO agreements.¹⁵⁵ There is a serious risk that a large

¹⁴⁹ Ibid

¹⁵⁰ World trade organization, 'AGRICULTURE NEGOTIATIONS: BACKGROUNDER' (World Trade Organization, 2019) <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd06_access_e.htm > accessed 31 October 2020

¹⁵¹ Ibid

¹⁵² Thomas Fritz, 'Special and Differential Treatment for Developing Countries' (2005) Heinrich Böll Foundation Global Issue Paper, No. 18, 17

¹⁵³ Ibid

¹⁵⁴ Kiichiro Fukasaku, 'Special and differential treatment for developing countries: Does it helps those who help Themselves?'(September 2000) UNU world institution for development Economics research Working paper No.97, 19

¹⁵⁵ Ibid

number of developing countries will be left out of the normal rules and procedures of the WTO.¹⁵⁶

Even though there are some flaws and deficiencies in several SDT provisions in WTO agreements, there is little reason to believe that the previous approach is appropriate for DCs and LDCs. The most efficient solution is to continue negotiating SDT provisions under WTO agreements, which must take the issue of trade capacity building very seriously and include binding commitments.

¹⁵⁶ Ibid

Chapter Four

The treatment of LDCs under the AfCFTA

4.1 .The need for special and differential treatment in the context of Africa

The fifty-five member States of AU that established the AfCFTA to create a single continent-wide market for goods and services and to promote the movement of capital and natural persons. This ambitious project enjoys considerable political support, but individual member States still face difficult choices.¹⁵⁷ According to Mr. Musse Mendaye, Multilateral Trade Relation and Negotiation Directorate and Alternative Negotiator of Ethiopia in the AfCFTA,' there is a sharp split along the lines of LDCs on one hand, and African DCs on the other, on the level of obligations that countries should undertake in liberalization/commitments within the on-going discussions of the proposed AfCFTA.'¹⁵⁸ While the LDCs see legitimacy in calling for SDT because of their weak economies and level of development, the non-LDCs hold a contrary view and argued that carving out LDCs as a group within the AfCFTA would mean there would be no AfCFTA since about 32 countries out of the 55 countries in Africa are LDCs.¹⁵⁹

On the contrary, number of experts argued that since UN legally defined the category of LDCs due to their different level of development, LDCs are special group and should be entitled to SDT provisions.¹⁶⁰ Nevertheless, this argument was strongly disagreed by most of the developing countries such as South Africa, Egypt, Nigeria, and Kenya among others.¹⁶¹ They argued that the LDCs category had been conceptualized in the multilateral context and outside of

¹⁵⁷ Trudi Hartzenberge ,(n.28)

¹⁵⁸ Interview with Musse Mendaye, Multilateral trade relation and negotiation Directorate Director of Ethiopian Ministry of trade, September.9, 2020

¹⁵⁹ Third world network-africa, 'African Countries Split on Special and Different Treatment within the CFTA Discussions towards Equitable Transformation in and for Africa' (Information Brief on the CFTA, 20 November 2017) <<http://twnafrica.org/wp/2017/wp-content/uploads/2018/12/Information-Brief-on-the-CFTA-20-Nov-2017..pdf>> accessed 31 October 2020

¹⁶⁰ Ibid

¹⁶¹ Ibid

Africa.¹⁶² The LDCs concept could not be applied in the relation between and amongst African countries because all African countries were vulnerable.¹⁶³ That is all countries in Africa were faced with the challenge of primary commodity dependence, low level of development and job creation.¹⁶⁴ Hence, the developing countries argued that the question was not about the different levels of development, as argued by some LDCs, but about the same challenges and vulnerabilities as a striking feature of all African countries. SDT should therefore be on case-by-case basis.¹⁶⁵

In addition, some argued that some LDCs in Africa were growing faster than the non-least developed countries and hence could not demand SDT in the AfCFTA framework and implementation.¹⁶⁶ The emergence of a ‘group’ within the context of the AfCFTA would undermine the objective of creating a single market.¹⁶⁷

It is well accepted in law and philosophy that the principle of equality can applied only among equals. A priori, it follows that some special and favorable treatment should be extended to the relatively weaker sections of the society (LDCs) nationally and internationally.¹⁶⁸ This principle supplies the rationale for SDT for developing countries within the continent Africa.¹⁶⁹ The AfCFTA trade liberalization movement cannot afford to ignore the interest of developing countries and their just demands, since majority of its members are LDCs.¹⁷⁰

It is acknowledged that the Agreement will have a differential impact from member state to member state. The AfCFTA will not affect Nigeria’s economy (the biggest African economy) in

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ James Thuo Gathii and others (n.77)

¹⁶⁹ Ibid

¹⁷⁰ Ibid

the same way it will influence smaller economies such as Seychelles or Guinea-Bissau.¹⁷¹ In the short-term, the Agreement may have adverse effects on many economies.¹⁷² A tougher competitive environment may threaten MSMEs and small-scale farmers because they would have higher trading costs than bigger companies and consequently face financial challenges to compete with greater firms.¹⁷³ Thus, this agreement may benefit larger companies instead of developing MSMEs and local producers.¹⁷⁴ To minimize the influence of biggest economies on smaller ones a differential schedule of liberalization was agreed upon in order to protect economies that are more fragile.¹⁷⁵

