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and**

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**A Third World Approach to the role of South Africa,
Nigeria and Kenya in the multilateral trading system**

By

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MASTER OF LAWS**

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DECLARATION

I, **Nosiphiwo Nzimande**, hereby declare that the contents of this thesis, except where referenced otherwise, represents my own work that has not been previously submitted for examination at the University of KwaZulu-Natal or any other university. Furthermore, it represents my own opinions and not necessarily those of the University of KwaZulu-Natal, Howard College Campus. This work is therefore made available for photocopying and for inter-library loan.

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To my number one fans, my three awesome siblings, words cannot express how grateful I am for the continued support and love that you have shown me. I hope that I have made you proud.

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'Even the darkest night ends and the sun will rise...abalali kungakakalungi.'

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LIST OF ABBREVIATIONS

AGOA	African Growth and Opportunity Act
AfCFTA	Africa Continental Free Trade Area
COMESA	Common Market for Eastern and Southern Africa
COVID-19	Coronavirus disease of 2019
EAC	East African Community
EC	European Community
ECA	Economic Commission on Africa
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreements for Trades and Tariffs
GEAR	Growth Employment and Redistribution
GSP	Generalised System of Preferences
IMF	International Monetary Fund
ITO	International Trade Organisation
LPA	Lagos Plan of Action
MFN	Most-favoured nation principle
MTO	Multilateral Trade Organisation
MTS	Multilateral Trading System
OAU	Organisation of African Unity
OPEC	Organisation of Petroleum Exporting Countries
OPS	Organised Private Sector
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community (SADC)
TWAIL	Third World Approaches to International Law
US	United States of America
USA	United States of Africa
WB	World Bank
WTO	World Trade Organisation

KEYWORDS:

TWAIL; GATT; WTO; Kenya; Nigeria, South Africa; Preamble; African countries; developed countries; developing countries; multilateral trading system; regional trade agreements; power imbalance; politics and economics.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM

The importance of trade in the international arena and the laws that regulate it cannot be understated. Global trade is subject to a set of rules governing agreements entered into between nations.¹ The General Agreement on Trades and Tariffs (GATT) and the World Trade Organisation (WTO) are the outcomes of developments within the international trade system.² After the failure to form the International Trade Organisation (ITO),³ GATT was established in 1947 and on January 1, 1948, 23 countries ratified it.⁴ Of the 23, only two African countries participated.⁵

There have been several trade negotiations under GATT. The first beginning in 1986 and the last set, termed the Uruguay Round, came to an end in 1994 with several agreements intended to strengthen trade rules and effectively reduce trade barriers.⁶ The WTO negotiations followed, and it started operating on January 1, 1995. This institution provides a forum for trade expansion and negotiations.⁷

The WTO is the centre of operations of the world trading system, and it enables countries to benefit from the system. The Preamble to the WTO agreement recognises the need to adopt positive measures, namely:

‘[T]o ensure that developing countries, and especially least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.’⁸

However, there have been difficulties in execution, as developed countries still hold a controlling hand in the world trading system. As stated by Stevens, one of the great

¹ ‘Introduction to the Laws of Kurdistan: Iraq Working Paper Series’ Stanford Law School published in The American University of Iraq Sulaimani in 2016) 3.

² Karunanidhi Reddy ‘Developing Africa: Trade barriers, liberalisation and Inequality in the World Trade Organisation’ (2011) Volume 5 *African Journal of Business Management* 8688.

³ Ibid.

⁴ ‘Fiftieth Anniversary of the Multilateral Trading System’ press brief available at www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm accessed on 6 February 2020.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ *The Results of the Uruguay Round of the Multilateral Trade Negotiations: The Legal Texts* (GATT Secretariat Geneva; 1994) 6.

challenges the WTO encounters is ensuring that all regions of the world gain from the multilateral trading system.⁹ The least developed nations, including many African countries, are not 'active participants' in the multilateral trading system.¹⁰ There is a tendency to discard the contribution made by African countries in the global trade system, as they are not as 'active' as other regions.

Although the importance of trade is never understated in trade agreements or by member nations of the WTO, what is understated is the role that African countries play in the multilateral trading system, resulting from their marginalisation.¹¹ The WTO is made up of 157 participants, and only 42 participants are African nations.¹² There has been a significant improvement in Africa's participation since only two African countries were founding members of GATT. There has also been a substantial improvement in Africa's performance in the trade and economic fields.¹³ However, although there have been improvements, Kessie and Apea note that African countries have not benefited from the expansion in world trade.¹⁴ Africa's performance has straggled compared to other developing country regions in Latin America and Asia.¹⁵

Interestingly, the WTO's core purpose is to ensure that each country is allowed to trade freely and thus enhance its growth and stability.¹⁶ It achieves this purpose by providing an essential forum for negotiating agreements.¹⁷ The WTO is the only global trade body in which countries can collectively discuss trade issues that affect them.¹⁸ This crucial global trade forum also has other objectives, including the 'reduction of tariffs and non-tariff barriers' and

⁹ Clydenia Stevens 'Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063' (2019) Volume 19 (1) *AHRLJ* 472.

¹⁰ Arvind Subramanian & Natalia T. Tamirisa 'Is Africa Integrated in the Global Economy?' IMF Staff Papers, Volume 50 (3) (2003) 352.

¹¹ Ibid.

¹² Joan Apecu 'The level of African Engagement at the WTO from 1995 to 2010' Martinus Nijhoff Publishers (2013) para 1 available at <http://journals.openedition.org/poldev/1492,DUI>, accessed on 17 February 2020.

¹³ Ibid.

¹⁴ Edwini Kessie & Yvonne Apea 'The Participation of African countries in the Multilateral Trading System'. In A.A Yusuf (ed) *African Yearbook of International Law*, BRILL Publishers (2006) 6. See also a report by the Trade and Development Studies Centre 'Enhancing the participation of SADC Member Countries and the role of SADC Secretariat in Regional & Multilateral Trade Negotiations' (2011) available at www.acp.int/content/enhancing-participation-sadc-member-countries-and-rule-sadc-secretariat-regional-and-multila accessed on 4 August 2020. Which provides that the share of African countries in world trade has dropped from five per cent in the 1970s and 80s, to less than three per cent in 2011.

¹⁵ Apecu op cit note 12 above para 2.

¹⁶ Z. Ntozintle Jobodwana 'Participation of African member states in the WTO Multilateral Trading System' (2016) *International Journal of African Renaissance Studies* 244.

¹⁷ Robert Koopman et al 'The Value of the WTO' (2011) Volume 42(4) *Journal of Policy Modelling* 830.

¹⁸ Koopman et al *ibid*.

the 'raising of living standards'.¹⁹ This model of the WTO opens markets whilst encouraging growth.²⁰ The orthodox view is that the 'open market' approach alone is insufficient, and it should be interwoven with 'good governance', 'modern infrastructure' and 'macro policies'.²¹ This infuses trade with politics and economics.

Trade occurs because different regions of the world produce different natural resources.²² While Jobodwana provides that 'trade occurs because the distribution of resources is not homogenous',²³ Chirikure asserts that trade is prompted by 'necessity, scarcity and/or abundance'.²⁴ He further states that trade is one of the most crucial cultural practices, which foster communication and interchange.²⁵ In the earlier stage of trade, Africa had commodities such as gold, ivory, silver and nuts.²⁶ Furthermore, it was considered to be one of the richest continents in respect of resources.²⁷ However, the current economic and development position of the continent is far from its origins. Of concern is that Africa is now considered to be one of the poorest continents.²⁸ The African continent is not poor, but it has been impoverished. One of the major contributing factors to this impoverishment is Africa's colonial past.²⁹ Other factors include 'post-colonial interventionist policies of governments' and 'weakness of member states or their inability to increase or diversify exports'.³⁰ African countries continue to suffer from social, political, economic and legal structural weaknesses, which play a part in their debarment from the global economic stream.³¹

Economic and political components play an essential role in the international trade system. Several problems affect Africa's participation in the global stream, some of which include

¹⁹ Jobodwana op cit note 16 above at 244.

²⁰ Ibid.

²¹ Ibid.

²² Jobodwana op cit note 16 above at 245.

²³ Ibid.

²⁴ Shadreck Chirikure *Documenting Precolonial Trade in Africa* (2017) Oxford Research Encyclopaedia of African History 1.

²⁵ Ibid.

²⁶ Jobodwana op cit note 16 above at 246.

²⁷ Ibid. See also Miriam Mannak 'Development-Africa: Why The Richest Continent Is Also the Poorest' *Inter Press Service News Agency* September 5 2008 available at <https://www.ipsnews.net/2008/09/development-africa-why-the-richest-continent-is-also-the-poorest/#:~:text=Africa%20is%20known%20as%20one,Zimbabwe-based%20NGO%20working%20on> accessed on 5 August 2020.

²⁸ Apecu op cit note 12 para 2. See also Tom Lebert 'Africa: A continent of wealth, a continent of poverty' *War on Want* 24 June 2015 available at <https://www.waronwant.org/media/africa-continent-wealth-continent-wealth-continent-poverty> accessed on 4 July 2020.

²⁹ Jobodwana op cit note 16 above at 245.

³⁰ Ibid.

³¹ Ibid.

‘high export concentration ratio’; ‘problems with implementation’; [lack of] ‘peace, stability, security and democracy’; ‘lack of capacity’; and ‘trade liberalisation as a potential source of fiscal instability’.³² Challenges such as those that affect peace, stability, security, and democracy of a nation are pivotal, as the international trade regime is affected by a country's domestic realities.³³ The WTO in itself is ‘part and parcel’ of the economic and political regime of the world trade system.³⁴

As noted above, on January 1, 1948 when the GATT came into force, one of the two African countries that were founding members was South Africa.³⁵ On November 18, 1960 Nigeria signed the GATT, and on February 5, 1964 Kenya signed.³⁶ This dissertation analyses the role these African countries have played in the operation and functioning of the multilateral trading system. There are various reasons why these countries are of interest. First, South Africa was one of the first African countries to be a member of the GATT and represents Southern Africa geographically. Secondly, Kenya is one of the fastest-growing nations in Africa and it represents Eastern Africa geographically. Thirdly, Nigeria is one of the most powerful countries in Africa and represents the Western part of Africa geographically. Lastly, Nigeria, Kenya and South Africa are 'high-income' African countries.³⁷

Verter notes that ‘South Africa and Nigeria are the largest and second-largest exporters from the continent’.³⁸ This is supported by Louw-Vaudran, who states that South Africa and Nigeria are ‘crucial for continental initiatives’.³⁹ In fact, both Kenya and Nigeria have chaired

³² Ibid.

³³ Antonio Garrastazu ‘The Politics of Trade: The WTO and Future of the International Trade Regime’ (2016) *Auctoritas Prudentium* 2016 ISSN 2305 – 9729, Ano VIII, No. 15 at 1.

³⁴ Ibid at 2.

³⁵ ‘Fiftieth Anniversary of the Multilateral Trading System’ note 4 above.

³⁶ World Trade Organization ‘Member Information – Kenya’ available at www.wto.org/english/thewto_e/countries/kenya_e.htm accessed on 16 February 2020.

³⁷ Rilwan Akeyewale ‘Who are the winners and losers in Africa’s Continental Free Trade area?’ available at <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business/> accessed on 8 March 2020.

³⁸ Nahanga Verter ‘International Trade: The Position of Africa in Global Merchandise Trade, Emerging Issues’ in Musa Jega Ibrahim *Economics and Development* (2017) Ch6, p.67 available at <https://www.intechopen.com/books/emerging-issues-in-economies-and-development/international-trade-the-position-of-africa-in-global-merchandise-trade> accessed on 9 March 2020.

³⁹ Liesl Louw-Vaudran ‘South Africa and Nigeria are crucial for continental initiatives’ available at <https://issafrica.org/issafrica/iss-today/south-africa-and-nigeria-are-crucial-for-continental-initiatives> accessed on 17 February 2020.

the organisation's principal bodies and are also oil-exporting countries, which 'perform relatively well' in world trade.⁴⁰

This dissertation analyses the role played by these particular African countries through the lens of TWAIL. TWAIL is an acronym short for Third World Approaches to International Law. It is a movement rooted in the anti-colonial movement. As succinctly described by Mutua, 'TWAIL is a response to decolonisation and the end of direct European control over non-Europeans'.⁴¹ This movement is critical of the international regime and has been characterised as being reactive and proactive. It is reactive as it responds to international law as an imperial project and proactive as it 'seeks the internal transformation of conditions in the Third World.'⁴² Accordingly, this dissertation responds to the multilateral trading system as an imperial project whilst seeking universal transformation of conditions within the multilateral trading system, regional trading system, and African countries.

1.2 RESEARCH PROBLEM

Although the WTO intends all countries that participate in world trade to secure a share in the growth of international trade, the implementation thereof has been ineffective.⁴³ African countries that are participants in the world trading system are still marginalised.⁴⁴ The system has an inherent power imbalance, evidenced by the gap between developed and developing countries.⁴⁵ This dissertation shows that this marginalisation and imbalance have roots in international law's imperial and mercantilist nature. Consequently, this nature has adversely affected the participation and contribution made by African countries within the multilateral trading system.

Of concern is the little weight given to the challenges these countries face concerning trade within the WTO, which affect their capacity to trade. African countries face internal political,

⁴⁰ Apecu op cit note 12 above para 3. In the elections for the Director-General of the WTO, both Kenya and Nigeria's candidates ran for the leadership role. Nigeria won when its candidate was elected.

⁴¹ Makau Mutua and Antony Anghie 'What is TWAIL?' (2000) Volume 94 *American Society of International Law* 31.

⁴² Ibid.

⁴³ Kessie & Apea op cit note 14 above at 6.

⁴⁴ Subramanian & Tamirisa op cit note 10 above at 352. See also a report by the Trade and Development Studies Centre 'Enhancing the participation of SADC Member Countries and the role of SADC Secretariat in Regional & Multilateral Trade Negotiations' (2011) available at www.acp.int/content/enhancing-participation-sadc-member-countries-and-rule-sadc-secretariat-regional-and-multila accessed on 4 August 2020.

⁴⁵ Dan Ben-David 'Trade, Growth and Disparity among Nations' available at https://wto.org/english/news_e/pres00_e/pov2_e accessed on 21 February 2020.

economic and legal impediments, affecting their capacity to trade with other countries in the world trading system. This last point is accentuated by Cooper when he states that 'international trade is foreign policy' and therefore it will be affected by the domestic realities.⁴⁶

1.3 PRELIMINARY LITERATURE STUDY AND REASONS FOR CHOOSING TOPIC

Politics, economics and law mould the multilateral trading system. However, the approach adopted by each discipline differs. The economic approach 'focuses on the ability of GATT and WTO to promote fixed trade in a predictable manner and economic efficiency at a global level'.⁴⁷ The political approach is 'interested in global power dynamics, collective action dilemmas and the distributive consequences of WTO agreements'.⁴⁸ Then the 'legal scholars find it a fertile field to apply the principles of public international law and jurisprudence of a rules-based system designed to regulate international trade'.⁴⁹ This dissertation primarily focuses on the legal approach to establish the extent to which the international trade legal system has included African countries.

This dissertation discusses the role that particular African countries have played in the multilateral trading system, adopting the core tenets of TWAIL. As explained by Appiagyei-Atua, TWAIL

'[S]eeks to question the assumptions and claims of neutrality, fairness and orderliness that law is supposed to embody and thereby decentre the garb of coloniality, hegemony, eurocentrity and universality that defines and dictates the discourse and praxis of international law, especially international economic law.'⁵⁰

TWAIL is synonymous with the critical theorist perspective on international law. This perspective questions the wealth and power disparities that exist between Africa and the rest of the globe,⁵¹ and it further examines the colonial and imperial character of international

⁴⁶ Garrastazu op cit note 33 above at 2.

⁴⁷ Ratnakar Adhikari Review Essay: *The Multilateral Trading System: Economic, Legal and Political Analyses* BRILL Publishers (2009) 410 available at <https://www.jstor.org/stable/27800767> accessed on 6 February 2020.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Kwadwo Appiagyei Atua 'Ethical Dimensions of Third World Approaches to International Law (TWAIL): A Critical Review' (2015) Volume 8 *African Journal of Legal Studies* 209.

⁵¹ James T Gathii 'Africa and the History of International Law' (2012) *Legal Studies Research Paper Series* No.48 at 14.

law.⁵² This dissertation also touches on the contributionist perspective, which emphasises the contribution made by African countries and advocates their advancement in the international trade framework.⁵³ In adopting these perspectives, this dissertation considers the multiplicity of African countries' participation in the world trading system.

The motivation behind this dissertation is to examine the exclusion that African countries continue to face in the world trading system. As stated by Verter, 'African countries have been left in the cold as they struggle to compete with advanced economies'.⁵⁴ There is a growing need to protect and assist African countries in the multilateral trading system, as their influence is unfairly overshadowed.

This dissertation discusses the minimal role of particular African countries in the multilateral trading system due to their subordination and exclusion from the system. It also provides recommendations to stimulate Africa's growth in the multilateral trading system, regional trading system, and African countries. As stated by Verter:

'[F]or trade, growth, and development, African countries should urgently open their markets to expand intra-African trade'.⁵⁵

This dissertation recognises the expansion of the intra-African trade as a feasible solution to some of the challenges faced by African countries in the regional and multilateral trading spheres.

1.4 LITERATURE REVIEW

In his analysis of Africa's participation in the framework of International Law, Gathii states that there are two perspectives.⁵⁶ The first is the contributionists' perspective and the second is the critical theorists' perspective.⁵⁷ The contributionists accentuate the contribution that African countries have made in International Law.⁵⁸ On the other hand, the critical theorists analyse the subordination of African states in their international relationships.⁵⁹ This dissertation supports the latter perspective, as it adopts the core tenets of TWAIL. However, although it primarily advocates the views of critical theorists, it also takes cognisance of the

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Verter op cit note 38 above at 65.

⁵⁵ Ibid.

⁵⁶ Gathii op cit note 51 above at 1.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

views raised by contributionists, as it is recognised that it is impossible to reflect on Africa's engagement in the global trading system in 'singular or consensual terms'.⁶⁰

This dissertation advocates that the multilateral trading system must consider the role of African countries in the system. Africa was the backbone of the beginnings of the trading system. As stated by Jobodwana, Africa is rich in resources such as gold, silver, nuts and ivory, which became the primary trading commodities.⁶¹ However, Africa is now considered to be one of the poorest continents.⁶² As mentioned above, Africa is not poor, but the continent has been impoverished. Turner also highlights that one of the contributing factors to this impoverishment was the exploitation of Africa's resources by European countries.⁶³

As cited by Gathii, Elias argues that African countries have always been participants in the global system.⁶⁴ While most writers focus on how Africa's downfall in the system was caused by decades of colonialism, Elias highlights that Africa's participation in the international system dated back 'prior to the colonial conquest'.⁶⁵ According to Elias, Africa was not incorporated into the framework of international law during the period of colonialism.⁶⁶ This account is due to the Eurocentricity of international law.⁶⁷ Elias argues that international law includes Africans.⁶⁸ Therefore, this dissertation submits that the African identity must also be recognised. In so advocating, factors that impede particular African countries effective contribution in the system are assessed. According to this dissertation, these factors also contribute to African countries' exclusion from the system and therefore, they must be taken into account when assessing Africa's contribution.

This dissertation takes into account the impact of the colonial period on Africa. According to Umozurike, the international system was used as a means 'to promote the trade in Africa for the benefit of Europeans'.⁶⁹ The decades of exploitation and subordination paralysed the people of the continent, and the many African national economies. Reddy supports this

⁶⁰ Ibid.