As it is mentioned earlier, Countries with large productive capacities in manufacturing may experience significant economic growth and welfare gains while small economies and LDCs may face substantial fiscal revenue losses and threats to local industries. An uneven distribution of benefits and costs among member States may prolong the negotiations and hinder its implementation. Sufficient flanking measures and flexibilities are therefore needed to enable the redistribution of benefits and a fair sharing of costs by member States.¹⁷⁶

4.2 The special and differential treatments in relation to trade in goods

The Protocol on Trade in Goods to the AfCFTA provides for the progressive elimination of tariff and non-tariff barriers¹⁷⁷ and includes substantive protections on non-discrimination (national treatment, most favored nation treatment, special and differential treatment).¹⁷⁸ Preferential treatment for trade in goods among the Member States of the AfCFTA will be administered by

¹⁷¹ Théophile Albert (n.62), p.19

¹⁷² Ibid ,p 20

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ James Thuo Gathii and others (n.77)

¹⁷⁶ Mesut Saygili and others (n 20), p 6

¹⁷⁷ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Goods (n.82), Articles 2, 7 and 10

¹⁷⁸ Ibid, Articles 4-6

common rules of origin based on the agreement, while overall trade in goods will benefit from increased customs cooperation.¹⁷⁹

Despite impressive progress in the negotiations, it is still not possible to trade under the AfCFTA. The reason is that negotiations of preferential tariff concessions and rules of origin have not been completed. These are the minimum requirements for a free trade area.¹⁸⁰

The COVID-19 crisis has inevitably influenced AfCFTA implementation. Negotiations have been suspended to complete some pending technical elements, such as rules of origin - products made in Africa - for some sensitive sectors, the exchange of tariff concessions on trade in goods and commitments on trade in services. In fact, the epidemic has led to the cancellation of a special AU summit that South Africa, which this year holds the rotating presidency of the continental organization, had scheduled for May in order to close those loopholes.¹⁸¹

4.2.1 Liberalization of trade - eliminating tariffs

The key provision relating to liberalization of trade concerns the provision (Article 7) obligating State Parties to ‘progressively eliminate’ import duties or charges having equivalent effect on goods originating from the territory of any other State Party. In accordance with their Schedules of Tariff Concessions, this will be attached to the Protocol under Annex 1 and will become an integral part of the Protocol.¹⁸²

¹⁷⁹ Hogan Lovells, ‘Report on AfCFTA Implication On The Continent’ (November 2019) Hogan Lovells Report,13 < <https://www.hoganlovells.com/en/knowledge/topic-centers/~media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx> > accessed September 6,2020

¹⁸⁰ Trudi Hartzenberg, 'The AfCFTA – a free trade area and a flagship project of the African Union' (Trade for Development News, 2019) < <https://trade4devnews.enhancedif.org/en/news/afcfta-free-trade-area-and-flagship-project-african-union> > accessed September 6, 2020

¹⁸¹Alonso Pedro , 'Coronavirus delays implementation of major African free trade agreement' (Atalayar, 10 May 2020) <<https://atalayar.com/en/content/coronavirus-delays-implementation-major-african-free-trade-agreement>> accessed 31 October 2020

¹⁸² International Trade Centre, ‘A Business guide to the African Continental Free Trade Area Agreement’ (September 2018) ITC, 17

The adoption of imprecise and relaxed SDT provisions that can easily provide leeway for countries to evade SDT obligations will only work contrary to the stated objective of the Agreement to promote and attain sustainable and inclusive socio-economic development among State Parties of AfCFTA. Some issues were raised during the negotiation, The LDCs argued that the potential loss of tariff revenue from liberalization, despite the low levels of - Africa trade, is a matter of concern for some. Moreover, the import tariff is a very effective measure to protect domestic industry from import competition.¹⁸³ So SDT should be provided for the LDCs. However, the argument of the non LDCs were that we are not that different we also face some economic difficulties or our economies might gate fragile at some point.so the need for SDT is not that essential.

Central to understanding this debate is Article 6 of the Protocol on Trade in Goods, concerning Special and Differential Treatment. This allows for State Parties that have different levels of development, and/or have been accorded 'individual specificities' by the other State Parties, to deviate from the tariff liberalization modalities. Article 6 of the protocol does not mention specifically the LDCs but based on their economic situation, their development status or individual specificities of any member countries can deviate from the principal obligation of the agreement. This article implies that based on member states economic or development statuses each individual state will be granted SDT. Since LDCs economies is fragile by default they will be entitled to the preferential treatments provided under the protocol.

The AfCFTA's Protocol on Trade in Goods recognizes different levels of development among the state parties and the need to provide flexibilities, special and differential treatment, and technical assistance to state parties with special needs. SDT provisions within the AfCFTA's Protocol on trade in Goods do not create an absolute legal right to SDT. What we can understand from the provisions like "Article 11 (modification of tariff concessions), Article 17 (trade remedies), Article 24 (infant industries), Articles 26 (general exceptions), Article 27 (security exceptions), and Article 28 (balance of payments difficulties), with Article 29 (covering technical assistance and capacity building)" is that they only establish legal base for SDT "case-by-case" presented by member states.

¹⁸³ Alexander Keck and Patrick Low,(n .117)

Among the several issues wrapped up in the modalities governing liberalization is the timing of tariff cuts, particularly insofar as this relates to LDCs versus non-LDCs, which will be an integral part of the Schedules of Tariff Concessions under Annex 1.¹⁸⁴

A distinction is drawn between LDCs and non-LDCs for the tariff negotiations under the Annex 1 of protocol in goods.¹⁸⁵ Member countries have agreed that tariff from 90 percent of tariff lines of trade in goods will be eliminated.¹⁸⁶ From the remaining 10 percent, 7 percent are designed as a sensitive product while the remaining 3 percent of the tariff line will be excluded from tariff liberalization.¹⁸⁷ For the liberalization process, the agreement gives special and differential treatment for developing and least developed countries.¹⁸⁸ For non-least developed countries tariffs barriers on Non-Sensitive Products (the 90% tariff line) will be eliminated after 5 years and 10 years by least developed countries.¹⁸⁹ Tariffs on Sensitive Products to be eliminated after 10 years by non-least developed countries and 13 years for least developed countries. A specific group of seven countries, the so-called ‘G6’ (Ethiopia, Madagascar, Malawi, Sudan, Zambia, Zimbabwe)¹⁹⁰ have argued that they face specific development challenges and have managed to secure additional flexibility to liberalize 85% of tariff lines in 10 years and the other 5% of tariff lines and for Non-Sensitive Products 15 years.¹⁹¹ Angola and Sao Tome and Principe, which are due to graduate from their LDC status in 2021 and 2024 respectively, are not included in the G6 group.¹⁹²

¹⁸⁴ *ibid*,p.18

¹⁸⁵ Trudi Hartzenberg,(n. 28)

¹⁸⁶ Willemien Viljoen ‘Rules of origin, tariffs and the AfCFTA’ 17 may 2019 TralacBlog. Available at <<https://www.tralac.org/blog/article/14063-rules-of-origin-tariffs-and-the-afcfta.html>> (accessed on 07, December 2021)

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ Trudi Hartzenberg,(n. 28)

¹⁹¹ Peter Lunenborg ‘‘Phase 1B’ of the African Continental Free Trade Area (AfCFTA) negotiations’ July 2019 (63) South Center policy brief , 4

¹⁹² Trudi Hartzenberg,(n. 28)

Due to the relatively disadvantaged economic or development situation of the least developed countries, there is a consensus that these countries must abide by slightly different rules and disciplines from those that apply to developed and developing countries. SDT provisions in goods for LDCs aim principally to facilitate compliance with AfCFTA rules in view of their limited capacities; to protect their policy space; and to support them in increasing their participation in regional trade by addressing supply side constraints and supporting trade-related elements of development strategies.

4.2.2. Rules of origin

The AfCFTA is a landmark achievement in the continent's history of regional integration and is expected to generate significant gains. Nevertheless, it is the rules of origin that will determine whether preferential trade liberalization under the AfCFTA can be a game changer for Africa's industrialization.¹⁹³ This is a criteria that determine the origin of a product and, by doing so, establish which products are eligible to receive preferential tariffs? Is a blouse made from Chinese silk, designed and stitched in China, but packaged in Kenya eligible to receive AfCFTA preferential tariff rates? What if it is made of imported Chinese silk, but stitched together in Kenya? The answer to these questions depends on the RoO that are being negotiated.¹⁹⁴

Rules of origin are the cornerstone for the effective implementation of preferential trade liberalization, the critical policy tool needed to make any FTA operational and are of vital importance in creating opportunities for African LDCs to boost trade.¹⁹⁵

The ongoing RoO discussions centers on the level of restrictiveness of the rules.¹⁹⁶ The more advanced African countries advocate for stricter rules of origin in the form of product-specific

¹⁹³ UNCTAD , 'Rules of Origin Key to Success of African Continental Free Trade Area' (UNCTAD , 26 June 2019) <<https://unctad.org/news/rules-origin-key-success-african-continental-free-trade-area> > accessed 31 October 2020

¹⁹⁴ Landry Signé and Colette van der Ven, (n.46), p.7

¹⁹⁵ UNCTAD, 'Rules of Origin key to success of African Continental Free Trade Area' (Tralac, 27 Jun 2019) <<https://www.tralac.org/news/article/14120-rules-of-origin-key-to-success-of-african-continental-free-trade-> > accessed September 6,2020

¹⁹⁶ Ibid

rules. They are worried about trade deflection: The weaker the rules of origin, the easier it is for non-AfCFTA countries to benefit from this African trade agreement.¹⁹⁷