⁶¹ Jobodwana op cit note 16 above at 246.

⁶² Ibid.

⁶³ Mandy Turner 'Scramble for Africa' *The Guardian* 2 May 2007.

⁶⁴ Gathii op cit note 51 above at 3. See also Taslim Olawale Elias and Richard Akinjide *Africa and the Development of International Law* Martinus Nijhoff Publishers (1988).

⁶⁵ Gathii op cit note 51 above at 3.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid at 17. See also Umo Umozurike *International Law and Colonialism in Africa* Nwamife Publishers (1979) 14.

argument by stating that prior to the colonial conquest, the economies of African countries were diversified.⁷⁰ Reddy contends that colonialism left the majority of the African countries underdeveloped and as a result, they were primarily focused on alleviating poverty and enhancing internal development.⁷¹ This contention is supported by Austin, who holds that 'legacy takes the form of path determination'.⁷² Austin conveys the idea that the choices made during the colonial era pinned down those made in the post-colonial era or influenced them.⁷³ As such, departing from the pre-revolutionary patterns remains strenuous and exorbitant.⁷⁴ Jobodwana also accentuates Reddy's contention when he notes that,

'countries in Africa continue to suffer from serious social, economic, political and structural weaknesses that contribute to their exclusion from the global economic stream'.⁷⁵

Jobodwana affirms Austin's idea by noting that this deterioration was not only caused by Africa's colonial past, but also 'post-colonial interventionist policies of governments'.⁷⁶

This dissertation considers how colonialism in Africa affected the continent during the decades of oppression and exploitation, and continues to be an underlying current in contemporary African countries. Kessie and Apea note that although there has been a significant improvement in developing countries share in the trading system, the contrary can be said to the shares of African countries, as they have stagnated. ⁷⁷ Jobodwana provides that:

'Some of these weaknesses are due to Africa's geographical location (e.g., land-locked); some are political (e.g., civil strife); some are economic (e.g., macro-economic instability); some are social (e.g., poor health and education), others are structural (e.g., lack of required infrastructure).'⁷⁸

Reddy cites Tupy, who holds that Sub-Saharan Africa's economy continues to suffer due to the lack of political stability and institutions needed to enhance its economy.⁷⁹

As mentioned above, the challenges and weaknesses faced by African countries are due to years of colonialism and other factors.⁸⁰ After identifying these challenges, this dissertation

⁷⁰ Reddy op cit note 2 above at 8692.

⁷¹ Ibid.

⁷² Gareth Austin 'African Economic Development and Colonial Legacies' (2010) para 2 available at <https://doi.org/10.4000/poldev.78> accessed on 19 March 2020.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Jobodwana op cit note 16 above at 246.

⁷⁶ Ibid.

⁷⁷ Kessie & Apea op cit note 14 above at 6.

⁷⁸ Jobodwana op cit note 16 above at 246.

⁷⁹ Reddy op cit note 2 above at 8693.

provides some recommendations to the challenges faced by particular African countries in the domestic, regional trading and multilateral trading spheres. The idea that ‘African countries need to look for African solutions to their social, economic and political problems’ is advocated by Jobodwana.⁸¹ This dissertation adopts and incorporates that idea by advocating regional integration as one of the most feasible solutions to some of the challenges faced by African countries in the regional and multilateral trading system.⁸²

However, the solution provided by Jobodwana does not take cognisance of the idea that ‘developing countries compromised their development sovereignty’,⁸³ by agreeing to adhere to the ‘institutional preferences of developed countries’.⁸⁴ Smith notes that there has been an increase in the number of complaints that have been filed under the WTO than under the GATT and most of these complaints have been filed by developing countries, especially against each other.⁸⁵ He further states that institutional inequalities in the global economic stream may impede the ability of developing countries to file contestable cases in the WTO.⁸⁶ Smith’s view encompasses the role of power in the multilateral trading system, noting that the power of developed countries places developing countries at a disadvantage, as developed countries can use their power to draw back on the assistance they provide to developing countries.⁸⁷

The multilateral trading system maintains an open trading system.⁸⁸ Open markets have been ‘to the benefit of the powerful players in the system’ while developing countries are ‘dependant on these markets’.⁸⁹ The dominant players⁹⁰ have ‘disproportionately benefited’

⁸⁰ Jobodwana op cit note 16 above at 245.

⁸¹ Ibid.

⁸² There is a broad agreement that if African countries were to reverse their marginalisation in the multilateral trading system, it would be necessary to increase intra-African trade. See also the report by the Trade and Development Studies Centre ‘Enhancing the participation of SADC Member Countries and the role of SADC Secretariat in Regional & Multilateral Trade Negotiations’ (2011) available at www.acp.int/content/enhancing-participation-sadc-member-countries-and-rule-sadc-secretariat-regional-and-multila accessed on 4 August 2020.

⁸³ Jobodwana op cit note 16 above at 245.

⁸⁴ Adhikari op cit note 47 above at 411.

⁸⁵ James Smith ‘Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement’ (2004) Volume 11(3) *Review of International Political Economy* 546.

⁸⁶ Ibid at 548.

⁸⁷ Ibid.

⁸⁸ Adhikari op cit note 47 above at 410.

⁸⁹ Ibid.

⁹⁰ European Union, United States, Japan and Canada (collectively called The Quad).

from the system.⁹¹ This disproportionate benefit has inevitably resulted in the role that African countries play in the functioning and operation of the multilateral trading system being depreciated. As accentuated by Elias, ‘Africa is and has been a co-equal player participant and shaper of international legal norms’.⁹² However, as expounded by critical theorists, the international system does not focus on the role played by African countries because it continues to be ‘an evil system which cannot alter its essential nature’.⁹³ This dissertation aims to advance Elias’ view by highlighting the role played by African countries in the multilateral trading system. However, it highlights this role in the context provided by critical theorists such as Umozurike and Anghie.⁹⁴

The dissertation primarily focuses on Kenya, Nigeria and South Africa. Kenya is the leading country in the Eastern Africa region and its economy has been primarily dependent on agriculture to foster economic growth.⁹⁵ Kenya is a member of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and it has recently signed the Africa Continental Free Trade Area agreement (AfCFTA).⁹⁶ The country is also a beneficiary of the Economic Partnership Agreement with the EU, the Generalised System of Preferences (GSP) of the EU and the African Growth and Opportunity Act (AGOA) with the US.⁹⁷ However, like any other African country, Kenya faces internal challenges resulting in investors hesitating to invest in its economy.⁹⁸ Its balance of trade deficit has jeopardised the country's share in the world economy.⁹⁹ However, the country has adopted policies aiming to solidify its multilateral and regional trade commitments.¹⁰⁰

⁹¹ Adhikari op cit note 47 above at 410.

⁹² Gathii op cit note 51 above at 10. See also Richard Elias Mshomba *Africa and the World Trade Organization* Cambridge (2011).

⁹³ Gathii op cit note 51 above at 16. See also Umozurike op cit note 69 above.

⁹⁴ Umozurike op cit note 69 above. See also Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2002) University of Utah.

⁹⁵ Miriam Omolo, Ruth Wanjia and Stephen Jairo ‘Comparative Study of Kenya, US, EU and China Trade and Investment Relations’ available at <https://www.ikenya.or.ke> accessed on 16 April 2020.

⁹⁶ Societe Generale ‘Country Risk of Kenya: International Trade’ (2020) available at https://import-export.societegenerale.fr/en/country/kenya/trade-country-risk?accepter_cookies=oui accessed on 27 September 2020.

⁹⁷ Ibid.

⁹⁸ ‘Trade Policy Review Body: Kenya’ press release available at https://www.wto.org/english/tratop_e/tp_r_e/tp124_e.htm accessed on 16 April 2020.

⁹⁹ Adan Mohamed ‘Kenya National Trade Policy: Transforming Kenya into a competitive export-led and efficient domestic economy’ (2017) available at <https://www.tralac.org/news/article/11897-kenya-national-trade-policy-transforming-kenya-into-a-competitive-export-led-and-efficient-domestic-economy.html> accessed on 27 September 2020.

¹⁰⁰ Ibid.

The second country whose participation is discussed is Nigeria – one of the strongest economies in Africa and primarily dependant on oil exports.¹⁰¹ Nigeria is the strongest member of the Economic Community of West African States (ECOWAS) and a member of the Organisation of the Petroleum Exporting Countries (OPEC).¹⁰² Nigeria was the last country to ratify the AfCFTA agreement.¹⁰³ However, the country has assured its commitment to both regional and multilateral trade. Whilst it has adopted a series of policies to demonstrate its commitment to the WTO, the results have been insignificant.¹⁰⁴ Khadiagala notes that Nigeria and South Africa have acted as leaders and representatives of countries in Africa,¹⁰⁵ actively participating in WTO negotiations,¹⁰⁶ representing Africa at G8 summits in the early 2000s.¹⁰⁷ South Africa is also the only African country that is represented in the G20.¹⁰⁸ South Africa is a member of the Southern African Customs Union (SACU), Southern African Development Community (SADC) and it has further entered into multilateral and bilateral arrangements with other countries.¹⁰⁹

These are some of the reasons which make these African countries the focus of this dissertation. Although African countries are said to be participants in the world trading system, this dissertation analyses the extent of their contribution by discussing the role of particular African countries in the regional and multilateral trading system. It also assesses the factors that have impacted their contribution and further provides possible recommendations to help solve the problems faced by these countries, to ensure effective participation.

¹⁰¹ Daniel B. Gordon 'Nigeria's Economy' in Christopher J. Kinnan, et al *Failed State 2030: Nigeria- A Case Study* Air University Press (2011) Ch2, p.42.

¹⁰² Societe Generale 'Country Risk of Nigeria: International Trade' (2020) available at <https://import-export.societegenerale.fr/en/country/nigeria/trade-country-risk> accessed on 27 September 2020.

¹⁰³ 'What's holding back Nigeria's AfCFTA ratification?' *CNBC Africa* March 6 2020 available at <https://www.cnbc africa.com/west-africa/2020/03/06/whats-holding-back-nigerias-afcfta-ratification/> accessed on 27 September 2020.

¹⁰⁴ Umar Abubakar Dubagari 'An Appraisal of Nigeria's Membership Participation in the WTO' (2016) Volume 21(7) Ver.2 *IOSR Journal of Humanities and Social Science* at 61.

¹⁰⁵ Gilbert M. Khadiagala 'South Africa and Nigeria in the Liberal International Order' in Flockhart et al (eds) *Liberal Order in a Non-Western World* (2014) Ch8 available at <https://www.jstor.org/stable/resrep18958.13> accessed 25 April 2020.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Societe Generale 'Country Risk of South Africa: International Trade' (2020) available at <https://import-export.societegenerale.fr/en/country/south-africa/trade-country-risk> accessed on 27 September 2020.

1.5 OBJECTIVES OF STUDY

The purpose of this dissertation is to discuss the contribution made by particular African countries in the trading system. In this respect, this dissertation has the following objectives:

1. To discuss the historical development and legal framework of the multilateral trading system.
2. To highlight the participation of particular African countries in the multilateral trading system and discuss the proliferation of the regional trading systems within the African continent.
3. To ascertain the role played by South Africa, Nigeria and Kenya in the multilateral trading system. Further, to analyse the domestic policies adopted by these countries to improve their trade performance in the global and regional trade spheres. In addition, to analyse the trade challenges faced by these countries in the post-colonial era.
4. To provide recommendations to ameliorate the particular challenges identified that the focused African countries face in the multilateral trading system.

1.6 RESEARCH QUESTIONS

In order to achieve the main objectives of this dissertation, which focus on the contributions made by these African countries to the functioning and operation of the multilateral trading system, the following research questions are addressed:

1. What is the multilateral trading system, and how were the GATT and WTO formed? What are the primary legal principles that form the core of the multilateral trading system and how have they been enforced?
2. To what extent did African countries participate in forming the trading system, and what are some of the challenges faced by particular African countries in the multilateral and regional trading systems?
3. What is the nature of trade in South Africa, Kenya and Nigeria? What are some of the impediments these countries face in the post-colonial era, impeding their capacity to trade effectively and perform relatively well in trade?
4. How can African countries address the legal impediments within the multilateral trading system?

1.7 RESEARCH METHODOLOGY

This research is a desktop approach involving an analysis of the GATT and the WTO legal texts, policies and discussion papers. A more descriptive approach is used to explain the historical and existing affairs relevant to this research. Other primary sources include trade regulations and trade policies used in Kenya, Nigeria and South Africa. The secondary sources include journal articles, textbooks, trade briefs and working papers.

1.8 STRUCTURE OF DISSERTATION

The dissertation is structured as follows:

Chapter One outlines the introduction to the dissertation, providing a brief background to the research and briefly introducing the legal principles in the multilateral trading system, focusing on particular African countries. It further provides the limitation of the study and the aim of the study.

Chapter Two discusses the historical development and legal framework of the multilateral trading system. This chapter provides a background of the system by discussing the origins and operation of the system.

Chapter Three reviews Africa's participation and the particular challenges faced by African countries in the multilateral trading system. This chapter also analyses the regional trade regime in place and the challenges faced by African countries in this regime.

Chapter Four provides a case study of South Africa, Nigeria and Kenya concerning their participation in the trading system. This chapter reviews the institutions in these countries to ascertain their position in the multilateral trading system. This chapter also analyses the main challenges that these countries face in this trading system.

Chapter Five then provides the conclusions drawn from the research and suggests recommendations to how African countries can manage these challenges.

CHAPTER TWO

FROM GATT TO WTO: THE HISTORICAL DEVELOPMENT AND LEGAL FRAMEWORK OF THE MULTILATERAL TRADING SYSTEM

2.1 INTRODUCTION

The multilateral trading system was not developed in a flash, nor was it intended to last forever. The system was the product of a myriad of agreements and successive rounds of negotiations. There were eight rounds of trade policy negotiations for the General Agreements for Trade and Tariffs (GATT) and the last round, termed the Uruguay Round, was completed in 1994.¹¹⁰ This round gave birth to the World Trade Organisation (WTO),¹¹¹ which is the current seat of administration of the multilateral trading system and has an enormous influence on world trade. As discussed in the previous chapter, this dissertation emphasises how the multilateral trading system has legitimised Africa's marginality. Accordingly, this chapter focuses on the historical development and legal framework of the multilateral trading system. The chapter further discusses the legal principles forming the core of this system and how these principles have been enforced.

2.2 THEORETICAL OVERVIEW OF THE MULTILATERAL TRADING SYSTEM

The multilateral trading system is the embodiment of multiple ideas and multiple schools of thought.¹¹² It is a representation of a concurrence of political, legal and economic principles.¹¹³ Although there is usually a conflict between these three disciplines, they have all impacted the current multilateral trading system.¹¹⁴ According to Van Grassiek, the continual development of the multilateral trading system is founded on three significant developments.

The first development was the recognition of sovereignty – the idea that each country is sovereign and thus having the power to determine its fate.¹¹⁵ Such sovereignty enables

¹¹⁰ Fiftieth Anniversary of the Multilateral Trading System op cit note 4 above.

¹¹¹ Ibid.

¹¹² Craig Van Grassiek *The History and Future of the World Trade Organisation* (2013) 3 available at https://www.wto.org/english/res_e/booksp_e/historywto_01_e.pdf accessed on 6 February 2020.

¹¹³ Ibid. See also Garrastazu op cit note 33 above at 1–2.

¹¹⁴ Van Grassiek op cit note 112 above at 3.

¹¹⁵ The WTO's recognition of sovereignty has been challenged in recent decades. See Sikiru Akinpelu Adewale 'The World Trade Organisation – Appraisal of its Laws and Nigeria's membership' (2019) p.14 available at www.researchgate.net/publication/335516117_THE_WORLD_TRADE_ORGANISATION_APPRAISAL_OF_ITS_LAWS_AND_NIGERIA_MEMBERSHIP accessed on 22 August 2020.

countries to enter into definitive agreements with one another, in which they have the autonomy to place volitional and reciprocal constraints on their practice of sovereignty.¹¹⁶ This idea led to the formation of international organisations and the WTO.¹¹⁷

The second significant development was the idea that ‘countries may extract mutual gains from freer trade’.¹¹⁸ This idea was strongly influenced by economists and their rationale for free trade. The liberalisation of markets occurs if policymakers believe that there is a reasonable prospect for their countries' exclusive and combined interests to benefit from an 'international division based on comparative advantage'.¹¹⁹ The idea of comparative advantage was initiated by Adam Smith in *The Wealth of Nations*, which was published in 1776.¹²⁰ However, it was David Ricardo who provided pivotal adjustments to the principle in 1817.¹²¹ He asserted that the principle of comparative advantage meant that even in circumstances where two nations are trading with one another and one nation produces goods cheaper than the other, they can still trade under conditions where both parties can benefit.¹²² As such, the principle of comparative advantage has remained a foundational principle of international trade.¹²³ The principle assumes a world where states can benefit from cooperation and voluntary trade.¹²⁴

The third significant development relates to power within the realms of the legal and economic foundations of the multilateral trading system. It is the idea of creating a system

¹¹⁶ Van Grassiek op cit note 112 above at 1. See also Joshua Meltzer ‘State Sovereignty and the Legitimacy of the WTO’ (2005) Volume 26 *U.Pa.J.Int’l Econ. L.*

¹¹⁷ Ibid. See also Meltzer op cit note 116 above at 693. Meltzer provides that state consent in the current WTO is its ultimate source of legitimacy. When a state consents, it reflects its free will; therefore, it is assumed that the state in question has acted in its best interest. State consent becomes a reflection of that state's legal sovereignty. However, this dissertation argues, particularly in African countries, that state consent may not necessarily be in the country's best interest nor its free will. This is because most leaders of African countries signed WTO agreements without adequately understanding them or their consequences. This dissertation submits that they succumbed to the pressure or fear of being left out of what would be one of the most potent global trade bodies. See Adewale op cit note 115 above at 7.

¹¹⁸ Van Grassiek op cit note 112 above at 2.

¹¹⁹ Ibid. Comparative advantage is the foundational principle of international trade, and it is a fundamental tenet of the argument that all actors can mutually benefit from one cooperation and voluntary trade. See Adam Hayes ‘Comparative Advantage’ (2020) available at

<https://www.investopedia.com/terms/c/comparativeadvantage.asp#:~:text=Comparative%20advantage%20is%20an%20economic,and%20realize%20stronger%20sales%20margins> accessed on 25 August 2020.

¹²⁰ Adam Smith *Wealth of Nations* W.Strahan and T.Cadell, London (1776).

¹²¹ William Krist ‘Chapter Three: Trade agreements and economic theory’ in William Krist *Trade Policy in Crisis* Wilson Centre (2020). These adjustments were made in his book *The Principles of Political Economy and Taxation*.

¹²² Ibid.

¹²³ Hayes op cit note 119 above.

¹²⁴ Ibid.

where power would assume a minor role and where the power of the dominant players would be limited by 'law or their recognition of mutual interest'.¹²⁵ Power is still a crucial component of the international order,¹²⁶ as Van Grassiek points out:

'[B]ut for the actions of two successive hegemonies, each of which employed their power to create and maintain a regime of market – opening trade agreements, it is doubtful that the legal and economic ideas on which the multilateral trading system is based would ever move beyond speculation and into practice.'¹²⁷

During the mid-19th century, Great Britain assumed the role of the hegemon and in the early 20th century, the United States assumed that power.¹²⁸ It was during the incumbency of the United States that the GATT was established.¹²⁹ At the time, African countries lacked the necessary political and economic power to participate in forming the multilateral trading system and participate in its continued development.¹³⁰

As illustrated in the next chapter, during the formation of the current system, most African countries were still colonies.¹³¹ Thus, the ideas of sovereignty, freer trade based on mutual interest, and power limitation excluded African countries.¹³²

¹²⁵ Van Grassiek op cit note 112 above at 2.