Yet, the stricter the rules, the more difficult it will be for companies, especially small- and medium-sized enterprises (SMEs) in LDCs, to meet the value-added threshold, and thus receive AfCFTA tariff preferences. Given the weak state of manufacturing in many African countries, and the fact that Africa's private sector consists, for the most part, of ill-equipped SMEs, strict rules of origin would preclude the majority of African businesses from taking advantage of the preferential tariffs under the AfCFTA. Thus, to ensure that State Parties will be able to trade using the AfCFTA preferences, negotiators should adopt relatively lenient rules of origin.¹⁹⁸

Since the RoO negotiation is not done yet, we cannot address whether SDT provisions are incorporated in the protocol or not. However, the rules should take into account the level of productive capacities and structural asymmetries across the broad set of countries, including the Least Developed Countries (LDCs), which face challenges in making use of preferential tariffs, let alone implement demanding origin requirements.¹⁹⁹

Since the intra-African trade interactions are relatively low, suggesting that the fixed cost components of rules of origin may be burden for many African traders, particularly Small economies that are mostly located in LDCs. In addition, excessive and unnecessary origin compliance costs can significantly lower LDC utilization rates and benefits from the agreement. The type of certification allowed for under the AfCFTA and implementation of certification processes will be a major determinant of costs, and could prove particularly burden for SMEs and firms in LDCs. Because of these constraints, the AfCFTA should work toward the adoption of simple, harmonized rules of origin. The stipulation of coequal rules is a useful first step to decrease costs of compliance, particularly for SMEs and LDCs, and to improve participation while still enabling the prevention of trade deflection.

4.3 The special and differential treatments in relation to trade in service

Services are an essential part of regional integration efforts, as recognized by governments in the context of AfCFTA. Strengthening economic relationships in Africa - including by facilitating

¹⁹⁷ Landry Signé and Colette van der Ven,(n. 46), p.7

¹⁹⁸ Landry Signé and Colette van der Ven, (n. 26)

¹⁹⁹ Ibid

the development of agriculture and industrialization - requires a strong services sector in the region.²⁰⁰ For example, suppliers and distributors of telecom, transport and financial services play a fundamental role in facilitating broader trade integration in East Africa. Services enable landlocked countries overcome geographical constraints and effectively access regional and global markets for their products.²⁰¹

The Preamble to the Protocol on Trade in Services acknowledges needs of “least developed, land locked, island states, and vulnerable economies in view of their special economic situation and their development, trade, and financial needs.”²⁰²

Article 7 of the Protocol on Trade in Services further advances this approach to SDT by noting that state parties should take into account challenges faced by other state parties and “grant flexibilities such as transitional periods, on a case by case basis, to accommodate special economic situations and development, trade and financial needs of the state parties.”²⁰³ The preferential treatment provided in these provision not only focus on the level of member countries economic level but also based on other factors like conflict statues, resource endowments or proximity to ports on case by case base.

The Protocol on Trade in Services under Article 7 also provides “especial consideration” in progressive services liberalization to “promote critical sectors of growth, social and sustainable economic development” as well as “especial consideration” for technical assistance and capacity building.²⁰⁴

²⁰⁰ Amina Mohamed, 'Why Trade in Services Matters for Development and Inclusiveness in Africa' (Inter press service news agency, 27 October 2020) <<http://www.ipsnews.net/2020/02/trade-services-matters-development-inclusiveness-africa/>> accessed 31 October 2020

²⁰¹ Ibid

²⁰² Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Service (n.101), Preamble

²⁰³ Ibid ,Article 7(b)

²⁰⁴ Ibid, Article 7(a) and (c)

The AfCFTA sets out provisions concerning special and differential treatment for sectors critical to growth, social and sustainable development,²⁰⁵ while emphasizing the right of its Members to regulate in order to meet national policy objectives.²⁰⁶

AfCFTA attempts to liberalize five of the twelve service sectors categorized by the WTO. These five sectors are business services, communication services, tourism and travel, as well as transport services. It is understood that liberalization may only happen in specific subsections.²⁰⁷ At the moment, this aspect is vague. The scope of specific commitments would be determined during negotiation rounds,²⁰⁸ which were expected to continue through to 2021.

LDCs could benefit greatly from further developing and expanding their services sector on an efficient and productive basis. Growth in services value added is more correlated with GDP growth than with growth in manufacturing value added, and also has stronger links with poverty reduction. Additionally, trading services could be a source of export diversification for LDCs, providing them with a new frontier for greater participation in inter Africa trade. These reasons highlight the importance of services for LDCs and support their collective request for preferential access at the AfCFTA. To assist LDCs to develop domestic regulatory and institutional capacity for their services sectors, the AfCFTA should include support commitments. Members should develop “appropriate mechanisms” to facilitate the effective market access of LDC services and service suppliers to Africa markets.