¹²⁶ Ibid. See article by Aileen Kwa 'Power Politics in the WTO' (2003) available at <https://www.google.com/amp/s/focusweb.org/publications/power-politics-in-the-wto/> accessed on 6 March 2020. Kwa provides that decisions taken at the WTO are supposed to be taken formally through the one-country, one-vote system. However, the decision-making process is done by consensus. Kwa defines consensus in this instance as one where the powerful developed countries 'impose consensus arrived at among themselves on the rest of the body'. This non-transparent and non-accountable system used at the WTO illustrates how power remains supreme.

¹²⁷ Van Grassiek op cit note 112 above at 2.

¹²⁸ Ibid. See Kori Schake 'A Tale of Two Hegemons: The Anglo-American Roots of the Post-war International System' (2017) available at <https://warontherocks.com/2017/12/a-tale-of-two-hegemons-the-anglo-american-roots-of-the-postwar-international-system/> accessed on 6 March 2020. Schake argues that although Britain and the US shared similar interests, Britain was left disappointed because the US did not become a faithful guardian of the British order. The US was more interested in shaping the rules in line with its domestic order. He further provides that what the US did should be a lesson for future hegemonies. The lesson is that 'no matter how much similarity they [hegemons] exhibit through the passage of power from one state to another, one will eventually seek to remake the international order in their image, just as the US has.' (para. 28)

¹²⁹ Chad Bown 'The WTO and GATT: A Principled History' in *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* Brookings Institution Press (2009) 11.

¹³⁰ See Paul Odhiambo 'Global Trade and Development: An African Perspective' The Ignatian Family Pre-World Social Forum seminar at Hekima College in Nairobi, 17th and 19th January 2007.

¹³¹ The first two African countries to join the GATT in 1947 were the then Union of South Africa and Southern Rhodesia (now Zimbabwe). Both countries were still under British rule at the time. See Odhiambo op cit note 130 above.

¹³² The exclusion of African countries is discussed throughout this dissertation. For instance, the WTO's dispute settlement mechanism that is in place underlines the asymmetrical agreements entered into between African countries and developed countries and the influence that the EU and US still have in the current system.

2.3 THE GENERAL AGREEMENT ON TRADE AND TARIFFS

The institutional framework that administered the international economy for close to five decades materialised after the Second World War.¹³³ The main components of this system remain unaltered.¹³⁴ The primary intention of the creators of GATT was that it be an agreement set against the backdrop of the International Trade Organisation (ITO).¹³⁵ The International Trade Organisation was intended to be ‘the third pillar of the Bretton Woods System, alongside the International Monetary Fund (IMF) and the World Bank (WB)’.¹³⁶ However, the United States Senate opposed the idea of its creation and the ITO did not materialise.¹³⁷ The failure to establish the ITO led to GATT assuming organisational authority to play the part of the ITO.¹³⁸ Assuming this role was challenging, as GATT lacked established organisational underpinning and developed several defective attributes during its 45-year existence.¹³⁹ Nevertheless, it still evolved into a global institution that became a forum for trade expansion and negotiations.¹⁴⁰

When the idea of the GATT was initiated, its binary aims were first to ‘prevent a retreat to the discriminatory economic blocs that fragmented the world in the 1930s’.¹⁴¹ The second aim was ‘promoting economic recovery and growth through the promotion of international trade’.¹⁴² However, these aims encountered problems, the main one being the creation of a rules-based system establishing a middle-ground between ‘the quest for open and non-discriminatory markets and the domestic welfare and development of states’.¹⁴³ This compromise led to the GATT providing a forum for the realisation of free trade and a forum for enhancing the interests of member states, achieved through states developing mutually

¹³³ Ann Capling and Richard Higgott ‘Introduction: The Future of the Multilateral Trade System – What Role for the World Trade Organisation?’ (2019) Volume 15(3) *Global Governance* at 314.

¹³⁴ Ibid at 315.

¹³⁵ Uri Litvak ‘Regional Integration and the Dispute Resolution System of the World Trade Organization after the Uruguay Round: A Proposal for the Future (1995) Volume 26 *University of Miami Inter-American Law Review* 569.

¹³⁶ Capling & Higgott op cit note 133 above at 315.

¹³⁷ Ibid. Some writers have argued that the failure of the ITO might have been due to the fears of the American business community that the ITO might be used as an instrument to regulate big business, rather than to promote its liberalisation (p.13).

¹³⁸ Litvak op cit note 135 above at 569.

¹³⁹ Ibid.

¹⁴⁰ Ibid at 570.

¹⁴¹ Capling & Higgott op cit note 133 at 315.

¹⁴² Ibid.

¹⁴³ Ibid.

advantageous trade relations with one another.¹⁴⁴ These developments were in line with the Preamble, which stated that its objectives were:

‘Recognising that their relations in the field of trade and economic endeavour should be conducted with a view of raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing full use of the resources of the world and expanding the production and exchange of goods.

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantages arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce...’¹⁴⁵

The legal principles forming the core of the multilateral trading system can be derived from the purposive interpretation of the Preamble of the GATT. These legal principles are the principles of non-discrimination and reciprocity. They form the foundation of the multilateral trading system.¹⁴⁶ The principle of non-discrimination is the most fundamental and it consists of two elements: the most favoured nation (MFN) principle and the national treatment principle.¹⁴⁷

The most-favoured nation principle (MFN) is the ‘cornerstone’ and the ‘pillar’ of the multilateral trading system.¹⁴⁸ Embodied in Article I of the GATT,¹⁴⁹ this principle was the ‘central organising principal’ and the heart of the organisation. According to the Consultative Board to the Director-General, this principle:

¹⁴⁴ Questions have been raised whether the trade agreements that the EU enters into with African countries are mutually beneficial. Adewale provides an example of the Nigerian textile industry, which took a considerable blow after Nigeria signed the WTO. Numerous other industries also nearly collapsed due to the massive influx of finished foreign goods. See Adewale op cit note 115 above at 10. See also Nwachukwu Sunny Nnabuihe, Nwachukwu Tobechukwu Odunze and Nwosu Ezekwesiri Okebugwu ‘World Trade Organisation and the Developing World Nigerian Economy: A Case Study’ (2014) Volume 1 *European Scientific Journal* 398.

¹⁴⁵ The Preamble of the General Agreements for Trade and Tariff, 1947.

¹⁴⁶ World Trade Organisation ‘Principles of the trading system’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm accessed on 27 May 2020.

¹⁴⁷ Bown op cit note 129 above at 15.

¹⁴⁸ *EC – Tariff Preferences*, Appellate Body Report para 101.

¹⁴⁹ Article I:1 of the GATT 1994 contains the General Most-Favoured Nation Treatment, the article provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

‘Required that the best tariff and non-tariff conditions extended to any contracting party of GATT had to be automatically and unconditionally extended to every other contracting party.’¹⁵⁰

The MFN principle required member states to treat one another with equality and discrimination between trading member states was not allowed.¹⁵¹ Therefore, where one state grants favour to another state, it must grant the same favour to all states that are its trading partners.¹⁵² However, there were exceptions to this principle, such as states being allowed to create free trade agreements where goods not part of that agreement can be discriminated against.¹⁵³ Another notable exception to the principle is that countries can give developing countries preferential treatment through special access to their markets.¹⁵⁴ This exception is in line with the current Preamble of the WTO and demonstrates how these principles still form the core of the multilateral trading system.

The second element of non-discrimination is the national treatment principle,¹⁵⁵ the purpose of which is to ensure that member states equate domestic and foreign products in the markets.¹⁵⁶ The Appellate Body in *EC – Seal Products*¹⁵⁷ analysed the relationship between Article I and Article III, by stating the differences and similarities between these two provisions.¹⁵⁸ The findings of the Appellate Body were as follows:

‘First, both article I: 1 and III: 4 are fundamental non-discrimination obligations under the GATT 1994, however they are not the same. Article I: 1 proscribes discriminatory treatment between and among like products of different origins. On the other hand,

¹⁵⁰ Consultative Board to the Director-General *The future of the WTO: Addressing Institutional Changes in the New Millennium* (2004) para 58 available at www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf accessed on 16 May 2020.

¹⁵¹ Peter Van den Bossche ‘Principles of Non-Discrimination’ in *The Law and Policy of the World Trade Organisation* Cambridge University Press (2005) 307-74.

¹⁵² Bown op cit note 129 above at 17. See also World Trade Organisation ‘Understanding the WTO: Principles of the Trading System’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm accessed on 27 May 2020.

¹⁵³ Ibid.

¹⁵⁴ Ibid. This principle also ensures that fair conditions of trade are secured. See also World Trade Organisation ‘Understanding the WTO: Principles of the Trading System’ op cit note 153 above.

¹⁵⁵ This principle is embodied in Article III of GATT, Article XVII of General Agreement on Trade in Services (GATS) and Article III of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

¹⁵⁶ Bown op cit note 129 above at 17.

¹⁵⁷ This case resulted from a complaint raised by Canada and Norway alleging that IC and MRM exceptions of the EU Seal Regime were not in line with Article I:1 and Article III: 4 of GATT, which formed the cornerstone of the GATT. These exceptions violated the non-discrimination obligation placed on each member state by these two Articles. This violation occurred because the two exceptions provided less favourable treatment to seal products from Canada and Norway than that provided to like seal products of domestic origin and those from other foreign origins (paragraph 1.5 of Appellate Body Report).

¹⁵⁸ *European Communities – ‘Measures Prohibiting Importation and Marketing of Seal Products’*, Reports of the Appellate Body, paragraph 5.78.

Article III: 4 proscribes discriminatory treatment of imported products vis-à-vis like domestic products.

Second, there is an overlap in the scope of application of Articles I: 1 and III: 4, insofar as “internal matters may be within the purview of the MFN obligation”.

Third, there are textual differences between Article I: 1 and Article III: 4. The national treatment obligation under Article III: 4 of the GATT 1994 is expressed through a “treatment no less favourable” standard. This is in contrast to Article I: 1 of the GATT 1994, which is expressed through an obligation to extend any “advantage” granted by a member, to any product originating in or destined for any other country “immediately and unconditionally” to the “like product” originating in or destined for all other members.

Finally, notwithstanding the textual differences between Articles I: 1 and III: 4, each provision fundamentally prohibits discriminating measures. Article I: 1 requires equality of competitive opportunities for like imported products from all members and Article III: 4 requires equality of competitive opportunities for imported products and domestic products.¹⁵⁹

The Appellate Body's analysis provided clarity on applying the principle of non-discrimination, consisting of the two separate elements (MFN and national treatment), sharing similarities but are different.¹⁶⁰ Their difference results in different applications, although they are contained under one principle. The Appellate Body's enunciation of the principles developed during the GATT 1947 regime also shows that although the GATT was intended to be a temporary institution, it still significantly impacted the development of the current multilateral trading system.

The second principle of GATT that forms the core of the multilateral trading system is reciprocity. The GATT Preamble makes explicit reference to this principle when it states that the parties to the agreement will enter into ‘reciprocal and mutually advantageous arrangements’.¹⁶¹ Hoekman states that:

‘Reciprocity is a fundamental element of the negotiating process. It reflects both a desire to limit the scope for free-riding that may arise because of the MFN rule and a desire to obtain “payment” for trade liberalisation in the form of better access to foreign markets.’¹⁶²

¹⁵⁹ Ibid para 5.79 – 5.82.

¹⁶⁰ Ibid.

¹⁶¹ The Preamble of the General Agreement on Trade and Tariffs, 1948.

¹⁶² Bernard Hoekman, Aaditya Mattoo and Phillip English (ed) *Development, Trade and the WTO* International Bank for Reconstruction and Development (2002) 43.

Most GATT/WTO agreements are propelled by reciprocity, as it is central to trade cooperation.¹⁶³ The general rule is that it is the agreements that construe reciprocity and not the other way round.¹⁶⁴ It is presumed that outcomes from a round of trade negotiations are outcomes that members consider to their advantage, by whichever standard they apply.¹⁶⁵ Another presumption is that various provisions for an adjustment set in place, such as renegotiation and safeguard measures, also ensure that reciprocity is achieved in each negotiation.¹⁶⁶ There has been much scepticism on whether reciprocity is a fundamental principle, as no other article in the instrument besides the Preamble recognises it as a fundamental principle.¹⁶⁷

Bown provides that this principle applies formally and informally in trade agreements.¹⁶⁸ On the one hand, it applies informally because it is not explicitly mentioned in any GATT article and it is assumed that when countries enter into trade agreements, they enter into them on a reciprocal basis. On the other hand, it applies formally because when parties enter into a reciprocal agreement that places obligations on both ends, if one of the parties to the agreement breaches it or fails to fulfil their obligation, then the other party can get recourse from the GATT dispute resolution mechanisms. This rule still applies in the current WTO as applied in the GATT treaty. However, of concern is the point raised by Finger when he states there is no way in which reciprocity can be measured or balanced, as the rules do not provide for this.¹⁶⁹

¹⁶³ Michael J Finger and Alan L Winters 'Reciprocity in the WTO' in Bernard Hoekman, Aaditya Mattoo and Phillip English (ed) *Development, Trade and the WTO: A Handbook* The World Bank (2002) 50. See also David R. DeRemer 'The Principle of Reciprocity in the 21st Century' (2016) *Institute of Economics, Centre for Economic and Regional Studies, Hungarian Academy of Sciences* 3.

¹⁶⁴ Finger & Winters op cit note 163 at 50.

¹⁶⁵ Ibid. The standard that is referred to is whichever the member chooses to apply. This is why Finger and Winters provide that 'determining the standard is part of the evaluation itself' (page 51).

¹⁶⁶ Ibid at 50. Finger and Winters refer to two provisions of renegotiation, Article XXVI - II.2 of GATT and Article XXVIII (3a, 3b, 4d, 5). According to them, Article XXVI – II.2 states 'in such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior such negotiations'. Article XXVIII (3a, 3b, 4d, 5) 'if the importing country wanting to raise a tariff above a previously bound level does not reach an agreement with supplying countries on appropriate compensation, the exporting countries will, in time be entitled to retaliate – "to withdraw . . . substantially equivalent concessions". However, even after citing these two provisions, Finger and Winters state that most renegotiations occur in the next round of negotiations (page 51).

¹⁶⁷ Bown op cit note 129 above at 16.

¹⁶⁸ Ibid.

¹⁶⁹ Michael J Finger 'Implementation and imbalance: dealing with the hangover from the Uruguay Round' (2007) 23(3) *Oxford Review of Economic Policy* 442.

This reveals one of the inherent flaws of the GATT treaty that it sometimes did not place volitional limits on states' exercise of sovereignty, as in this instance. Such flaws inevitably result in developed countries taking advantage of developing countries by entering into one-sided agreements.¹⁷⁰ These agreements are seen as acceptable or legitimate solely because they comply with the treaty, suggesting that the treaty in question was designed to favour the powerful developed countries as creators of the current system.

While Article XXXVI.8 of GATT provides that members from developed states may not expect any reciprocation from agreements with less-developed countries, by way of curtailed trade tariffs and barriers,¹⁷¹ Finger argues that Article XXVI commitments are not legally binding as the article is limited by Article XXXVII.1. This article states, 'the developed countries shall (comply) to the fullest extent possible – that is, except where compelling reasons, including legal reasons, make it impossible...'¹⁷² The point raised by Finger serves as a primary example of a provision in the treaty that is on the face of it to the benefit of developing countries, but on a deeper analysis, is not the case. Therefore, the GATT Treaty provides an example of a treaty that is filled with loopholes and inherent flaws, which fail to fulfil the promises of the Preamble.

Stiles notes some of the other inherent flaws of the GATT Treaty and one such significant weakness was that it was intended to be an interim agreement.¹⁷³ When the United States failed to ratify the ITO agreements, the development of what was intended to be the third pillar came to a halt.¹⁷⁴ The rules of the ITO were instead embedded in GATT.¹⁷⁵ Although GATT developed into an independent institution with foundations based on 'legalism' and later developed into 'pragmatism', it made no mention of any other legal norms other than those of the institution.¹⁷⁶ Stiles notes that during the late 1950s, when new problems started

¹⁷⁰ See Donna Lee 'South Africa in the WTO' in Donna Lee, Ian Taylor and Paul D. Williams (eds) *The New Multilateralism in South African Diplomacy* Palgrave Macmillan, London (2006) 51-77. Lee argues that Southern members in the WTO cannot influence negotiations because of the asymmetries inherent in the organisation.

¹⁷¹ WTO Analytical Index GATT 1994 – Article XXXIV available at https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art34_jur.pdf&ved=2ahUKEwj6Ozj_o3sAhX7URUIHfdxBL0QFjACegQIDRAC&usg=AOvVaw3RJGXlj2Gsac4lqUqQ4fA9 accessed on 23 March 2020.

¹⁷² Finger & Winters op cit note 163 above at 51.

¹⁷³ Kendall Stiles 'Negotiating Institutional Reform: The Uruguay Round, the GATT and the WTO' (1996) Volume 2(1) *Global Governance* 121.

¹⁷⁴ Ibid.

¹⁷⁵ Capling & Higgott op cit note 133 above at 315.

¹⁷⁶ Stiles op cit note 173 above at 121.

developing, the European and US negotiators had to find other possible interpretations of the articles of the treaty.¹⁷⁷ These interpretations were crucial for the preservation of their domestic economies.¹⁷⁸

GATT was intended to provide a foundation for the rehabilitation of war-torn economies.¹⁷⁹ According to Clercq, most of the founders of GATT were Western democracies and they set in motion a trading regime with rules promoting their self-interest, their colonies and other co-founders from developed countries.¹⁸⁰ However, it may be questioned whether the trading regime was ever in the interests of the colonies of Western democracies, as Western democracies were in control of the territories, in which case benefit was bestowed upon the coloniser rather than the colony.

Members' commitment to GATT raised questions before the Uruguay Round. This was because the internal legal framework of member states was used to overshadow the rules of GATT.¹⁸¹ In his 1987 review of the international trading system, Clercq stated that a single institutional framework was needed to regulate global trade and the GATT served as this framework.¹⁸² The GATT would serve as this framework while the international system was still awaiting the formation of a new trade organisation.¹⁸³ According to Capling and Higgott:

‘[W]ith no formal organisational status, no administrative capacity to deal with problems between meetings of the contracting parties, and only a tiny secretariat, GATT nevertheless proved to be a robust and adaptable institution.’¹⁸⁴

The GATT membership increased steadily from its 23 founding members in 1947.¹⁸⁵ It became an ‘essential attribute of global citizenship’, as the majority of the countries in the world wanted to become part of GATT.¹⁸⁶

As major transformations continued to occur in the trading system, new rules in line with these transformations had to be established.¹⁸⁷ The Commission on Global Governance

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Willy de Clercq ‘The Role of GATT in the International Trading System’ (1987) Volume 22(4) *Harvard International Review* 84.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Van Grassiek op cit note 112 at 10.

¹⁸⁴ Capling & Higgott op cit note 133 above at 315.

¹⁸⁵ Ibid.

¹⁸⁶ Van Grassiek op cit note 112 above at 11.

supported these transformations and developments in the international system. A report published by the commission evidenced this.¹⁸⁸ The report, cited by Van Grassiek, stated that the creation of the WTO would be ‘a crucial building block for global economic governance’.¹⁸⁹ This ‘crucial building block’ was the product of the Uruguay Round of trade negotiations.¹⁹⁰

2.4 THE URUGUAY ROUND OF TRADE NEGOTIATIONS

The evolution of the GATT to the WTO was a stepwise process and the most crucial step of that process was the Uruguay Round of trade negotiations.¹⁹¹ The Uruguay Round brought significant changes to world trade, as the negotiations covered all outstanding issues and sought to bring reform by extending into new trade areas.¹⁹² Moreover, the number of participants contributed to making this round the most significant negotiations in history, as 123 member countries participated.¹⁹³ However, the round also faced challenges that included the seven-and-a-half-year negotiations, taking double the time scheduled.¹⁹⁴ Another problem was that the participation of developing countries was minimal.¹⁹⁵ While such a historically significant round of trade negotiations would have been expected to have been inclusive, developed countries played the most significant role in the formation of the WTO, supporting the argument of this dissertation that the trading system reflects the ideas of a few developed countries.

The change in the global political and economic setup of the 1980s resulted in new matters being brought to the fore, thus creating new issues for GATT members.¹⁹⁶ These issues constituted a huge encumbrance on developing member countries and thus resulted in the GATT having to undergo developments between 1988 and 1991.¹⁹⁷ To deal with the global issues, Italy's Minister of Trade and Industry suggested forming a trade organisation to

¹⁸⁷ Capling & Higgott op cit note 133 above.

¹⁸⁸ Van Grassiek op cit note 112 above at 11.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ World Trade Organisation ‘The Uruguay Round’ available at www.wto.org/english/thewto_e/whatis_e/tif_e/facts_e.htm accessed on 3 May 2020.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Richard Hess *Zimbabwe Case Study on Trade Negotiations* (2001) 35.

¹⁹⁶ Stiles op cit note 173 above at 126.

¹⁹⁷ Ibid.

administer the GATT apparatus.¹⁹⁸ In April of that year, the Multilateral Trade Organization (MTO) constitution was introduced by a Canadian delegate and in July, the European Community (EC) officially proposed the MTO.¹⁹⁹ The final proposition detailed the formation of a global institution that would assume the nature and form of the GATT, but would be grounded on new obligations from members party to the treaty.²⁰⁰ The delegates present at the negotiations reacted with astonishment and doubt at the proposition of the MTO. The US was mainly concerned with the possible extreme ramifications that the shift would have in global trade and thus believed that the MTO should not be included in the agenda.²⁰¹

However, the Director-General (DG) was willing to gamble on the matter and the MTO was incorporated into the 1991 Draft Final Act.²⁰² In 1991, the DG presented the draft final act, which integrated all the agreements and settled pending issues.²⁰³ This draft final act is similar to the final draft of 1994, termed the Marrakesh Agreement, which set in motion the MTO.²⁰⁴ This treaty established the World Trading Organisation. What is significant is that the same treaty that was deliberated on and founded by a few developed nations created the current multilateral trading system. This is why the multilateral trading system favours developed countries and thus results in the marginalisation of developing countries.

African countries and other developing nations did not play an active part in forming the current system. Adewale boldly asserts that:

‘Most African countries who attended the conference signed the agreement, but without reading or understanding the implications for their countries. Some francophone African countries were said to have signed the agreement based on France having signed, while some of the officials signed after dinner with some business tycoons from the West.’²⁰⁵

¹⁹⁸ Ibid.

¹⁹⁹ Debra P Steger ‘The World Trade Organisation: A New Constitution for the Trading System’ in Marco Bronckers and Ranhard Quick *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2013) 143. See also Stiles op cit note 174 and Irvin A Williamson and Debra P. Steger ‘The Significance of the World Trade Organisation for the Future of the Trading System’ (1994) Volume 88 *Proceedings of the Annual Meeting [American Society of International Law]* 126.

²⁰⁰ Stiles op cit note 173 above at 140.

²⁰¹ Steger op cit note 199 above at 145. See also Stiles op cit note 173 above.

²⁰² Ibid at 140.

²⁰³ Ibid. See Williamson & Steger op cit note 199 above at 126.

²⁰⁴ Stiles op cit note 173 above at 140.

²⁰⁵ Adewale op cit note 115 above at 7.

The Uruguay Round of trade negotiations discussion suggests some of the reasons why African countries remain marginalised in the current system. This round created the epicentre of the current multilateral trading system, discussed in the next section.

2.5 THE WORLD TRADE ORGANISATION

The World Trade Organisation was one of the most notable outcomes of the Uruguay Round. All the participants shared a common purpose, which would result in the formation of an agreement that would be receptive to the various economic difficulties faced by member countries.²⁰⁶ The participants of the Uruguay Round sought to conserve, protect and expand the multilateral trading system.²⁰⁷ The WTO was seen as ‘an organ aimed at promoting the liberalisation of world trade’.²⁰⁸

The main objective behind the creation of the WTO was to create, implement and promote a system based on free trade.²⁰⁹ Williamson and Steger cite two primary objectives of the WTO after the Uruguay Round.²¹⁰ The first is the fulfilment of the obligations arising from the outcomes of that round. Secondly, to provide an organisational framework responsible for the administration of the trade regime.²¹¹ Hoekman and Mavroidis also provide their version of the functions of the WTO when it was established.²¹² First, the WTO was to be the heart of trade negotiations between members in order to curtail barriers on trade; secondly, it was to provide a forum for members to find consensus on policies impacting on international trade; and lastly, to provide a forum where members could administer their trade business.²¹³ Article III of the WTO (agreement) provides the functions of the organisation.²¹⁴

²⁰⁶ Muhammad Ijaz Latif ‘Uruguay Round of GATT and Establishment of the WTO’ (2012) Volume 65(1) *Pakistan Horizon* 54.

²⁰⁷ Ibid at 53.

²⁰⁸ Ibid at 54.

²⁰⁹ Ibid.

²¹⁰ Williamson and Steger op cit note above 199 at 126.

²¹¹ Ibid.

²¹² Bernard M. Hoekman and Petros C. Mavroidis *The World Trade Organisation: Law, Economics and Politics* 2 ed (2007) 1.

²¹³ Ibid.

²¹⁴ Article III of the WTO provides for the functions of the WTO:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives of this agreement and the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiation among its members concerning their multilateral trade relations in matters dealt with under the agreement in the Annexes to this agreement. The

Latif succinctly describes the functions of the WTO:

‘Article III of the WTO Agreement dictates that the WTO will facilitate the implementation, administration and operation besides promoting the objectives of the WTO agreement and of the Uruguay Round Agreements. It is charged with providing a forum for negotiations amongst members about their multilateral trade relations, governing the dispute settlement mechanism, providing multilateral surveillance of trade policies, and cooperating with the IMF and World Bank to achieve greater coherence in global economic policymaking.’²¹⁵

Despite the WTO's efforts at ensuring that it meets its objective, the organisation has sustained much criticism over the years. Critics have submitted that the organisation needs to be remodelled to meet contemporary demands because it has become outdated.²¹⁶ Some of the submissions made by these critics are that the current global economic problems are multiplex and intricate, compared to those that existed at the time of the creation of the GATT/WTO.²¹⁷ Moreover, they contend that there was an imbalance that existed during the formation of the organisation.²¹⁸ Therefore, it can be argued that member states from developed countries dominated the negotiation process and developing countries had minimal participation in its formation. Finger supports this argument by describing the participation of developing countries as 'passive or defensive' during the Uruguay Round.²¹⁹ He strengthens this argument by further submitting that the Doha Development Round, which took place

WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations and a framework for the implementation of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this agreement.
4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 3 to this agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

²¹⁵ Latif op cit note 206 above at 55.

²¹⁶ Debra P Steger (ed) 'Why Institutional Reform of the WTO is Necessary' in *Redesigning the World Trade Organization for the Twenty-First Century* Wilfred Laurier University Press (2009).

²¹⁷ Ibid. Other critics also criticise the asymmetries that exist in the WTO. See Faoumata Jawara and Aileen Kwa *Behind the Scenes at the WTO. The Real World of International Trade Negotiations* Zedbooks (2003). See also Duncan Cameron 'Why the WTO Talks Collapsed (Again)?' (2007) *Progressive Economic Forum*. See also Jagdish Bhagwati *The World Trading System At Risk* Princeton University Press (1991). See also K.C Fung, Alicia Garcia-Herrero and Alan Sui 'Developing Countries and the WTO: A foreign influence approach' (2010) Volume 19(1) *The Journal of International Trade and Economic Development*.

²¹⁸ Finger op cit note 169 above at 441.

²¹⁹ Ibid at 442.

after the Uruguay Round, ‘reflected the widespread concern that developing countries gave more than they got at the Uruguay Round’.²²⁰

2.6 FROM THE GATT TO THE WTO

The criticism of the WTO is directed towards the organisation acting contrary to its founding objectives. Despite critics' views, the WTO was formed to meet the growing demands of the contemporary world. Williamson and Steger further this statement by providing that one of the founding objectives of the WTO was to create an institution that would provide a framework for the multilateral trading system. This institution would also be competent enough to deal with the demands and challenges of the current world.²²¹ Therefore, the birth of the WTO allowed the GATT to take its proper place in history and when that happened, a new organisation would address the growing trade concerns among states.²²² Hence, the WTO is equipped with the necessary tools to address growing trade concerns. The Consultative Board to the Director-General states that:

‘[T]he inception of the WTO reflected a recognition by the overwhelming majority of states that exist today that the process of trade liberalisation and increasing economic interdependence required an institutional and constitutional base going beyond that provided imperfectly by the GATT.’²²³

As such, the GATT had to be restructured to meet the needs of all members of the global trade regime. The Consultative Board further provides that the WTO is necessary, as it ‘provides a level playing field with a credible referee dealing even-handedly with all players.’²²⁴

However, critics disagree with this statement by pointing to some of the inherent flaws in the current system under the WTO.²²⁵ The influence of the two hegemons (EC and US) during trade negotiations leading to the formation of the current trade regime contributed to these inherent flaws. However, Bellmann, Hepburn and Wilke argue that a ‘shift in the balance of

²²⁰ Ibid at 440.

²²¹ Williamson & Steger op cit note 199 above at 127.

²²² Ibid.

²²³ Consultative Board to the Director-General op cit note 150 above para 34.

²²⁴ Ibid para 40.

²²⁵ See Patrick A. Messerlin ‘The Influence of the EU in the World Trade System’ in Martin Dauton, Amrita Narlikar and Robert M. Stern *The Oxford Handbook on the World Trade Organization* (2012). See also Johan Lindeque and Steven McGuire ‘The United States and Trade Disputes in the World Trade Organisation: Hegemony Constrained or Confirmed?’ (2007) Volume 47(5) *Innovation, Competition and Change in International Business* 725-744.

global economic and political power has transformed the playing field'.²²⁶ Since the formation of the WTO, several shifts have occurred in the balance of power of the global trading system.²²⁷ The emergence of new economies is an example of such a shift, and many developing countries have joined the WTO. According to Steger, the active participation of developing countries in the global economy is essential, as their inactivity could potentially affect the organisation's legitimacy.²²⁸ The participation of developing countries is discussed in the next chapter, which focuses explicitly on developing African countries in the multilateral trading system.

2.7 CONCLUSION

This chapter has discussed the historical development and the legal framework of the multilateral trading system through the lens of power and power imbalances existing in the multilateral trading system. The chapter focused on the formation of the two organisations, which have played a central role in the functioning and operation of the system. The negotiations that led to the formation of these two organisations were both primarily dominated by developing countries. This chapter found that the WTO is a continuation of the GATT, as the legal principles embedded in GATT are still applied in the current WTO. This has resulted in the WTO facing a backlash from critics, who point out that the WTO is an anachronistic organisation that does not consider the needs of current contemporary conditions. Moreover, the organisation has inherent inequalities as it is still dominated by powerful developed countries, even though developing countries make up two-thirds of the organisation.²²⁹

The next chapter focuses on the participation of African countries in multilateral trading. The underlying themes of power and power imbalances continue to present themselves. While the third chapter continues the discussion of the themes of this chapter, it narrows its focus on the participation of African countries. The next chapter also highlights the when, why, and how

²²⁶ Christophe Bellmann, Jonathan Hepburn and Marie Wilke 'The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives' (2013) *International Development Policy* para 68 available at <https://journalarticles.openedition.org/poldev/1012> accessed on 14 May 2020.

²²⁷ Williamson and Steger op cit note 199 at 127.

²²⁸ Steger op cit note 199 above.

²²⁹ See Messerlin op cit note 226 above. See also Johan Lindeque and Steven McGuire 'The United States and Trade Disputes in the World Trade Organisation: Hegemony Constrained or Confirmed?' (2007) Volume 47(5) *Innovation, Competition and Change in International Business* 725-744. Friedrich Ebert Stiftung *A changing global order: Eastern Africa perspectives* Consumer Unity Trust Society (2007).

African countries are excluded from this current system and how African countries have responded to this exclusion.

CHAPTER THREE

PARTICIPATION OF AFRICAN COUNTRIES IN THE MULTILATERAL TRADING SYSTEM AND THE PROLIFERATION OF REGIONAL TRADE AGREEMENTS

3.1 INTRODUCTION

The timeline of Africa's participation in the multilateral trading system is unclear. Some writers cite Africa's participation in the system as commencing in the period after colonisation.²³⁰ Other writers cite the commencement in the period before colonisation.²³¹ Whatever the case, there is certainty that the participation of African countries in the system has increased substantially.²³² Research shows that there has been a substantial increase in the number of African countries participating in trade, and there has been a concomitant improvement in their trade and economic performance.²³³ This improvement has also been evidenced by the proliferation of regional trade agreements on the African continent.

The previous chapter's discussion of the historical development and legal framework of the multilateral trading system highlighted the fact that African countries and other developing

²³⁰ For example, Antony Anghie in *Imperialism, sovereignty and the making of International Law* divides history into three phases. The first phase is termed the period of colonialism. The second phase is termed the period of sanitised colonialism. The third phase is termed the post-world war two era, where institutions such as the United Nations were established. See Kwame Anthony Appiah 'Africa: The Hidden History' (1998) *The New York Review* available at <https://www.nybooks.com/articles/1998/12/17/africa-the-hidden-history/> accessed on 27 August 2020. Appiah referred to the HR Trevor-Roper declaration when there was no African history to teach, only the history of Europeans in Africa. The rest, he continued, is darkness.

²³¹ See Martti Koskeniemi 'Histories of International Law. Dealing with Eurocentrism' (2011) Volume 19 *Rechtsgeschichte*. He argues that the histories of non-European worlds are needed to illuminate the diversity of human experience. So far, the attention of post-colonial critics has been perhaps more a critique of European practices than on examining alternative institutions and vocabularies. (at 171). See also Ihediwa Nkemjika Chimmee 'African Historiography and the Challenges of European Periodization: A Historical Comment' (2018) *Editorial Board*. See also Jakob Zollmann 'African International Legal Histories – International Law in Africa: Perspectives and Possibilities' (2018) Volume 31 *Leiden Journal of International Law* 897-914. See also Taslim Olawale Elias and Richard Akinjide *Africa and the Development of International Law* Martinus Nijhoff Publishers (1988).

²³² See Apecu op cit note 12 above para 1. There are currently 42 African member countries in the WTO, compared to two African countries initially part of GATT in 1947.

²³³ Ibid. The improvements began after the late 1980s and 1990s. However, the main concern has been that this growth is not inclusive, as only certain countries (mainly oil-exporting countries) have made significant improvements in their performance, while the majority of the countries in the continent has seen a decline. On this last point, see also Ron Sondray *Mega regional trade agreements and South Africa's Trade Standing: Implications for the Tripartite Free Trade Area Negotiation* (2014) South African Institute of International Affairs Occasional Paper 195 at 6. Sondray suggests that growth is not inclusive.

countries assumed a minimal role in forming the current multilateral trading system. The previous chapter also highlighted that this minimal role has resulted in their marginalisation in the system. This chapter provides a thorough discussion of African countries' role in the multilateral trading system and the challenges that they continue to face in this system. This discussion also illustrates how African countries have been and continue to be marginalised by the trading system. It further discusses how these countries have responded to the marginalisation by embarking on regional trade agreements in the African continent and the challenges faced by these regional initiatives.

3.2 HISTORICAL OVERVIEW OF AFRICAN COUNTRIES' PARTICIPATION IN TRADE AND REGIONAL INTEGRATION INITIATIVES

In chapter one, this dissertation highlighted that 'legacy takes the form of path determination', as provided by Austin.²³⁴ This chapter adopts an approach in line with Austin's idea. It discusses Africa's participation in the trading system as stretching across three periods: the pre-colonial era, the colonial era and the post-colonial era (independence).²³⁵ The discussion of Africa's participation in this manner is important, as it gives a clear picture of Africa's participation in the multilateral trading system and evidences Africa's exclusion from this system. The discussion further explains the long-term effects of the events that occurred in the periods leading to independence and after independence. This discussion supports the dissertation's argument that the choices made by African countries in the post-colonial era are impacted by and influenced by those that were made during prior eras. Austin furthers this argument by providing that departing from choices of previous eras remains challenging for African countries.²³⁶

Shaw states that the foundations of the current international system are embedded in the development of Western culture and political organisation.²³⁷ Mutua supports this view, capturing the essence of the dissertation's argument when he notes:

²³⁴ Austin op cit note 72 above para 2.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Kwadwo Appiagyei-Atua 'Ethical dimensions of Third World Approaches to International Law (TWAIL): A Critical Review' (2015) Volume 8(3-4) *African Journal of Legal Studies* 212. See also Malcolm Shaw *International Law* 5th ed Cambridge University Press (2003) 13.

‘The regime of international law is illegitimate. It is a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalisation of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination...’²³⁸

Africa remains ‘the subordinated other to the western self’.²³⁹ This subordination gives rise to an improper analysis of Africa's part, as the ‘African reality is always squeezed into European models’.²⁴⁰ The reality is that the European experience in Africa continues to harm the African continent. Nunn's empirical investigation supports this, as it proved that the slave trade had a long-term effect on African countries' economic performance.²⁴¹ The slave trade existed on the continent for more than 300 years.²⁴² Although it increased Africa's trade, the economies of African countries were largely subordinated to European interests.²⁴³ The extraction of slaves in Africa caused poor economic performance for the continent.²⁴⁴ Nunn's assessments provide that the approximately 72 per cent gap between African countries and other regions would otherwise not be present.²⁴⁵ Furthermore, the 99 per cent gap between African countries and other developed worlds would also not be present if the slave trade had not taken place.²⁴⁶

The slave trade is not the only event in history that underpinned and impacted Africa's performance; it set the tone for the colonial era. According to Settles, the colonial era perfected ensuring that Africa was integrated into the global economic system.²⁴⁷ However, Africa's integration was costly for the continent, resulting in the devastation of intra-African

²³⁸ Ibid. See also Mutua and Anghie op cit note 41 above.

²³⁹ William Brown ‘Africa and International Relations: A comment on IR Theory, Anarchy and Statehood’ (2006) Volume 32(1) *Review of International Studies* 121.

²⁴⁰ Ibid.

²⁴¹ Nathan Nunn ‘The Long Term Effects of Africa's Slave Trades’ (2008) Volume 123(1) *Quarterly Journals of Economics* 139.

²⁴² Joshua D. Settles *The impact of Colonialism on African Economic Development in Africa* (Honors Thesis University of Tennessee 1996).

²⁴³ Ibid.

²⁴⁴ Nunn op cit note 241 above at 139-40.

²⁴⁵ Nathan Nunn ‘Understanding the long-run effects of Africa's trade’ in Stelios Michalopoulos and Elias Papaioannou *The Long Economic and Political Shadow of History Volume II. Africa and Asia* CEPR Press (2017) 40.

²⁴⁶ Ibid.