At the Niamey Summit, several AfCFTA-related initiatives were announced that will be very important, especially for LDCs facing adjustment challenges, as they start to implement their liberalization commitments.²⁰⁹ Africa’s largest trade bank finance facility to support countries to adjust in an orderly manner to sudden tariff revenue losses because of the implementation of the AfCFTA Agreement. An Africa-wide digital payment system is to be developed in collaboration

²⁰⁵ Ibid, Article 7

²⁰⁶ Ibid, Article 8

²⁰⁷ Chijioke Odo, The African Continental Free Trade Area Unfolding changes, (2019) Deloitte & Touche, 2

²⁰⁸ Ibid

²⁰⁹ UNCTAD, (n.16)

with the AU. It will be a platform to domesticate intra-regional payments. It could save the continent more than \$5 billion in payment transaction costs per annum.²¹⁰

The AfCFTA is supposed to liberalize trade in services as well as goods. However, the talks on services are also only just beginning, so the shape of the outcome and potential effects are not yet foreseeable. Hence, the economic statuses of LDCs should be given high consideration while entering article 6 of the service protocol which provides preferential treatment.

The preferential treatments that ought to be provided for LDCs in sector service waiver and technical assistance. Member states granted LDCs services or service supplier's preferential treatment that would otherwise be inconsistent with most favored nation treatment. In addition, comparatively well advanced members can provide technical assistance in transferring technology and knowledge to The LDCs.

4.4. SDT in relation to trade in dispute settlement

The AfCFTA Dispute Settlement mechanism modelled from the procedure used by the WTO.²¹¹ Generally, upon request, the AfCFTA may assist all member Parties in respect of settling their dispute(s) that will arise among all member Parties. Some of the assistance provided by the AfCFTA, inter alia; alternative dispute resolution mechanisms like good offices, conciliation, or mediation only if requested by the member Party or Parties.²¹² Moreover, AfCFTA Secretariat may provide additional legal service advice, and organize special training courses as regards dispute settlement procedures and practices to enable member Parties to develop their

²¹⁰ Ibid

²¹¹ World Trade Organization, 'WTO Disputes Reach 400 Mark' (WTO, 6 November 2009) < https://www.wto.org/english/news_e/pres09_e/pr578_e.htm > accessed 31 October 2020 (The press release by former WTO Director-General Pascal Lamy, on the occasion of the system reaching the milestone of having the 400th trade dispute brought to it, in November 2009: "The dispute settlement system is widely considered to be the jewel in the crown of the WTO". He also noted that the fact that it has dealt with so many disputes is a "vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes.")

²¹² Agreement Establishing the African Continental Free Trade Area protocol on Dispute settlement (adopted March 21st, 2018) art 8

capacity.²¹³ However, AfCFTA provide that it may provide general assistance to all member Parties as regards dispute settlement and it does not specifically provide SDT for LDC. Unlike the WTO DSU, that provides explicitly provision in this respect, AfCFTA failed to incorporate a provision that grants SDT for LDCs. Though, AfCFTA does not contain specific and explicit provision that grant SDT to LDCs, the author of this research of the opinion that there are rooms to exploit the assistance provision stipulated by it. This is because AfCFTA declares that it provide assistance to all its member Parties irrespective of their status

Even if, most African countries fall within LDC's, the reality remains that Africa has its "super powers" in the trading arena. For example, over 50% of Africa's cumulative GDP of Africa is contributed by Egypt, Nigeria and South Africa, while Africa's six sovereign island nations collectively contribute just 1%.²¹⁴ Moreover, whose volume of trade is likely to increase with the coming of the agreements, and these will be the new trend of the system, suing each other more day by the day and where they want to establish dominance, go for the small players.²¹⁵ As I see it, the higher economies will want to guard themselves more and small economies (LDCs) tend to settle more than rich ones, in order to save costs and it will be difficult for them to retaliate against the super powers. The LDCs cannot go against the bigger member countries because of the economic dominance of the rich country. Even if they dare to go against or retaliate despite their political dominance and diplomatic relation, it makes no significant impact to the country or product of that country.

There are multiple, complex and interrelated causes for the LDCs not be able participate in AfCFTA dispute settlement system. In addition, some of them are; Since LDCs have a very small share of global trade, their ability to threaten or to pose retaliation against larger trading partners, who violate their rights, is very limited. Moreover, retaliation is likely to 'hurt' the

²¹³ Ibid, art 28

²¹⁴ Rilwan Akeyewale , 'Who are the winners and losers in Africa's Continental Free Trade area?' (17 Oct 2018) < <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business/> > accessed 26 jun 2020

²¹⁵ Bernard Hoekman,(n. 142)

economic interests of the complaining LDCs (by depriving themselves of cheaper imports) more than it 'encourages' the offending larger economies to comply.

Lack of specialized legal, economic and scientific expertise that advise their governments on how best to safeguard their rights and force their entitlements under AfCFTA agreement. Moreover, the nature of the case demands expert lawyer that they do not have always thus it forces to hire outside experts; but hiring them is not easily possible because of their high cost to be paid. Because of the above listed reasons, preferential treatment should be incorporated in the AfCFTA dispute settlement protocol.