²⁴⁷ Settles op cit note 242 above.

trade and the African economy.²⁴⁸ Hence, Austin provides that the deviation from the patterns of the colonial era remains challenging and costly for African countries.²⁴⁹ He further cites Acemoglu, Johnson and Robinson, who argue that the poverty that was faced by African countries towards the end of the 20th century was caused by colonialism.²⁵⁰ The European settlers monopolised several sectors of African countries.²⁵¹ For this reason, Settles provides that ‘had colonialism never been imposed on Africa, its development would be significantly different and many of the problems that plague it today would not exist’.²⁵²

After independence, the main concern of most African governments was the reparation of their economies due to the many years of colonialism.²⁵³ Reddy provides that the post-colonial governments were mainly concerned with eradicating poverty and promoting their national economies.²⁵⁴ However, Qobo states that some of the policies endorsed by post-colonial leaders, in the urge to increase development further stifled Africa's development.²⁵⁵ Ocheni and Nwankwo support Qobo's statement. They maintain that the development of Africa was also stifled by the corrupt and selfish behaviour endorsed by some of the African political leaders. This behaviour could be traced back to the colonial and imperial history of the continent.²⁵⁶

After the colonial period, regional integration gained impetus by support from African governments after independence.²⁵⁷ Regional integration was eagerly adopted as a pivotal component of the development strategy in the African continent.²⁵⁸ Qobo explains that regional integration and Pan-Africanism were the two dominant themes of African leaders’

²⁴⁸ Ibid.

²⁴⁹ Austin op cit note 72 above para 2.

²⁵⁰ Austin op cit note 72 above para 7.

²⁵¹ Austin op cit note 72 above para 8. Austin mentions that European settlers appropriated the African land, and Africans had to sell their land labour to European farmers. He also mentions that a significant part of the service sector was monopolised by Europeans (para 8).

²⁵² Settles op cit note 242 above.

²⁵³ Reddy op cit note 2 above at 8692.

²⁵⁴ Ibid.

²⁵⁵ Mzukisi Qobo *The challenges of regional integration in Africa: In the context of globalisation and the prospects for a United States of Africa* (2007) ISS Paper 145 at 2 available at <https://www.files.ethz.ch/isn/98933/PAPER145H.pdf> Accessed on 18 July 2020.

²⁵⁶ Stephen Ocheni and Basil C Nwankwo ‘Analysis of Colonialism and its impact in Africa’ (2012) Volume 8 *Cross Culture Communication* 1.

²⁵⁷ Trudi Hartzenberg ‘Regional Integration in Africa’ (2011) at 2 available at https://www.wto.org/english/res_e?reser_e/ersd201114_e.pdf accessed on 5 July 2020.

²⁵⁸ Ibid.

development framework.²⁵⁹ The views of prominent African leaders, seen as the leaders of Africa's integration movement, must be considered.

Emperor Haile Selassie of Ethiopia, Julius Nyerere of Tanzania and Kwame Nkrumah of Ghana are often cited as the founding fathers of Africa's integration movements.²⁶⁰ The idea behind regional integration was immensely influenced by Africa's emancipation from slavery and colonialism.²⁶¹ Nyerere used the following analogy to explain and promote African unity:

‘The position can be compared to that of a number of brothers crossing a maelstrom on parallel and joined rope bridges, each burdened with balancing poles and weights, as well as his own building equipment. A single broad structure with firm foundation would enable all to cross more easily, enable loads to be carried jointly where appropriate and eliminate the danger of one brother over-balancing the other by inadvertently shaking the holding wire. Indissoluble African unity is the stone bridge which would enable us all to walk in safety over this whirlpool of power politics, and enable us to carry more easily the economic and social loads which now threaten to overwhelm us.’²⁶²

The model of African unity adopted by these leaders was rooted in Pan-Africanism, an ideology developed in the late 19th and early 20th centuries.²⁶³

Ayittey provides that this model of unity was designed to end the subjugation of African people and became a war cry for the struggle for independence in the African continent against colonialism.²⁶⁴ In contrast, Qobo affirms that the promotion of regional integration and Pan-Africanism:

‘[S]ought to externalise Africa's problems, with much of the blame laid at the door of former colonial powers, with little responsibility and accountability demanded of the post-colonial African elite. Politically, this was the safest position to be in as economic failures could always be ascribed to the legacy of imperialism and colonialism’.²⁶⁵

²⁵⁹ Qobo op cit note 255 above at 2.

²⁶⁰ Luwam G. Dirar ‘Rethinking and Theorizing Regional Integration in Southern Africa’ (2014) Volume 28 *Emory International Law Review* 127.

²⁶¹ Ibid.

²⁶² Julius K. Nyerere ‘A United States of Africa’ (1963) Volume 1 *The Journal of Modern African Studies* 1.

²⁶³ George B. N. Ayittey ‘The United States of Africa: A Revisit’ (2010) Volume 632 *The Annals of the American Academy of Political and Social Sciences* 86. Ayittey holds that Pan-Africanism was a philosophy derived from the belief that African people share common cultural and racial bonds and objectives. The original purpose of Pan-Africanism was racial and cultural.

²⁶⁴ Ibid.

²⁶⁵ Qobo op cit note 255 above at 2.

Regional integration gained impetus after colonialism, as it was supposed to enhance Africa's political and economic growth, backed by the Organisation of African Unity (OAU) and the Economic Commission on Africa (ECA).²⁶⁶ Regional integration was also used as a 'political instrument to deal with imbalances in the international system'.²⁶⁷ This is explained by Stiftung, who states that regional trading blocs are an advantage, as the economies of individual African countries cannot deal with the challenges of globalisation.²⁶⁸ Therefore, they need to unite in order to increase their bargaining power in international organisations.²⁶⁹

3.2.1 Research arguments

The Eurocentricity of international law remains the primary reason it remains challenging for African countries to depart from the choices of prior eras. This Eurocentricity remains one of the reasons why the African reality will always be squeezed into European models, as argued by Shaw and Mutua.²⁷⁰ The perpetuation of this system will result in African experiences being ignored and Europe's experiences in Africa being acknowledged for what we are told they were, rather than what they were.²⁷¹

The European experience in Africa harmed the continent. Nunn's evidence supports this and also illustrates that the performance of African countries today is affected by the events that

²⁶⁶ Ayittey op cit note 263 above at 86. Ayittey provides that the OAU was established to advance the cause of Pan-Africanism. However, the organisation lost its credibility and was thus dissolved. The AU replaced the OAU.

²⁶⁷ Qobo op cit note 255 above at 2.

²⁶⁸ Consumer Unity Trust Society and Friedrich Ebert Stiftung *A changing global order: Eastern Africa perspectives* Friedrich Ebert Stiftung, Kenya (2007) 53.

²⁶⁹ Ibid.

²⁷⁰ See note 237 & 238 above.

²⁷¹ This dissertation makes this statement in the context of colonialism. When looking at the impact of colonialism, one is presented with two choices: either colonialism is viewed as having a negative impact or a positive impact on the continent. Most writers believe that colonialism had a negative impact on Africa. Inasmuch as this dissertation fails to understand how colonialism had a positive impact on the continent, some writers argue that it did. For example, Bruce Gilley in 'The Case for Colonialism' submits that colonialism was beneficial for many countries – in many places, colonialism was both objectively beneficial and subjectively legitimate'. 'Reclaiming colonial modes of governance' would be beneficial for today's fragile states. This dissertation provides that if the European experience in Africa is constantly portrayed in this manner, rather than what it is, then the African reality will always be subordinated and marginalised.

See too Brandon Kendhammer 'A controversial article praises colonialism. But colonialism's real legacy was ugly' *The Washington Post* 19 September 2017 available at <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/19/colonialism-left-behind-a-long-legacy-most-of-it-bad/%3foutputType=amp> accessed on 27 August 2020. See also Bruce Gilley 'The Case for Colonialism' (2018) *Academic Questions* available at https://www.nas.org/academic-questions/31/2/the_case_for_colonialism accessed on 27 August 2020.

occurred in prior eras.²⁷² Nunn's evidence further affirms that Africa's performance today continues to be characterised and underpinned by its history. This history successfully marginalised Africa from the global system.²⁷³

The colonial period also had a negative impact, as it continued to marginalise African countries from the global economic system and legitimised this marginality. In this regard, this dissertation presents the view that this marginality may be why the first generation of African leaders chose to adopt an inside-out strategy, which focused on domestic policies aimed at developing all sectors of the country. This strategy would strengthen African countries internal affairs and eventually lead to economic growth in the continent. However, the view presented by this dissertation is quickly challenged by Qobo, Ocheni and Nwankwo, who argue that African leaders also contributed to stifling growth in the continent.²⁷⁴ In response to what is further stated by Ocheni and Nwankwo, the dissertation submits that irrespective of where the behaviour of post-colonial leaders stemmed from, collectively the behaviour stifled growth and development in the continent.²⁷⁵ Moreover, this behaviour contributed to some of the failures of regional integration efforts.

This dissertation submits that regional integration remains desirable for African economic growth despite the backlash it has faced. However, this regional integration should not be the old model, which was only grounded on the 'ideological paradigm of Pan-Africanism' and focused on 'politics rather than on economics'.²⁷⁶ This model of regional integration would ensure Africa's participation, continental unity and it would enable the continent to deal with the current challenges in the trading system effectively.²⁷⁷ The principles of good governance would be entrenched in this new model; moreover, it would enhance development in the continent and be rooted in Black Consciousness.

²⁷² See Nunn op cit note 241 and 245 above.

²⁷³ Ibid.

²⁷⁴ Qobo op cit note 255 above and Ocheni & Nwankwo op cit note 256 above.

²⁷⁵ Ibid.

²⁷⁶ Qobo op cit note 255 above at 2.

²⁷⁷ In the final chapter of this dissertation, two models of regional integration are presented as possible solutions to Africa's regional challenges. The first is developmental integration and the second is a people-centred approach to integration. See Consumer Unity Trust Society & Stiftung op cit note 269 above for a developmental approach. See Palallo Michael Lehloenyia and Maropeng Norman Mpya 'Exploring the citizen inclusiveness and micro-economic empowerment aspects of regional integration in Africa' (2016) *Law, Democracy and Development* for a people's centred approach.

The South African Student Organisation defines Black Consciousness as:

‘The concept of Black Consciousness implies the awareness by the Black people of power they wield as a group, both economically and politically and hence group cohesion and solidarity are important facets of Black Consciousness.’²⁷⁸

If African regional schemes are rooted in this ideology, they will achieve the desired result and existing continental divisions would be countered. The idea of regional schemes being rooted in Black Consciousness is already embedded in the African Union, Agenda 2063 and the AfCFTA. The essence of these blueprints is to ensure an African continent that is prosperous, integrated and peaceful.²⁷⁹

This historical overview has provided the first half of the picture on Africa's participation in the multilateral trading system by setting out the factors contributing to and influencing Africa's marginalisation in the global trading system. The following section provides the second half of the picture, illustrating Africa's actual participation in the multilateral trading system.

3.3 AFRICAN COUNTRIES' PARTICIPATION AND THE CHALLENGES IN THE MULTILATERAL TRADING SYSTEM

The presence of African countries in trading systems stretches from the early days of trade when gold, ivory, silver and nuts were commodities of exchange.²⁸⁰ However, throughout the years of the GATT, the participation of African countries was meager and close to non-existent.²⁸¹ An improvement began to be seen in the Uruguay Round.²⁸² Smith cites Kuruvila, who contrasts the first two and a half years of the WTO, to the GATT period and notes the substantial improvement in the participation of developing countries.²⁸³ Although it is said that there was a substantial improvement in the participation of African countries, Apecu points out that from the time of the coming into operation of the WTO, until the launch of the Doha Round in 2001, the participation of African countries in the Uruguay Round was in the

²⁷⁸ See Steve Biko Foundation ‘Steve Biko: The Black Consciousness Movement (1965-1976)’ available at <https://artsandculture.google.com/exhibit/steve-biko-the-black-consciousness-movement-steve-biko-foundation/AQp2i2I5?hl=en> accessed on 12 November 2020.

²⁷⁹ See African Union ‘Agenda 2063: The Africa We Want’ available at <https://au.int/en/agenda2063/overview> accessed on 12 November 2020.

²⁸⁰ Jobodwana op cit note 16 at 244.

²⁸¹ Apecu op cit note 12 above para 32.

²⁸² Ibid.

²⁸³ Smith op cit note 85 at 546.

absence of full knowledge.²⁸⁴ Finger and Nogues have also criticised this round on the ground that the Doha Round took place to cover the unbalanced previous round.²⁸⁵

As illustrated in **Table 1**, the participation of African countries improved during the last two rounds. Finger explains that when developing countries joined the GATT, they assumed the role of spectators or observers, as many of them had agreed to join under Article XXVI.5 (c).²⁸⁶ This Article removed the negotiation of concessions as a barrier for entry and therefore relieved some developing countries from entering any negotiations.²⁸⁷ However, the run-up to the Uruguay Round saw an increase in the participation of developing countries as they began to view trade as a valuable tool for development.²⁸⁸ Latif affirms this by noting that during the Uruguay Round, although developed countries and developing countries had different objectives, they shared a common vision of perpetuating trade in the international system.²⁸⁹ These countries had to work together to create trading responsive to contemporary economic problems.²⁹⁰ However, Finger holds that the agreements of the Uruguay Round were accepted without being properly understood or adequately quantified.²⁹¹ The outcome of this failure to understand or quantify these agreements was a round of unbalanced trade negotiations.

To rectify the unbalanced Uruguay Round, the Doha Round was implemented in 2001, to ensure that the needs of developing countries were addressed.²⁹² The Doha Round aimed to enhance economic development of developing countries and ensure the adequate

²⁸⁴ Apecu op cit note 12 above para 32.

²⁸⁵ See Joseph Michael Finger and Julio J Nogues *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations* The World Economy (2002).

²⁸⁶ Article XXVI 5 (c) provides:

‘If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

²⁸⁷ Finger op cit note 169 at 442.

Article XXVI (5) (c) allowed a subset of countries to join without having to promise reforms, if their former colonisers were GATT members at the time of their own independence. See Man-Keung Tang and Shang-Jin Wei ‘The value of making commitments externally: Evidence from WTO accession’ (2009) available at <https://voxeu.org/article/value-making-commitments-externally-evidence-wto-accessions> accessed on 27 August 2020.

²⁸⁸ Finger op cit note 169 above at 442.

²⁸⁹ Latif op cit note 206 at 53.

²⁹⁰ Ibid.

²⁹¹ Finger op cit note 169 above at 443. Adewale op cit note 115 above.

²⁹² Apecu op cit note 12 above para 94.

participation of developing and least-developed countries in trade negotiations.²⁹³ Whilst the Doha Round was mainly concerned with the implementation of commitments; imbalance was also addressed when the provisions of special and differential treatment (SDT) were reviewed to define and enhance these provisions.²⁹⁴ Although implementation was the focal point of the round, Finger points out that there was no guidance on how it would be approached and there was also no work programme on implementation.²⁹⁵ The only work programme provided was for SDT, which was roguishly labelled as implementation.²⁹⁶

SDT provisions are not the focus of this dissertation. However, a brief background of these provisions and the assistance they provide to developing countries is provided. SDT provisions can simply be explained as special rights awarded to developing countries, thus allowing them to receive favourable treatment from the rest.²⁹⁷ According to Klein and Page, the purpose of SDT is to allow developing country members to prioritise their own needs to a greater extent and prioritise the needs of others to a lesser extent.²⁹⁸ From Klein and Page's explanation of SDT provisions, it appears that SDT provisions do not mean that developing country members are not allowed to prioritise the needs of other members; they have to prioritise these needs but at a lesser extent.²⁹⁹ This is one of the fundamental differences between SDT provisions and the principle of non-reciprocity. The principle of non-reciprocity permitted developing country members to opt-out of Most Favoured-Nation-based

²⁹³ Kimberly Amadeo 'Doha Round of Trade Talks' *The Balance* 17 September 2020 available at <https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365> accessed on 20 September 2020.

²⁹⁴ Finger op cit note 170 above at 445. See also World Trade Organisation 'Briefing Notes: Special and differential treatment' available at https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm#:~:text=In%20the%20Doha%20Declaration%2C%20ministers,more%20precise%2C%20effective%20and%20operational.&text=Numerous%20proposals%20were%20made%20by%20developing%20and%20least-developed%20countries accessed on 28 September 2020.

Ministers agreed to strengthen SDT provisions and make them more precise, effective and operational.

²⁹⁵ Finger op cit note 169 above at 445.

²⁹⁶ Ibid.

²⁹⁷ World Trade Organization 'Special and Differential Treatment' available at www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e/htm accessed on 2 September 2020.

²⁹⁸ Peter Klein and Sheila Page 'Special and Differential Treatment of Developing Countries in the WTO' (2005) *Global Development Studies* available at www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3320.pdf accessed on 2 September 2020.

²⁹⁹ Ibid.

liberalisation obligations.³⁰⁰ However, at the end of the Uruguay Round, the single-undertaking approach was adopted. This meant that developing and developed countries had to comply with similar sets of agreements on trade rules.³⁰¹

In light of this, SDT provisions were reintroduced to address difficulties that developing countries had with implementing WTO agreements and thus standing the risk of being left out of the WTO.³⁰² SDT provisions include that:

- a. Developing country members are given extended periods to implement their commitments;
- b. Specific mechanisms are in place to assist developing countries to increase their trading opportunities;
- c. Specific provisions were adopted requiring all members to protect trade interests of developing countries;
- d. Assistance will be provided to developing countries to enable them to develop a framework to execute and handle WTO work;
- e. Some provisions assist Least Developed Country (LDC) members.³⁰³

Although these provisions above were enhanced in the Doha Round, the Doha Round has been criticised for its failure to execute its implementation goal and its failure to include African countries. Jensen and Gibbon state that:

‘The round became dominated by topics and proposals of little relevance and at times threatening for some groups of developing countries, particularly in sub-Saharan Africa. As a result, African engagement in the Round has been generally low and defensively articulated, though some fringe gains have been achieved’.³⁰⁴

They continue to state that the Doha Round was overly focused on mending the mistakes of previous rounds, as it wanted to soothe the belief that developing countries had been swindled during the Uruguay Round.³⁰⁵ The Doha Round's over-focus on mending its past

³⁰⁰ Kiichiru Fukasaku *Special and Differential Treatment for Developing countries: Does it help those who help themselves* (September 2000) WIDER Working Paper Series No.197 at 1 available at www.wider.unu.edu/sites/default/files/wp197.pdf accessed on 02 September 2020.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ World Trade Organization op cit note 298 above.

³⁰⁴ Michael Friis Jensen and Peter Gibbon ‘Africa and the WTO Doha Round: An Overview’ *Development Policy Review* 6.

³⁰⁵ Ibid.

mistakes, rather than focusing on the current implementation, led to the issues that were agreed upon being of little relevance to African countries' development.³⁰⁶ The authors further explain that modern studies that reveal that African countries gained from the Doha Round can do this 'mainly because they include gains from African countries' own liberalisation'.³⁰⁷

As developed countries gain more from trade negotiations than developing countries, Finger and Nogues maintain that there was no chance of the Uruguay Round being fair.³⁰⁸ What the North conceded during that round was to the benefit of the North and the South. However, what the South conceded was of benefit to the North and costly to the South.³⁰⁹ They describe this outcome as 'the politics of imperialism, of extracting from a less powerful party'.³¹⁰ The 'politics of imperialism' tend to overshadow the decision-making process of the WTO. Consequently, the opportunities for developing countries' participation are limited. Finger and Nogues provide that three things limit this participation.³¹¹ The first is the inexperience of developing countries in negotiations. The second limitation is the heightened mercantilist approach of the most dominant power (the US). Lastly, when the WTO was formed, the principle of consensus that was used during the GATT era became ineffective and thus placed small countries at the mercy of bigger ones.

According to Ismail and Vickers, scholars argue that the WTO decision-making process utilised during trade negotiations is not suitable for the contemporary needs of the trading world.³¹² They further refer to the argument that the 'golden triangle of decision making' is not compatible with the modern realities of the globalised world.³¹³ The 'golden triangle' comprises of the ascendancy of certain contracting members, the rationale behind the single-

³⁰⁶ Ibid.

³⁰⁷ Ibid at 7.

³⁰⁸ Finger & Nogues op cit note 285 above at 15.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Faizel Ismail and Brendan Vickers 'Towards a fair and inclusive decision-making WTO negotiations' in C. Birkbeck (ed) *Making Global Governance Work for Development* (2011). For example of critics of the decision-making process in the WTO, see Steger op cit note 215 above. See also Will Martin and Patrick Messerlin 'Why is it So Difficult? Trade Liberalisation under the Doha Agenda' (2007) Volume 23 *Oxford Review of Economic Policy*, 347-66. Finger op cit note 169 above.

³¹³ Ismail & Vickers op cit note 312 above.

undertaking rule and the consensus principle.³¹⁴ The argument presented is that the 'golden triangle of decision making' in trade negotiations is not compatible with the current dynamics of the WTO, as it results in 'lowest common denominator deals' that fail to create new trade rules or flows for the changing markets.³¹⁵ There has been a significant change in the global system; the markets have considerably changed and the WTO membership has become diversified.³¹⁶ Developing countries constitute an overwhelming majority of the WTO and therefore, they should be more involved in the decision-making process during negotiations.

The inclusion of developing countries is essential; the Preamble to the WTO recognises the overwhelming majority of developing country member states and sets one of its objectives as their 'sustainable development'.³¹⁷ However, the organisation still seems to lack an understanding of this as its core element or goal, as it is still unresponsive to developing countries' needs and allows its inner political realities to overshadow this goal.³¹⁸ The WTO must make reforms that ensure that the promotion of developing countries' needs and concerns are one of its focal missions. Ismail and Vickers advise that this will not make the organisation a 'developmental agency and institution', as critics claim.³¹⁹ Instead, this would ensure that the WTO is an equitable institution, accessible to all of its members and prioritises all its members' needs on an equitable basis.³²⁰

This section provided the second half of the picture illustrating Africa's exclusion from the global trading system. The following section provides African countries' response to this marginalisation by discussing regional trade agreements.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Robert Wolfe 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) Volume 12 *Journal of International Economic Law* 835-36.

³¹⁷ Ismail & Vickers op cit note 312 above.

³¹⁸ Saif Al-Islam Alqadhafi 'Reforming the WTO: Toward More Democratic Governance and Decision-Making' (2007) available at https://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf accessed on 27 August 2020. Saif adopts a similar approach to this dissertation. This is the 'reformist approach' which advocates a change in the WTO's governance. The organisation must demonstrate good governance and accountability to accommodate even the poorest members in the organisation.

³¹⁹ Ismail & Vickers op cit note 312 above.

³²⁰ Ismail & Vickers op cit note 312 above.

3.4 A BRIEF DISCUSSION OF THE ORIGINS OF REGIONAL TRADE AGREEMENTS

This century has seen an increasing interest in regional trade agreements (RTAs) from states, to the extent that they have become an essential feature of the multilateral trading system.³²¹ For instance, Crawford and Fiorentino report that between January 2004 and February 2005, the WTO received notification of the establishment of 43 RTA's – a historical record.³²² In the year 2020, there were reportedly 306 regional trade agreements in force.³²³ Since this century has seen a proliferation of RTA's, the explanation of RTA's and their origins is suitable.

According to Lehloenya and Mpya, RTAs can be traced back to the pre-independence period where the colonial powers created regional trade schemes, whose main intention was the preservation of their interests.³²⁴ Leal-Arcas states that RTAs have a dual meaning, the first is general and the second is specific. He explains that:

‘The general meaning is that RTAs may be agreements concluded between countries not necessarily located in the same geographical region. The specific meaning is that the parties to an RTA offer to each other, by definition, more favourable treatment in trade matters than to the rest of the world, including WTO members.’³²⁵

Regardless of the meaning they acquire, RTAs have become a significant feature of international trade and they acquire their mandate from Article XXIV of GATT.³²⁶ According to Hilpold, Article XXIV expanded the multilateral trading system and created room for RTAs to flourish.³²⁷ However, although RTAs are indeed flourishing, Article XXIV has been severely criticised. Much of the criticism stems from the Article being seen as a derogation of

³²¹ Jo-Ann Crawford and Roberto V. Fiorentino ‘The changing landscape of regional trade agreements’ (2005) WTO Discussion Paper 8 at 1 available at https://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf&ved=2ahUKEwik0qnK75XsAhWQX8AKHaFkC-oQFjAAegQIDBAC&usg=AOvVaw3zINkLx1o_OuHNaqUYaoSD&cshid=1601641418033 accessed on 23 July 2020.

³²² Ibid.

³²³ World Trade Organisation *Regional Trade Agreements gateway-WTO* (2020) available at https://www.wto.org/english/tratop_e/region_e/region_e.htm#:~:text=back%20to%20top-,Facts%20and%20figures,the20GATT%20or%20the%20 Accessed on 12 November 2020.

³²⁴ Lehloenya & Mpya op cit note 277 above at 91.

³²⁵ Rafael Leal-Arcas ‘Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?’ (2011) Volume 11(2) *Chicago Journal of International Law* 600.

³²⁶ See full article on Annexure attached.

³²⁷ Peter Hilpold ‘Regional Integration According to Article XXIV GATT – Between Law and Politics’ (2003) Volume 7 *Max Planck Yearbook of United Nations Law* at 220.

some of the WTO provisions,³²⁸ while the other criticism stems from the substance of the Article.³²⁹ However, this dissertation takes a different route by analysing the origins of this Article.

It has been reported that this Article came about as a result of the US's desire to further European integration and to convince developing countries to sign the Havana Charter.³³⁰ Article XXIV was simply a product of the US creation, which was neatly tailored to suit the trade treaty they had reached with Canada, while also ensuring that the Havana Charter came into effect.³³¹ Moreover, this Article was a means for EU integration to be sufficiently regulated.³³² Nagarajan supports this latter view by pointing out that the EU has mainly used Article XXIV.³³³ The EU is one of the most powerful trading blocs, with specific and general interests in the rules-based system.³³⁴ Nagarajan explains that securing access to the markets of third world countries is the EU's specific interest, and the general interest is creating a rules-based multilateral trading system.³³⁵

It therefore appears that Article XXIV was simply part and parcel of the US plan to ensure that it, together with the EU, remained the primary shapers of the global economy. This dissertation's analysis of the provisions of Article XXIV is through two lenses: first, Article XXIV is beneficial for the continent, regardless of how it originated, as it allows African countries to present an impactful front in global trade. Secondly, this Article is not beneficial to Africa, as it also allows the EU and other powerful developed countries to infiltrate the

³²⁸ See Leal-Arcas op cit note 325 at 606.

³²⁹ See Jagdish Bhagwati 'Regionalism and Multilateralism: An Overview' in Jaime de Melo and Arvind Panaganya (eds.) *New Dimensions in Regional Integration* Cambridge University Press (1993). See also Gerard Curzon *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (1965). See also Kenneth W Dam *The GATT: Law and International Economic Organisation* University of Chicago Press (1970). See also FA Haight 'Customs Unions and Free-Trade Areas under GATT: A Re-Appraisal (1972) Volume 6 *Journal of World Trade Law* 391-404.

³³⁰ Kerry Chase 'Multilateralism Compromised: the mysterious origins of GATT Article XXIV' (2006) Volume 5(1) *Cambridge University Press* at 1. See also Nigel Nagarajan 'Regionalism and the WTO: New Rules for the Game?' (Economic Papers No.128, June 1998) at 6.

³³¹ Ibid. Chase states that neither the Havana Charter nor the US free-trade agreement was ever ratified.

³³² For instance, consequent to the creation of African Caribbean and Pacific Countries by the Treaty of Rome in 1957, preferential relations were established between the EU and ACP countries. See Remi Long *Renegotiating GATT Article XXIV – a priority for African countries engaged in North-South trade agreements* (2006) Africa Trade Policy Centre at 2.

³³³ Nigel Nagarajan *Regionalism and the WTO: New Rules for the Game?* (Economic Papers No.128, June 1998) at 4.

³³⁴ Ibid at 3-4.

³³⁵ Ibid.

African markets methodically. These developed countries enter into asymmetrical agreements with African nations, which further exhaust the economies of these countries.³³⁶ African countries are placed in a compromising position in that integrating their markets into the world economy is essential for their economic and social development. Therefore, the continuous support of regional integration is crucial as it allows African countries to focus on strengthening their markets.

3.5 THE REGIONAL TRADE REGIME IN THE AFRICAN CONTEXT

Over the years, there has been a significant increase in the formation of regional trade agreements and they have become an essential feature of the multilateral trading system. Their growing impetus in the African continent began after colonialism when the first generation of African leaders believed that regional trade would be necessary for Africa's development framework.³³⁷ However, Qobo asserts that these integration efforts have failed to bear satisfactory fruit for the African continent.³³⁸ On the contrary, a blind eye cannot be turned to the progress made by African countries in these regional trade regimes. It must be acknowledged that regional trade agreements, just like any other agreements, face some challenges. However, the focus should be on how they can assist African countries in the multilateral trading system.

Mapuva *et al.* define regional integration in simple terms as being an act by some individual states who decide to enter into a formal agreement collectively.³³⁹ They further cite Ernest Haus, who gives a clear definition of regional integration as:

‘The process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institution possess or demand jurisdiction over pre-existing national states. The result of a process of political integration is a new political community, superimposed over pre-existing ones.’³⁴⁰

³³⁶ For instance, the existing agreements between EU and Africa have been termed colonialism in new clothes as they are asymmetrical and also against a colonial framework. See GRAIN 'Colonialism's new clothes: The EU's economic Partnership with Africa' 21 August 2017 available at <https://www.grain.org/en/article/5777-colonialism-s-new-clothes-the-eu-s-economic-partnership=agreements-with-africa> accessed on 20 March 2020.

³³⁷ Qobo op cit note 255 above.

³³⁸ Ibid.

³³⁹ Jephias Mapuva and Loveness Muyengwa-Mapuva ‘The SADC regional bloc: What challenges and prospects for regional integration’ (2014) Volume 18 *Law, Democracy Development* 22.

³⁴⁰ Ibid.

Regional integration assists member states on a regional and global landscape, and it does this by strengthening their bargaining power during negotiations or other international issues.³⁴¹ Regional integration also acts as a shield for individual member states, as one state cannot effectively manage economic challenges exclusively.³⁴²

Thus, regional trade schemes were formed to assist African leaders' development framework and assist the continent to attain economic freedom.³⁴³ The approach that was used by African countries to regional integration differs from the approach used by other continents such as Europe and Asia. According to Lehloenya and Mpya, two approaches were used by post-independence African countries to pursue unification and development.³⁴⁴ The first would see rapid integration of the African continent and the second would see a gradual integration, where African states would start by strengthening themselves first. Eventually, the creation of regional blocs would ensue.³⁴⁵ The second approach proved to be best suited for African countries.

The first blueprint for that African integration was the Lagos Plan of Action (LPA).³⁴⁶ The Preamble to the Lagos Plan of Action stipulated, amongst other things, that:

‘We commit ourselves, individually and collectively, on behalf of our governments and peoples, to promote the economic and social development and integration of our economies with a view to achieving an increasing measure of self-sufficiency and self-sustainment...’³⁴⁷

The LPA targeted the year 2000 for the achievement of the integration of the African market.³⁴⁸ However, the LPA was not successful. Lehloenya and Mpya assert that the failure of the LPA was a result of its lack of flow.³⁴⁹ It failed to put in place measures to oversee and

³⁴¹ Ibid at 23.

³⁴² Ibid.

³⁴³ Lehloenya & Mpya op cit note 277 at 91.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Qobo op cit note 255 at 1. The Lagos Plan of Action had 354 principles, which served the purpose of 'providing the best conditions of life to peoples of Africa. See 'The Lagos Plan of Action for the economic development of Africa (1980 – 2000)' Annex 1 page 98.

³⁴⁷ The Lagos Plan of Action for the economic development of Africa (1980 – 2000) Preamble page 4.

³⁴⁸ Qobo op cit note 255 above at 1.

³⁴⁹ Lehloenya and Mpya op cit note 277 above at 93.

inquire into the implementation of plans.³⁵⁰ The governments that signed the LPA also did not take any action or put measures to ensure that these plans were implemented.³⁵¹

Following the failure of the LPA, African governments came together to form another initiative to promote integration in the continent. The Treaty Establishing the African Economic Community (The Abuja Treaty) was established in 1991 and it started operating in 1994.³⁵² This Treaty aimed to create the African Economic Community and this would be done through a gradual process, which would ensure that by the year 2028 the goal would be achieved.³⁵³ One of the main objectives of the Treaty, cited in Article 4, was the integration of African economies 'in order to increase economic self-reliance' and to promote 'self-sustained development'.³⁵⁴ Although the Treaty had objectives that developed the economies of African countries and therefore assisted in eradicating poverty, it also had inherent weaknesses. Lehloenya and Mpya point to two inherent weaknesses of the Treaty.³⁵⁵ First, it effectively discharged any obligations that RECs might have towards the Treaty, and it gave them the power to negate the objectives of the Treaty.³⁵⁶ Secondly, it also did not prevent members from being parties to other RECs.³⁵⁷

Overlapping membership has been a challenge with an increase in regional and sub-regional integration schemes in Africa. Some of the WTO-recognised regional schemes in the African

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Qobo op cit note 255 above at 1.

³⁵³ Ibid.

³⁵⁴ Treaty Establishing the African Economic Community (1991) Article 4 page 9. Article 4 provides for the objective of the treaty; the objectives are as follows:

- a. To promote economic, social and cultural development and the integration of Africa economies in order to increase economic self-reliance and promote an endogenous and self-sustained development;
- b. To establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development;
- c. To promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among the Member States and contribute to the progress, development and economic integration of the continent; and
- d. To coordinate and harmonise policies among existing and future economic communities to foster the gradual establishment of the Community.

³⁵⁵ Lehloenya and op cit note 277 above at 93.

³⁵⁶ Ibid.

³⁵⁷ Ibid. When a member of a RTA is also party to other RTA's, this is termed the overlapping of membership and it has been a problem in current regional trade initiatives in Africa.

continent are illustrated in **Table 2** on the appendix page.³⁵⁸ Out of all the regional schemes that are listed in **Table 2**, the most prominent for this dissertation is the East Africa Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC). This is because the three countries, which are the focus of this dissertation belong to each regional bloc: South Africa is a member of SADC,³⁵⁹ while Kenya is a member of the EAC.³⁶⁰ Furthermore, Nigeria is a member of ECOWAS.³⁶¹ These countries have also signed the African Continental Free Trade Area (AfCFTA), which is said to be an economic game-changer for Africa.³⁶² However, Nigeria was the last country to sign the agreement after the country's officials voiced concerns about the agreement.³⁶³ As illustrated below, this dissertation supports, promotes and encourages the formation of the AfCFTA.

Regional integration is vital in the African continent because of the small and diverse economies of the countries.³⁶⁴ This inhibits them from achieving the economic success they envision on the global front. Therefore, to make a monumental impact, integration should be at the forefront of their economic plans. Ajulu argues a case for state-led developmental regionalism because the individual economies of African countries cannot face the global market single-handedly.³⁶⁵ Therefore, African countries can achieve in regional blocs what they fail to achieve individually.³⁶⁶ Lehloenyana and Mpya assert that for these integration schemes to have a significant impact, they should be inclusive. They should enhance growth and build opportunities addressing issues crucial to the people of the continent.³⁶⁷ They urge that citizens of African countries be included in integration efforts by stating that the integration efforts should be 'people-centred', and this will ensure that issues faced by

³⁵⁸ Source: Jaime De Melo & Yvonne Tsikata *Regional Integration in Africa: Challenges and Prospects* (December 2014) WIDER Working Paper 2014/037 at 6.

³⁵⁹ South Africa joined SADC in August 1994.

³⁶⁰ Kenya signed the Treaty Establishing EAC in 1999.

³⁶¹ Nigeria became a member of ECOWAS on May 28, 1975.

³⁶² Boureima Balima 'Economic 'game changer'? African leaders launch free-trade zone' *Reuters* 7 July 2019 available at www.reuters.com/article/us-africa-trade/economic-game-changer-african-leaders-launch-free-trade-zone-idUSKCN1UzuBX#~:text=African%20leaders%20launch%20free-trade%20zone,-Boureima%20Balima accessed on 20 March 2020. The AfCFTA is discussed below.

³⁶³ *Ibid.*

³⁶⁴ John Ravenhill 'Regional Integration in Africa: Theory and Practice' in Daniel H. Levine and Dawn Nagar (eds.) *Regional-Building in Africa: Political and Economic Challenges* Palgrave Macmillan (2016) 39.

³⁶⁵ See Consumer Unity Trust Society & Stiftung op cit note 268 above at 53.

³⁶⁶ *Ibid.*

³⁶⁷ Lehloenyana & Mpya op cit note 277 at 95.

ordinary people on a day-to-day basis will be addressed.³⁶⁸ Ngang and Tshimpaka share the same sentiments on the importance of including the people in Africa's development process.³⁶⁹

Ngang argues that it is important to include the people in development processes, as the end goal of development is the enhancement of the people's standards of living.³⁷⁰ Ngang further notes that some of the African initiatives failed because they 'lacked the appropriateness to sustain the hopes of the peoples of Africa'.³⁷¹ Ngang is supported by Tshimpaka, who emphasises that the state's exercise of power should reflect the people's will.³⁷² Moreover, he cites Heiskanen, who states that people-centeredness is about state sovereignty being succeeded by the notion of the people's sovereignty through legitimacy.³⁷³ Therefore, people need to be included in state processes, mainly because they are affected by decisions taken at the state level.

3.5.1 Challenges faced by African countries in regional trade regimes

The inclusiveness of citizens in integration efforts has been a challenge faced by African governments in integration efforts. As stipulated by Mutua:

'Politicians often act in ways which are against the interests of their peoples, so rules of international law ought to be evaluated from the actualised experience of these peoples, rather than those of the states.'³⁷⁴

This view is supported by Lehloeny and Mpya who say that African governments lack the political will to include the public in integration efforts.³⁷⁵ They continue to state that there is a call to develop mechanisms that would allow the public and non-state actors to participate in regional integration in Africa.³⁷⁶ Citizens would be able to provide their views on how

³⁶⁸ Ibid.

³⁶⁹ See Carol Ngang 'Systems problem and a pragmatic insight into the right to development governance for Africa' (2019) Volume 19 *African Human Rights Law Journal* 365-94. See also Leon Mwamba Tshimpaka *People-centred Approaches to Regionalism: Southern African Civil Society Networks and SADC, 1989 to 2016* (unpublished PhD thesis, University of Pretoria, 2019) 39-40.

³⁷⁰ Ngang op cit note 369 above at 370-71.

³⁷¹ Ibid at 383-384. Ngang cites NEPAD and the Lagos Plan as examples.

³⁷² Tshimpaka op cit note 369 above at 42. See also Veijo Heiskanen *The legitimacy of international organisations* Tokyo: United Nations (2001).

³⁷³ Ibid.

³⁷⁴ Appiagyei-Atua op cit note 237 above at 234.