4.5. Experience of some African RECs and SDT

The agreement acknowledges the instrumental role that existing regional economic communities such as Southern African Development Community (SADC), East African Community (EAC), and the Common Market for Eastern and Southern Africa (COMESA) have played in advancing intra-Africa trade and further aims to liberalize trade amongst RECS member states as well non-member states.²¹⁶

The AfCFTA secretariats should tack a lesson how RECs in Africa handle unequal advantages of members from the agreements and what kinds of SDT are provided to solve these inequalities? To answer this question, we will see the experience of RTAs in managing unequal advantage in Africa and what outcomes it resulted. Special and differential treatment in COMESA and EAC gives member states the right to progress slowly while giving the others to move forward without affecting the other.²¹⁷

To solve the challenges of the unequal advantage of the customs union, SACU used different mechanisms. It used a financial strategy in the form of tariff income subsidy and non-financial redistribution policy targeting the allocation of key industries to disadvantaged countries to solve

²¹⁶ Wesley Kajirwa, The Africa Continental Free Trade Area (AfCFTA): What it Denotes for Africa and its People - Australian Institute of International Affairs (12 Aug 2019) < <https://www.international-affairs-free-trade-area-afcfta-what-it-Denotes-for-Africa-and-its-People/> > accessed 31 October 2020

²¹⁷ The Treaty Establishing AEC (January 24, 2013)

the gravitation of investors to the already developed market.²¹⁸ The other mechanisms have been making sure the countries get an equal share of the projects and their benefits of the integration process, credit access for less developed countries and access for development funding.²¹⁹ In ECOWAS, the prime way used to solve unequal advantage was establishing “Fund for Co-operation, Compensation and Development of the Community” which became a tool to compensate member states for the loss of income because of liberalization of trade.²²⁰ For ECOWAS, equal advantage from the integration process is one of its principles. In addition to compensation, the fund assists member states suffered from loss of tariff, provide finance for development activity, and promote development projects in less developed member states of ECOWAS.²²¹

The rules of origin in SADC have become restrictive and product-specific under pressure from member states. The fact that in some sectors negotiations on the rules of origin are still ongoing is probably indicative of a lack of political commitment to liberalization.²²² The complicated and restrictive rules of origin are likely to increase administrative costs. And will make it difficult for exporters to take advantage of SADC preferences.²²³ As such, they constitute a serious obstacle to the liberalization of intraregional trade. There is an attempt to ameliorate possible polarization effects on least developed country (LDC) member states through nonreciprocal market access in sugar and more relaxed rules of origin in textiles.²²⁴ The AfCFTA should consider the experience of SADC regarding RoO. If the RoO become strict, there will be a chance that member states specially LDCs unwilling to politically commit to liberalization and actively participate under

²¹⁸ Oliver S. Saasa (ed.), ‘Economic Cooperation and Integration among Developing Countries, in joining the future economic integration and cooperation in Africa’ (1991) Nairobi, Africa Centre for Technology Studies at 20.

²¹⁹ Ibid

²²⁰ The Revised Treaty of ECOWAS (24th July, 1993), Article 21 &48

²²¹ Ibid, Article 4

²²² Padamja Khandelwal, ‘Comesa and Sadc Prospects and Challenges for Regional Trade Integration’ (01 Dec 2004) IMF Working Papers Volume 2004: Issue 227, 12

²²³ Ibid

²²⁴ Ibid

AfCFTA agreement. AfCFTA members need to identify and agree on eligible goods for preferential treatment through a list of clear and simplified rules of origin that is easy to administer and that promotes value addition along the continental production chain. The list could be modeled on the rules of origin in some of the RECs—COMESA’s may be some of the simplest.²²⁵

The agreement of SADC also includes provisions for protection of infant industries and antidumping and safeguard measures.²²⁶ The SADC agreement provides for asymmetry of treatment between members states at different levels of development.²²⁷ The most developed member, South Africa, is to lower tariffs on intraregional imports on the fastest schedule, while the LDC members, Malawi, Mozambique, Tanzania, and Zambia are to do so; on the slowest schedule.²²⁸ The schedule that asymmetries the treatment of states between developed and LDCs can be an example to arrange AfCFTA tariff schedule.

²²⁵ Protocol on the Rules of Origin for products to be traded between the member states of COMESA (Revised September 2002)

²²⁶ Padamja Khandelwal,(n. 218), p 36

²²⁷ Ibid

²²⁸ Ibid

Chapter Five

Proposals and justification on how LDCs should be treated in the AfCFTA

5.1. Proposal and justification on goods

Tariff concessions are still to be negotiated among the member states, they have to finalize negotiations on rules of origin and for trade in services, and the specific commitments are also still to be negotiated.²²⁹ For LDCs, these outstanding negotiations are critical because they are likely to determine the positive or negative effect of the agreement.

Even if, the above mentioned preferential treatments are provided under the agreement, during the transition period, adjustment costs like decreasing tariff revenues, unemployment and decreasing economic activities in some small sectors are likely to happen due to a reallocation of resources. Adjustment costs and the duration of the transition period are expected to be longer for LDCs than non LDCs due to their economic strength .In particular, a lack of labor mobility between sectors is expected to be a key challenge for many small economies (particularly LDCs).

In my opinion, to minimize these possible challenges some support mechanisms should be provided under AfCFTA.