³⁷⁵ Lehloeny & Mpya op cit note 277 above at 95.

³⁷⁶ Ibid.

governments could deal with challenges faced by its people and promote good governance, accountability and transparency.

Another challenge that hinders the prosperity of regional integration efforts in the African continent includes political motives. De Melo and Tsikata expand on this point:

‘Regional integration in Africa has its roots in political forces determined by the colonial legacy that resulted in a configuration of geographical artificial states where arbitrary borders coupled with great ethno-linguistic diversity contributed to the continent’s high number of conflicts and to its high trade and communication costs.’³⁷⁷

The increase of international trade in Africa results in the subordination of the African economy to European interests.³⁷⁸ After independence, one of the driving forces for regional integration was to strengthen the African economy and emancipate it from European control. Qobo states that Pan-Africanism and regional integration became essential tools for African leaders after independence.³⁷⁹ However, it seems as though the emancipation of the African economy from European power fell off the bandwagon.³⁸⁰

One of the reasons why African countries enter into these north-south agreements is because of the impediments they encounter in regional trade agreements. African countries sometimes fail to meet their financial commitments, resulting in financial constraints for regional schemes, as expenses are overstretched.³⁸¹ Furthermore, these financial constraints result in these countries facing implementation issues.³⁸² Mutai provides that implementation issues revolve around the lack of capacity in both finances and human resources.³⁸³ This incapacity

³⁷⁷ De Melo and Tsikata op cit note 358 at 3.

³⁷⁸ Settles op cit note 242 above.

³⁷⁹ Qobo op cit note 255 above at 2.

³⁸⁰ In the late 1970s, it was reported that there were 60 per cent North-South PTAs and only 20 per cent South-South PTAs. However, in 2010, there was a decrease, as out of 55 PTAs 43 PTA’s were South-South and 12 were North South. See De Melo and Tsikata op cit note 358 at 2. Preferential trade agreements are defined as agreements that liberalise trade between two or more countries but do not extend this liberalisation to all countries. See Andrea Dur and Manfred Elsig ‘Introduction: the purpose, design and effects of preferential trade agreements’ in Andrea Dur and Manfred Elsig (ed) *Trade Cooperation: The purpose, design and effects preferential trade agreements* Cambridge University Press (2015) at 1.

³⁸¹ Henry Kibet Mutai ‘Regional trade integration strategies under SADC and the EAC: A comparative analysis’ (2011) 1 *SADC Law Journals* 96.

³⁸² Ibid at 95.

³⁸³ Ibid.

eventually leads to African countries relying on external donors to meet their financial obligations.³⁸⁴

The lack of finances and human resources in Africa has led to the deterioration of living conditions.³⁸⁵ Further, the continent has poor infrastructure, which also acts as an encumbrance to regional integration efforts.³⁸⁶ The continent has many small economies and a substantial number of them are landlocked.³⁸⁷ Furthermore, the continent inherited transport networks from the colonial era, which were created to further trade between Africa and Europe.³⁸⁸ These networks still aim towards extra-continental linkages.³⁸⁹ This dissertation argues that extra-continental linkages infiltrate regional schemes in Africa, thus resulting in the downfall of these initiatives. This is evidenced by statistics showing that intra-African trade remains consistently low compared to its international trade.³⁹⁰

African leaders also further complicated regional schemes by choosing a model of regionalism that placed much pressure on policy autonomy, yet the background conditions of the continent do not favour this.³⁹¹ The chosen model of regionalism is inconsistent with the mission of regional schemes, thus negatively affecting the credibility of these schemes.³⁹² This dissertation argues that the background within which regional integration is set is the cause of some of its problems. Further, unsupportive economic conditions and lack of institutional support from countries part of these regional schemes also hinders regionalism efforts. This view is supported by Ravenhill, who asserts that some governmental structures

³⁸⁴ Ibid at 96.

³⁸⁵ Leander Heldring & James A. Robinson *Colonialism and Economic Development in Africa* (November 2012) National Bureau of Economic Research Working Papers 18566 at 4.

³⁸⁶ Adewale op cit note 115 above.

³⁸⁷ Hartzenberg op cit note 257 above at 3.

³⁸⁸ Settles op cit note 242 above.

³⁸⁹ Ravenhill op cit note 364 above at 39.

³⁹⁰ Hartzenberg op cit note 257 above at 10. In 2000-2017, 80 to 90 per cent of the exports from the continent were for external markets. Of this 80 per cent, the US trade accounts for 55 per cent and the EU accounts for 68.1 per cent. Moreover, Africa imports approximately more than 90 per cent of its goods from external markets. Compare this to the 16.6 per cent of trade that occurs between African countries. See UNCTAD press release and report on the state of regional trade in Africa available at <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=520> accessed on 15 September 2020.

³⁹¹ Ravenhill op cit note 364 above at 40. This coincides with what was said by Brown, See William Brown 'Africa and International Relations: A comment on IR Theory, Anarchy and Statehood' (2006) Volume 32(1) *Review of International Studies* 121. He states that we must be careful of fitting African reality to a European model, which has been the fundamental problem with most of Africa's strategies.

³⁹² Ibid.

in the continent have been unwilling to renounce their sovereignty in favour of regional institutions.³⁹³ He further argues that the national structures of these countries are often overstretched and therefore cannot compensate for their incapability at the regional level.³⁹⁴

Incapability at a regional level is a problem that most regional schemes face. Mapuva *et al.* state that SADC has failed to meet most of its targets³⁹⁵ because they have been overambitious.³⁹⁶ It appears that overlapping of membership could also cause these missed targets, as some African countries are part of other regional forums. Further, it appears that the domestic financial constraints faced by individual member states in regional forums also add to their financial burden and missed targets. Additionally, the overlapping membership results in countries having agreed to a wide range of policies that clash or are immaterial to them.³⁹⁷

Regardless of the challenges faced by African countries in regional integration schemes, it appears that regional integration remains the more feasible way for African countries to assert their position in global trade. However, there needs to be a more effective model, as already mentioned above.

3.6 THE AFRICA CONTINENTAL FREE TRADE AREA: THE FUTURE OF AFRICAN INTEGRATION

The idea of African unity is not new. As mentioned above, since independence, African unity has always been at the forefront of African leaders' post-colonial initiatives in the belief that the first step to African success is through unity. This was signalled on May 24, 1963 in Kwame Nkrumah's iconic speech, in which he earnestly appealed to the other leaders for a robust African union.³⁹⁸ The unification of African countries would be the only way to prevent Western capitalists from dominating the region.³⁹⁹ Nkrumah came up with the idea of setting up a committee of foreign ministers, consisting of 'two of the best brains from each

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Mapuva *et al.* op cit note 339 above at 26.

³⁹⁶ Ibid.

³⁹⁷ Ibid at 26-7.

³⁹⁸ African Union 'Speeches and Statements Made at the First Organization of African Unity (O.A.U) Summit – May 1963' available at https://au.int/sites/default/files/speeches/38523-sp-oau_summit_may_1963_speeches.pdf accessed on 26 October 2020.

³⁹⁹ Mayeme Dambre *United States of Africa? A thing of Fantasy or Bloody Reality* (2020) 4. Available at https://www.researchgate.net/publication/338283462_United_States_of_Africa accessed on 25 October 2020.

independent state'.⁴⁰⁰ This committee would be responsible for the execution of the United States of Africa idea.

However, even after Nkrumah's profound speech, African leaders did not pursue the robust United States of Africa idea. Instead, they chose to settle for the OAU⁴⁰¹ and since then, Africa has had many failed integration and development efforts.⁴⁰² As stated by Nwakama, even after these efforts, Africa has 'remained in a static state'.⁴⁰³ However, the idea of the United States of Africa has maintained its relevance throughout the years. In the AU Summit in 2010, Muammar al-Qaddafi also delivered a speech endorsing the idea; however, it was rejected by some African countries and did not materialise.⁴⁰⁴ African leaders raised multiple concerns, including that the diverseness of the African continent rendered the idea of a 'USA' impractical.⁴⁰⁵ As mentioned above, the economic, social and political disparities between African countries have consistently been recognised as one of the challenges to achieving successful regional integration.

Two years after the 2010 Summit, the AU held another summit where heads of states and governments agreed on establishing the Continental Free Trade Area (CFTA) by 2017.⁴⁰⁶ The creation of the CFTA was a step-wise process that could be broken down into the following parts:

⁴⁰⁰ 'The committee of Foreign Ministers, officials and experts, should be empowered to establish: (1) A commission to frame a constitution for a Union Government of African States. (2) A commission to work out a continent-wide plan for a unified or common economic and industrial programme for Africa, this should include proposals for setting up: (a) A common market for Africa; (b) An African currency; (c) An African monetary zone; (d) An African central bank; (e) A continental communication system; (f) A commission to draw up details for a common foreign policy and diplomacy; (g) A commission to produce plans for a common system of defence; (h) A commission to make proposals for a common African citizenship. (see page 53).

⁴⁰¹ 'We must unite now or perish – President Kwame Nkrumah' *New Africa* 3 March 2013 at 7. Available at <https://newafricanmagazine.com/3721/7/> accessed on 26 October 2020.

⁴⁰² These efforts include: the Lagos Plan of Action (LPA) & the Final Act of Lagos (FAL) of 1980, Africa's Priority Programme for Economic Recovery (APPER) of 1986, the African Alternative Framework for Structural Adjustment Programme (AAF-SAP) of 1989, the African Charter for Popular Participation for Development of 1990 and the United Nations New Agenda for the Development of Africa (UN-NADAF). See Emmanuel Nwakama 'NEPAD & Africa's development: A critical analysis' (2016) *Pan African Social Review* at 93.

⁴⁰³ Nwakama op cit note 402 above at 93.

⁴⁰⁴ Ayittey op cit note 263 above at 99. Ayittey mentions that South Africa, Nigeria and Ethiopia are amongst the states which rejected the idea.

⁴⁰⁵ Ibid.

⁴⁰⁶ United Nations Conference on Trade and Development *Africa Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods* UNCTAD Report 2016, 1. Available at https://www.unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf accessed on 2 March 2020.

- a. In January 2012, an Action Plan on Boosting Intra-African Trade (BIAT) was adopted, identifying seven focus areas. The areas were: trade information, trade policy, trade-related infrastructure, trade facilitation, factor market integration, productive capacity and trade finance.⁴⁰⁷
- b. In June 2015, the AU hosted its 25th summit in South Africa, where heads of states agreed to commence with negotiations on the liberalisation of trade in goods and services.⁴⁰⁸
- f. In May 2018, an extraordinary summit was held in Kigali, Rwanda; the founding agreement of the AfCFTA and the Kigali Declaration and the Protocol to the Treaty Establishing the African Economic Community were presented for signature.⁴⁰⁹

The general objectives of the AfCFTA are stated in Article 3 of the Agreement Establishing the African Continental Free Trade Area and Article 4 states the specific objectives of the free trade area.⁴¹⁰ While achieving the objectives in Article 3 and 4, Article 5 provides guidance on how the objectives should be achieved by stating the free trade area's principles.⁴¹¹ The AfCFTA is the largest free trade area, by number, since the creation of the WTO.⁴¹² Its creation is of importance for the African continent, as intra-African trade has been relatively low.⁴¹³ The free trade area will improve intra-African trade and also create opportunities for businesses and citizens.⁴¹⁴ Most importantly, the free trade area is promoted as 'African solutions to African problems'.⁴¹⁵

Although the free trade area will create many opportunities, the main concern has been how it will facilitate adequate participation from all states. Dambre argues that the only way in

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Tralac 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> accessed on 25 October 2020.

⁴¹⁰ See Appendix below for full provisions.

⁴¹¹ See Appendix below for full provision.

⁴¹² Kim Cloete *Africa's new free trade area is promising, yet so full of hurdles* World Economic Forum 8 September 2019 available at <https://www.forum.org/agenda/2019/09/africa-just-launched-the-world-s-largest-free-trade-area/> accessed 25 October 2020.

⁴¹³ Ibid. Intra-African exports make up 16.6 per cent of the exports in 2017, as compared to 68 per cent in Europe and 59 per cent in Asia.

⁴¹⁴ United Nations Conference on Trade and Development note 405 above.

⁴¹⁵ Onyinye Nkechi Onwuka and Kingsley Chigozie Udegbonam 'The African Continental Free Trade Area: Prospects and Challenges' *Accord* available at <https://www.accord.org.za/conflict-trends/the-african-continental-free-trade-area/> accessed on 23 October 2020.

which the idea of continental unity is going to be successful is if regional hegemons assume the role of facilitator,⁴¹⁶ on the basis that colonialists had succeeded in ‘disarranging the continent based on geographical factors’ and thus producing a continent filled with self-governing states with different tribes.⁴¹⁷ Dambre raises a valid argument, as the diverseness of African countries has always been a significant challenge for executing the United States of Africa idea. The current challenges encountered by regional initiatives question how a free trade area would deal with it.

Erasmus argues that disbanding Regional Economic Communities is ‘unrealistic and politically impossible’.⁴¹⁸ The argument is valid, mainly because of the work that RECs have done thus far and the achievements they have made cannot be undone or forgotten. Article 19(2) of the Agreement Establishing the Africa Continental Free Trade Area permits an overlapping of membership.⁴¹⁹ According to Erasmus, the effect of this provision is that intra-African trade will also take place under already existing rules.⁴²⁰ However, as already mentioned above, although regional initiatives have been successful, overlapping of membership remains one of the challenges to regional integration in the African continent. Technically permitting overlapping membership would only add to existing problems.

Although there is not much clarity on how the negotiating processes will be conducted in the AfCFTA, it is clear that an approach similar to that of the WTO will not be used.⁴²¹ This approach would be where each country makes a liberalisation offer to other union members before a single agreement being negotiated.⁴²² Schmeig points out that the Preamble to the AfCFTA indicates that eight RECs will act as 'building blocs' for the free trade area, commencing with the liberalisation of trade between those countries and regions without

⁴¹⁶ Dambre op cit note 399 above at 4.

⁴¹⁷ Ibid.

⁴¹⁸ Gerhard Erasmus *How will the AfCFTA and other African Trade Arrangements co-exist?* (2019) at 2 available at <https://www.tralac.org/documents/events/tralac/2735-tralac-brief-how-will-the-afcfta-and-other-african-trade-arrangements-co-exist-march-2019.html> accessed on 24 October 2020.

⁴¹⁹ Article 19 provides that state parties that are members of other regional economic communities, regional trading arrangements, and customs unions, which have attained higher levels of regional integration than under this Agreement, shall maintain such higher levels.

⁴²⁰ Erasmus op cit note 418 above.

⁴²¹ Evita Schmeig *The African Continental Free Trade Area: Perspectives for Africa, Policy Choices for Europe* Stiftung Wissenschaft und Politik German Institute for International and Security Affairs Comment Paper No.10 (10 March 2020) at 2.

⁴²² Ibid.

FTAs.⁴²³ It appears that the gradual process is the most suitable solution. This process will first allow regions that do not have free trade areas to establish them; secondly, allow regions with FTAs that are not operational to set them in motion. It will lastly strengthen existing regional initiatives. Once this process is done and FTAs exist around the entire continent, a continental amalgamation can begin.

The highly anticipated launch of the AfCFTA was supposed to be on July 1, 2020. Due to the current global pandemic, the launch was postponed and the free trade area was launched on January 1, 2021. According to the Secretary-General of the AfCFTA, Wamukele Nene, although the pandemic COVID-19 delayed the free trade area's launch, it exposed African countries over-reliance on global supply chains.⁴²⁴ Consequently, when global markets are disrupted, African countries suffer the most.⁴²⁵ As such, for this dissertation, the launch of the AfCFTA marks the first step towards Africa's remedial process. Unfortunately, the process began at a time when the globe is amid a pandemic. However, this will allow African countries to strategise and find solutions to mitigate against the effects of future pandemics, which could have market-related ramifications as heavy as the current.

The first shipment took place on January 4, three days after its launch and the first phase of negotiations are currently underway. As stated by Silver Ojakul, the chief of staff at the AfCFTA secretariat,

‘economic integration is not an event. It is a process. We must start somewhere.’⁴²⁶

Judging from the impetus that the launch of the AfCFTA received and its growing need in the African continent, the free trade area is off to a great start.

3.7 CONCLUSION

This chapter reviewed Africa's participation in the multilateral trading system, and it further reviewed the particular challenges faced by African countries in this system. It further analysed the proliferation of regional trade regimes in the continent and the challenges faced

⁴²³ Ibid.

⁴²⁴ Thomas Kendra ‘Launch of trading under the AfCFTA: stepping in the right direction’ *Africa Law and Business* available at www.iclg.com/alb/15766-launch-of-trading-under-the-afcfta-stepping-in-the-right-direction accessed on 29 June 2021.

⁴²⁵ Ibid.

⁴²⁶ Ibid.

by African countries in these regimes. Although regional integration efforts in Africa are encumbered by the impediments that these countries face at both the domestic and regional levels, it remains Africa's most feasible solution to economic development for the continent. However, for these integration efforts to be successful, African countries have to ensure that the approach used is favourable to the continent. The use of an appropriate approach will ensure active participation on Africa's part in the multilateral trading system.

After discussing Africa's participation in this chapter, the next chapter narrows down the focus to three African countries: South Africa, Nigeria and Kenya. The underlying themes of power and power imbalance continue to present themselves in the next chapter. The next chapter also illustrates the impact of these two themes by undertaking a country analysis.

CHAPTER FOUR

CASE STUDIES ON SOUTH AFRICA, NIGERIA AND KENYA'S PARTICIPATION IN THE TRADING SYSTEM

4.1 INTRODUCTION

International trade law remains primarily centred on state entities. As stated by Kapoor, the WTO is a 'state-centred and trade-related institution'.⁴²⁷ As such, the multilateral trading system is a playing field for states to enter into reciprocal agreements with one another.⁴²⁸ State entities can enter into various trade agreements and these entities are limited by laws regulating these agreements.⁴²⁹ The previous two chapters illustrated the participation of African countries in the multilateral trading system during the formation of the current system and after its formation. This illustration is essential for the overall objective of this dissertation, which is to highlight how African countries continue to be marginalised by the global trading system. Moreover, the illustration highlights the influence exerted by developed countries in the multilateral trading system and their contribution to the subjugation of African countries.

This chapter demonstrates the discussions of previous chapters by undertaking a country analysis. The countries considered for this analysis are: South Africa, Nigeria and Kenya. This chapter ascertains the role played by South Africa, Nigeria and Kenya in the multilateral trading system. It further analyses the domestic policies adopted by these countries to improve their trade performance in the multilateral and regional trading systems. Moreover, the chapter discusses the challenges these countries face in the post-colonial era, affecting their capacity to trade and trade performance.

⁴²⁷ Ilan Kapoor 'Deliberative Democracy and the WTO' (2004) Volume 11(3) *Review of International Political Economy* 532.

⁴²⁸ See chapter two above, page 19 – the discussion on the GATT Preamble allowing states to enter into reciprocal and mutually advantageous agreements with one another.

⁴²⁹ See chapter two above, page 16 – the discussion of the power of states being limited by 'law or their recognition of mutual self-interest'.