- Since the trading capacity of LDCs is low, structures should be set up to coordinate the delivery of trade related technical assistance and build capacity to trade. The secretariat or other organ from AfCFTA should provide sustainable financial, technical, and capacity building assistance programs to support the developing country Members, in particular LDCs, to implement their agreements, to adjust to the reform process, and to benefit from opportunities presented.”
- Lack of infrastructure also one of the main expected challenge of the small economies, aid for Trade and infrastructure investments, should be considered to help the most affected countries, in particular least-developed, landlocked and small economies. Hence, AfCFTA can tack the role of supporting improved ways of monitoring and evaluating the initiative, encourage mainstreaming of trade into national development strategies by partner countries, and

²²⁹ Trudi Hartzenberge, (n.28)

encourage additional flows of Aid for Trade from bilateral, regional and multilateral donors to support beneficiary countries.

- Another significant challenge posed by this agreement is the question of the RoO. RoO can change everything if they are simple, transparent and predictable. If they're not, RoO can be a roadblock to trade because of misunderstanding and because of the unpredictability that may discourage business entrepreneurs to trade. Hence, AfCFTAs RoO ought to take into account inequalities and difference among African countries, especially LDCs.
- Thus, in order to maximize participation under the AfCFTA, the costs of complying with rules of origin must be reduced as much as possible by introducing rules that are (1) simple, in order to reduce information and certification costs, and (2) have a relatively low value-added requirement, in acknowledgment of the difficulty and cost of sourcing qualifying intermediate inputs.

Therefore, by including the above mentioned SDTs in the protocol, member countries will be better able to reap the full benefits of the AfCFTA on economic growth and development.

5.2. Proposal and justification on services

The protocol on trade in services affords developing countries flexibility in terms of making market-opening commitments. The protocol on trade in services on special and differential treatment states that, in order to ensure increased and beneficial participation in trade in services by all parties provide special consideration to the progressive liberalization of service sectors commitments and modes of supply which will promote critical sectors of growth, social and sustainable economic development.²³⁰

There is much unfinished business to be carried out under the Protocol on Trade in Services. The results of the ongoing negotiations will be annexed to the Protocol, whereupon they will form an integral part of the Protocol.²³¹ At the time of adoption of the Protocol, some of the anticipated issues to be annexed are Schedules of Specific Commitments; MFN Exemption(s); List of Priority Sectors; framework document on Regulatory Cooperation and others.²³² To assist LDCs

²³⁰ Agreement Establishing the African Continental Free Trade Area: Protocol On Trade In Service (n.101), Article 6(a)

²³¹ Akiko Yanai, (n.119), p.39

²³² Ibid

to develop domestic regulatory and institutional capacity for their services sectors, the annex should include support commitments by further elaborating article 6 of the service protocol.

Hence, here are some of preferential treatments that need to include under the service protocol.

- The non-binding nature of the SDT provisions on service protocols that demand positive action in terms of technical assistance make it difficult to implement these provisions in a coherent and effective manner. So, Binding technical assistance commitments should be incorporated in the protocol.
- There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions in line with their development situation. Even if most of the members of AfCFTA are LDCs, there are still some “super powers” that have economic and political dominancy. So special consideration should be accord to the provision of technical assistance and capacity building through continental support programmes. Hence, small economies could gain this special treatment in order to actively participate with in the tread agreement.

5.3. Proposal and justification on Dispute settlement

Special and differential treatment takes a different form in the DSU than in the other covered agreements, which contain the substantive rules governing international trade. The DSU must recognize the special situation of developing and least-developed country members by making available to them, for example, additional or privileged procedures and legal assistance.²³³ Developing countries may choose a faster procedure, request longer time-limits, or request legal assistance.

The AfCFTA has an Annex on Trade Remedies and Safeguards, based on the relevant WTO principles. Disputes thereunder often involve technical rules and proof via the use of trade data, but they are vital for the rules-based regulation of trade in goods. Only few African countries have the domestic machinery in place to implement trade remedies according to the applicable

²³³ World trade organization, 'Developing countries in WTO dispute settlement' (World Trade Organization, 2017) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm > accessed 31 October 2020

rules.²³⁴ In this area there must be deliberate efforts to assist AfCFTA State Parties to develop expertise and domestic procedures for investigation private complaints involving trade remedy measures.²³⁵ The AfCFTA Secretariat has been given the task to assist State Parties in this regard.

Hence in my opinion, these are some of preferential treatments that should be incorporated Under AfCFTA dispute settlement protocol:

- LDCs need external cost-effective legal assistance to help identify, pursue and defend their AfCFTA rights. So, the AfCFTA secretariat should provide legal advice and make available a qualified legal experts to the member LDCs which so request. Or at list provide cost-effective legal assistance to help them to identify, pursue and defend their AfCFTA rights.
- Explicit Technical assistance should also be provided so that LDCs develop their own national expertise that can defend their AfCFTA right. Or AfCFTA can tack the experience of the WTO and establish advisory centers which provide legal assistance and service for the LDCs. This could encourage and help for the member LDCs defend their right under AfCFTA.
- Increasing use of Good offices, conciliation, and mediation Promoting legal aid to the countries in need. Good offices, conciliation, and mediation assistance should be explicitly and specific lay provided for LDCs by AfCFTA secretariat.
- Judges at this African court (dispute settlement body) should be from different countries across the continent. This diversity of judges from varying countries would help reduce the bias between wealthy and poor countries.
- Developing countries may choose a faster procedure, request longer time-limits, or request legal assistance. Members are encouraged to give special consideration to the situation of member LDCs.

²³⁴ Ibid (Egypt, Morocco, Tunisia and South Africa)

²³⁵ Gerhard Erasmus, 'Will disputes under the AfCFTA Agreement be less “political”?' (Tralac Blog, 27 Mar 2020) <<https://www.tralac.org/blog/article/14455-will-disputes-under-the-afcfta-agreement-be-less-political.html>> accessed 31 October 2020

- In developing this continental court, the African Union should also take care to make sure the voices of all African nations are heard. Africa is a continent of 55 different countries, all at varying levels of economic development and each with its own needs. African Member States must consider this when drafting the rules for procedure for this court. Just as African nations do not want the desires of wealthy investors to overshadow their own needs, nor do smaller, less-developed countries want their voices to be silenced by larger, stronger economies. If the continent is to develop collectively, then all countries must have an equal footing when it comes to dispute settlement. Equitable representation in the tribunal must be a top priority.

Chapter SIX

Conclusion and recommendation

6.1. Conclusion

The core issues addressed in this research is that how the LDCs are treated under the AfCFTA agreement and what SDTs provisions should be incorporated to rectify the expected problem in relation to trade in goods, trade in service and dispute settlement.

AfCFTA was signed in 2018 and it was launched on July 1, 2021. AfCFTA is a major step toward achieving the goals of the Agenda 2063, which is the African Union's strategy for sustainable development. It is expected to contribute significantly to the continent's efforts in achieving the goals contained in Agenda 2063, as well as the aspirations of the Sustainable Development Goals.

It is expected to create significant opportunities for African businesses and investors. AfCFTA is a project mainly aimed at creating a single market for goods and services across Africa. Its main objective is to promote regional and continental trade and investment. It is expected to presents promising economic development and sustainable growth that reaches all market sectors with in the member countries. But blending unequal parties could be a complex and troublesome process, as it is clear, from the integration experience of African's regional economic communities and WTO.

The fear is that the AfCFTA's benefits are likely to be unevenly distributed, with the greatest gains flowing to the stronger economies with larger productive capacities, while the LDCs will be left struggling with the negative effects of tariff cuts and other obligations from the agreement. LDCs are experiencing trade deficit, importing more than it exports while trading globally and regionally. They lack the technological capacity or economic power to actively participate in the trading arena of AfCFTA.

Plus, the negotiation regarding RoO is still going on. So during negotiation, if rules of origin are made too costly or complex to comply with, firms may instead forego these preferences and choose to trade with partners outside the AfCFTA. Such motivating forces may be more

disadvantages for small income nations such as LDCs, in which profitable capacities and competitiveness levels may be lower.

Protocol in service incorporates the term SDT under article 6. Which is a very important factor towards providing win win solution for economical difference between the developing and least developing countries. But the annex that clarifies the details commitment and treatment are still under negotiation. So the specific period of transition and the terms of technical assistance are yet to be identified.

The AfCFTA dispute settlement protocol modelled the WTO agreement. There was no detailed discussion on the incorporated issues in the article (in this case SDT).It needs further discussion regarding how the interests of the vulnerable countries could be protected. So the special and differential treatments are yet to be identified, if there are any.

The experiences of the WTO and RECs, in implementing SDT can be used by the AfCFTA in its efforts to improve the conditions for LDCs. The WTO as well as RECs has many special provisions that give LDCs special treatment. These special provisions include, for example, longer time periods for implementing Agreements and commitments or measures to increase trading opportunities for LDCs.

6.2. Recommendation

The analysis made on the treatment of LDCs under AfCFTA in the body part of the paper and the findings pin down above will lead to the following recommendation:

- Means of aid for Trade and improving infrastructure should be provided to help the most affected countries, in particular least-developed, landlocked and small economies.
- Binding technical assistance commitments should be incorporated in the protocol on Goods and services.
- Less strict rules on local content or substantial transformation, requirements should be part of SDT provision under AfCFTA RoO.
- Certification processes in RoO must be simple and low-cost. In addition, capacity-building programs must be established to improve knowledge of certification processes.

- Appropriate flexibility on service should be provided for LDCs AfCFTA members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation.
- Good offices, conciliation, and mediation assistance should be explicitly and specific lay provided for LDCs by AfCFTA secretariat.
- Appointment of dispute settlement body should be from different countries across the continent.
- Explicit Technical assistance should also be provided so that LDCs develop their own national expertise that can defend their AfCFTA right.
- AfCFTA should have to provide legal advice and assistance for LDCs explicitly in respect of settlement of dispute.
- Members should exercise “due restraint” when launching disputes against LDCs and states that complaining Members must exercise “due restraint” in asking for compensation or suspending concessions or other obligations when the responding party is LDC.

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