4.2 BACKGROUND OF THE IMPORTANCE OF DOMESTIC INSTITUTIONS IN TRADE LAW

The UNCTAD reports that trade has been the ‘motor of economic, social and political integration of African countries for many centuries’,⁴³⁰ and state entities have been the driving force behind that motor. In order to ensure that they fully benefit from trade, states have to create an enabling internal environment. The previous statement follows from what was stated by Alan Wolff:

‘Notwithstanding the engagement of African countries, their share of world trade has fallen, not least because of commodity-dependency in many economies and unfavourable price movements. But it is also a failure to create a domestic environment that enables their societies to thrive in an increasingly open world economy.’⁴³¹

Wolff’s statement is supported by Nunn and Trefler, who also acknowledge the impact of international trade on domestic institutions.⁴³² However, they assert that the impact depends on the initial conditions of the state.⁴³³ Berkowitz, Moenius and Pistor provide a contrary view that ‘the quality of domestic institutions has little impact on the international pattern of trade flows’.⁴³⁴ Yet, they acknowledge that empirical studies have shown the opposite by showing a link between a country’s domestic institutions and the integration of markets.⁴³⁵ Anderson and Marcouiller conducted such an empirical study, showing that the inadequacy of domestic institutions constrains trade far more than tariffs.⁴³⁶ They further found that factors such as imperfect contract enforcement and corruption reduces trade dramatically.⁴³⁷

From the views presented above, it appears that for African countries to thrive or benefit from world trade wholly, they have to ensure that their domestic institutions enable effective trade

⁴³⁰ United Nations Conference on Trade and Development ‘Africa Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods’ UNCTAD Report 2016 at 1 available at https://www.unctad.org/en/PublicationsLibrary/webdite2016d7_en.pdf accessed on 02 March 2020.

⁴³¹ ‘Alan Wolff ‘The importance of the rules-based multilateral trading system cannot be overestimated’ *Tralac News* 9 October 2018 available at www.tralac.org/news/article/13559-the-importance-of-the-rules-based-multilateral-trading-system-cannot-be-overestimated.html accessed on 2 August 2020.

⁴³² Nathan Nunn & Daniel Trefler ‘Domestic Institutions as a source of Comparative Advantage’ (2014) Volume 4 *Handbook of International Economics* 305.

⁴³³ Ibid.

⁴³⁴ Daniel Berkowitz, Johannes Moenius & Katharina Pistor ‘Legal Institutions and International Trade Flows’ (2004) Volume 26(1) *Michigan Journal of International Law* 164.

⁴³⁵ Ibid.

⁴³⁶ James E. Anderson & Douglas W Marcouiller ‘Insecurity and The Pattern of Trade: An Empirical Investigation’ (2002) Volume 84, Issues 2 *The Review of Economics and Statistics* 342.

⁴³⁷ Ibid.

participation. In essence, this will produce a better performing world economy, which provides a playing ground for developing countries economic development. It will also lead to poverty alleviation and sustainable development in their domestic institutions. This is in line with the Preamble to the GATT,⁴³⁸ which ignited a common belief amongst African countries that the WTO and multilateral trading system could enhance economic development and also work as a mechanism for poverty alleviation.⁴³⁹ However, for this to occur, it appears that the domestic institutions of African countries must be improved.

This dissertation argues that if the domestic institutions of states provide unfavourable working conditions, as is the case of many African countries, then states cannot fully benefit from trade. Whilst this dissertation acknowledges the view of Berkowitz, Moenius and Pistor,⁴⁴⁰ it strongly supports Nunn and Trefler's view,⁴⁴¹ particularly because of the empirical investigation conducted by Anderson and Marcouiller.⁴⁴² Moreover, the views of Nunn, Trefler, Anderson and Marcouiller are supported by Cooper, who emphasises that 'international trade is foreign policy' and therefore it is affected by the domestic realities of a country.⁴⁴³

African countries also need to advance intra-African trade to assist the continent on the global economic front by strengthening its economy and bargaining power. This will also protect them from further losses. This last statement flows from Figueredo's account that:

'It is the weakest entities in the system, the developing countries, which are most affected by the malfunctioning of the international trading system'.⁴⁴⁴

As such, the view that African countries need to enhance their domestic conditions and institutions to promote growth and economic development is advanced by this dissertation. If African countries provide a solid domestic and continental front, in the case of a retreat of the

⁴³⁸ The Preamble recognises the relations of states in the field of trade and economic endeavour should be conducted with a view of raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing full use of the resources of the world and expanding the production and exchange of goods.

⁴³⁹ Wolff op cit note 431 above.

⁴⁴⁰ Berkowitz, Moenius & Pistor op cit note 434 above.

⁴⁴¹ Nunn & Trefler op cit note 432 above.

⁴⁴² Anderson & Marcouiller op cit note 436 above.

⁴⁴³ Garrastazu op cit note 33 above at 2.

⁴⁴⁴ Reinaldo Figueredo 'The Retreat of Multilateralism: The International Trading System in Crisis' (1983) Volume 5(3) *Third World Quarterly* 613.

multilateral trading system, they would not be affected as they currently would. This last contention is explained by Pityana's metaphor, which succinctly explains the impact of the global system on Africa. He states that Africans should be concerned about the global economy because 'if the world economy sneezes, the continent's current cold could quickly escalate into a severe bout of the flu'.⁴⁴⁵

4.3 CASE STUDIES: SOUTH AFRICA, NIGERIA AND KENYA

As outlined in the introduction, this section provides a succinct overview of South Africa, Nigeria and Kenya in the multilateral and regional trading systems, in line with the TWAIList approach adopted by this dissertation. It further looks at the domestic institutions in these countries, to ascertain the policies that have been adopted to assist in their participation in the multilateral and regional sphere. Moreover, it looks at the challenges faced by these countries, affecting their capacity to trade.

4.3.1 SOUTH AFRICA

4.3.1.1 Background

South Africa was one of the two African countries that were the founding members of the GATT in 1947.⁴⁴⁶ South Africa was also a founding member of the Marrakesh Agreement establishing the WTO in 1994.⁴⁴⁷ The significance of the two dates is that when South Africa became the founding member of the GATT, it was still under British rule and the apartheid government's participation in the multilateral trading system was minimal.⁴⁴⁸ However, when South Africa became a signatory of the WTO in 1994, it was under new democratic rule.⁴⁴⁹ The 'new' South Africa became an active participant in WTO negotiations and trade policies adopted in the country were in line with its new constitutional principles. For this reason,

⁴⁴⁵ Siphon M Pityana *How Africa can secure its long-term economic growth* World Economic Forum 4 September 2020 available at <https://www.weforum.org/agenda/2019/09/how-africa-can-secure-its-long-term-economic-growth/> accessed on 9 November 2020.

⁴⁴⁶ Fiftieth Anniversary of the Multilateral Trading System note 4 above.

⁴⁴⁷ World Trade Organisation, Member Information – South Africa available at www.wto.org/english/thewto_e/countries/south_africa_e.htm accessed on 06 February 2020.

⁴⁴⁸ See Lee op cit note 170 above at 1.

⁴⁴⁹ Ibid. In her chapter, Lee makes reference to the role which the apartheid government played in previous rounds of trade negotiations. The apartheid government played no role in these rounds. However, in 1994, things changed when The National Economic Forum participated in the Uruguay Round. The National Economic Forum, which consisted of the apartheid government, the ANC and the COSATU, entered the last stages of the Uruguay Round. This eventually led to the ANC government ratifying the Marrakesh Agreement.

Ismail states that:

‘South Africa’s participation in the WTO was informed by its domestic development challenges and that its values were derived from its long struggle against apartheid and its transition to a new democracy.’⁴⁵⁰

South Africa participated in WTO forums and in drawing agreements to strengthen regional integration and inter-regional trade.⁴⁵¹ The country also entered into preferential agreements with other regional blocs such as the European Union (EU).⁴⁵² However, it is essential to note that the country remains devoted to advocating African interests on the global economic front to ensure that the continent is not marginalised.⁴⁵³ The country has adopted what Lee terms a ‘middle power’ strategy.⁴⁵⁴

However, South Africa's advocacy for African countries and its role of 'middle power' has been subject to scepticism, particularly after the events during the negotiations preparing for

⁴⁵⁰ Fazel Ismail *Reflections on a new democratic South Africa's role in the multilateral trading system* (2011) BWPI Working Paper 158 at 4 available at https://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi_wp_15811.pdf accessed on 24 August 2020.

⁴⁵¹ Sibulele Walaza *South Africa: Between regional integration and trade multilateralism* (2014) Institute for Global Dialogue – Issue 106 at 1 available at https://media.africaportal.org/documents/s_a_between_regional_integration_and_trade_multilateralism.pdf accessed on 27 August 2020. Some of the agreements and forums that South Africa is part of are: are South African Customs Union, South African Development Community Free Trade Agreement, the European Union South Africa Trade and Development Cooperation Agreement, European Free Trade Association and Mercosur Agreements; South Africa through the SADC has finalised negotiations on Phase I of the Tripartite Free Trade Agreement, which turns SADC, EAC, COMESA into a Free Trade Area. See South Africa Country Commercial Guide ‘South Africa-Trade Agreements’ available at <https://www.export.gov/apex/article2?id=South-Africa-Trade-Agreements> accessed on 15 November 2020.

⁴⁵² Walaza op cit note 451 above at 1. See also Catherine Grant-Makokera ‘A case study of South Africa’ in Marta Martinelli and Nicoletta Pirozzi *Promoting Stability and Development in Africa: How to Foster Cooperation between Public and Private Sectors* Istituto Affari Internazionali (2015) 117-146, when she says that SA is the only African country to have a strategic partnership with the EU.

⁴⁵³ Ibid at 117.

⁴⁵⁴ Lee op cit note 170 above at 6. According to Taylor, trying to define what a middle power is difficult. However, this dissertation will try to define this term through Van der Westhuizen’s description of a middle power as a state that plays the role of mediator. As such, a middle power assumes the role of a neutral agent. States that assume the role of middle power are ‘trustworthy’ and ‘propound the general interest’. Lotze provides that South Africa plays the role of middle power as it has assumed the role of being the spokesperson for the continent. See Ian Taylor *Hegemony, “Common Sense” and Compromise: A Neo-Gramscian Analysis of Multilateralism in South Africa’s Post-Apartheid Foreign Policy* (PhD dissertation, University of Stellenbosch, 2000) 68. See also Janis van der Westhuizen ‘South Africa’s Emergence as a Middle Power’ (1998) Volume 19(3) *Third World Quarterly* 435-8. See also Walter Lotze *South Africa as a Middle Power at the WTO Brokering African Interests* (MA dissertation– Political Science and International Studies, University of Stellenbosch, 2007) 1.

the Third WTO Ministerial Conference in Seattle.⁴⁵⁵ These events, along with others, are discussed below.

4.3.1.2 Multilateral Trading System Contribution

South Africa's position in the global economic front and the WTO mirrors the 'financial policies, trade and investment strategies and other economic and socio-economic policies' adopted within the country.⁴⁵⁶ As mentioned, South Africa's participation in the multilateral trading system has also been strongly informed by the constitutional principles adopted by the country at the birth of its new democracy.⁴⁵⁷ These values were articulated by Nelson Mandela, when he maintained that South Africa's foreign policy must be based on the following six principles:

1. Human rights;
2. Justice and respect for international law;
3. Peace;
4. The interests of Africa;
5. International cooperation on economic development.⁴⁵⁸

However, Keet boldly asserts that:

'When the new South African government took over in May 1994, they did not challenge the WTO Agreements which the previous government had entered into. Even with the exclusive tariff reduction implementation, undertakings began to have manifestly negative effects on production and employment within South Africa in the following years. The new democratic government stood by the trade and 'trade-related' international commitments of the previous regime and even actively defended them.'⁴⁵⁹

The justifications provided by the South African government were: first, that the country was already 'legally committed' to the agreements and secondly, maintaining these agreements was necessary in ensuring South Africa's integration into the world economy.⁴⁶⁰ The more so because the pre-democracy government's firm reliance on international affairs and the strong

⁴⁵⁵ Ismail op cit note 450 above at 4.

⁴⁵⁶ Dot Keet *South Africa's Official Position and Role in Promoting the WTO* Alternative Information and Development Centre (2002) at 1 available at <https://www.tni.org/files/WTOpositions%20and%20rule%20of%20SouthAfrica.pdf> accessed on 29 August 2020.

⁴⁵⁷ Ismail op cit note 450 at 4.

⁴⁵⁸ Ibid.

⁴⁵⁹ Keet op cit note 456 above at 2.

⁴⁶⁰ Ibid.

relationship with the Western powers acted as security to South Africa's economy.⁴⁶¹ However, South Africa was not the only beneficiary of the relationship with the West, as the Western powers also benefited from this relationship. When economic sanctions were implemented against South Africa, the US and Great Britain were placed in a compromising position. Although they were aware of the persisting unacceptable internal conditions, the country was economically crucial to them as it provided them with essential commodities.⁴⁶² Thus, South Africa's position in global trade is important for this dissertation because its decision to actively pursue the foreign policy adopted by the apartheid government was based on the belief that it would place them in a better economic position. Moreover, the country's policies supported Pan-Africanist motives and also saw a need for export-led growth strategies.⁴⁶³ This earned South Africa ties with the international system's major players and earned them a position as the 'middle-power facilitator' between Africa and the West.⁴⁶⁴

However, South Africa's middle power status has also been criticised, as it stands accused of attaching itself to the West. According to Lee, whilst most developing countries have criticised the policies and principles of the WTO, South Africa has not been as critical on both.⁴⁶⁵ It appears that South Africa's lack of criticism is contingent to the position that it assumes in the WTO. Most developing countries became suspicious of South Africa's position, particularly after preparing for the Third WTO Ministerial Conference in Seattle.⁴⁶⁶ According to Keet, some South African delegates and delegates from the rest of the African continent were assigned to work in different working groups, dealing with a great number of issues.⁴⁶⁷ However, Keet continues to state that these working groups were 'diversionary tactics' employed by the WTO secretariat and the US trade representative to exclude developing and least developed countries from the actual negotiations.⁴⁶⁸ The actual

⁴⁶¹ South African History Online *South Africa's Foreign Relations During Apartheid* available at <https://www.sahistory.org.za/article/south-africas-foreign-relations-during-apartheid-1948> accessed on 9 September 2020.

⁴⁶² Ibid. The article continues to provide that South Africa was the main coal and gold supplier of Western countries, which is why Britain and the US were against the sanctions placed on South Africa.

⁴⁶³ Lee op cit note 170 above at 1-2. The South African government's adoption of the Growth, Employment and Redistribution Programme in 1996 supported the WTO's trade liberalisation agenda.

⁴⁶⁴ Ibid at 2.

⁴⁶⁵ Ibid at 2.

⁴⁶⁶ These developing countries include the Africa Group, CARICOM – the Caribbean Group and some Latin American Countries.

⁴⁶⁷ Keet op cit note 456 above at 8.

⁴⁶⁸ Ibid.

negotiations occurred in the 'Green Room', not accessible to any other countries besides the Quad members and those countries that the Quad allowed to participate.⁴⁶⁹ South Africa was allowed to participate during these negotiations, and its participation was said to be in the interests of Africa's advancement. Yet, South African representatives did not consult with other African countries.⁴⁷⁰

However, since the Ministerial Conference in Seattle, South Africa has tried to rectify its image. The country's participation in the Doha Development and Nairobi Ministerial Conference was primarily aimed at the advancement of developing countries. In November 2013, the South African Trade and Industry parliamentary monitoring group had a meeting to discuss the country's negotiating objectives for the Doha Round.⁴⁷¹ The report from that meeting highlighted that South Africa's main focus during the Doha Round would be to ensure that existing imbalances were overcome, and the outcomes of the round would ensure developmental gains for developing countries.⁴⁷² Further, South Africa would achieve these goals by forming alliances with other Southern groups such as NAMA-11, Africa Group, G90 and G20.⁴⁷³

Ismail notes that South Africa's ability to build the abovementioned bridges with other developing countries resulted in the country assuming an important role in the negotiations on SDT for developing countries.⁴⁷⁴ As mentioned above, SDT was one of the critical areas for developing countries when the Doha Round commenced. However, even after assuming

⁴⁶⁹ See Kent Jones *Green Room Politics and the WTO's crises of Representation* Centre for the Study of International Institution Conference, November 2004. See also Daniel C. Esty 'The World Trade Organisation's legitimacy crisis' (2002) Volume 1(1) *World Trade Review* 14. According to Esty, the exclusion of most developing country representatives from the green room signifies that the WTO is not adequately representative. It further raises the question of the WTO's legitimacy.

⁴⁷⁰ Keet op cit note 456 above at 9.

⁴⁷¹ The country's objectives were aimed at firstly, 'enhancing market access for products of exports interests in developing countries', secondly to 'renegotiate rules that perpetuate imbalances in the international trade regime' and thirdly to 'ensure appropriate policy space for developing countries to pursue development objectives through meaningful implementation of the principle of SDT'. See Parliamentary Monitoring Group 'South Africa's Approach to the WTO 9th Ministerial Conference' (Trade and Industry Meeting Report, 01 November 2013) available at https://pmg.org.za/committee_meeting/16689/ accessed on 16 November 2020.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Ismail op cit note 450 above at 14.

this significant role, South Africa was still criticised for 'privileging trade-offs rather than stand-offs' with developed countries.⁴⁷⁵ Vickers also notes that the country's role in negotiations 'promoted and legitimised the WTO's agenda and its neoclassical model of development'.⁴⁷⁶

However, Lee presents a different view of South Africa's role in the WTO, which could explain its promotion of developed-country-orientated neoclassical model of development.⁴⁷⁷ Lee argues that South Africa's role in the WTO had more of a symbolic impact, but the substantive or the procedural impact is difficult to identify.⁴⁷⁸ The view presented by Lee raises speculation for this dissertation concerning South Africa's participation in the WTO. Perhaps South Africa's role is a façade, to make it seem as though African countries participation is similar to that of other developed nations. A statement by Kapoor succinctly elaborates the argument put forward by this dissertation regarding South Africa's participation. Kapoor states that:

'Power fixes or privileges certain types of knowledge, and ignores and suppresses others, so that it is the knowledge claims of the dominant participants that tend to get naturalised.'⁴⁷⁹

The argument is that South Africa's conformity with the agendas of the WTO favours the dominant powers, instead of Africa.⁴⁸⁰ The dominant powers seek to present the image of the WTO being an 'all-encompassing' organisation, which embraces the views of all countries, including African countries. However, in reality, the views of African countries or those of other developing and least developed countries are not treated the same as those of developed countries. The existing asymmetries prove that 'power politics' is and will continue to be the

⁴⁷⁵ Ibid.

⁴⁷⁶ Brendon Vickers 'Re-claiming development in multilateral trade: South Africa and the Doha Development Agenda' in Amrita Narlikar and Brendan Vickers *Leadership and Change in the Multilateral Trading System* Republic of Letters Publishing (2009). See also Ismail op cit note 450 above at 14.

⁴⁷⁷ Lee op cit note 170 above at 10.

⁴⁷⁸ Ibid.

⁴⁷⁹ Kapoor op cit note 427 at 534. See also Lee op cit note 170 above at 10.

⁴⁸⁰ The point made by this dissertation is further supported by Kapoor when he states 'the combination of inadequate legitimising procedures and lack of qualitative deliberations makes it unlikely that the WTO outcomes will be just. In the midst of power politics, exclusion, bargaining and unethical knowledge, the consensus reached in this multilateral sphere is most likely to be coerced and one-sided - to the advantage of Western members.'(p.534).

name of the game. The Seattle conference and the continued omission in addressing the failure of SDT are primary examples of this.⁴⁸¹

4.3.1.3 Regional Trade Contribution

South Africa's ties with the rest of the African continent are also built on principles enunciated from the country's struggle for freedom. Ismail writes that Nelson Mandela declared that:

‘South Africa's relations with the continent of Africa should be based on the ‘principles of equity, mutual benefit and peaceful cooperation’, as he committed the new South Africa to taking responsibility for the Southern African region, ‘not in a spirit of paternalism or dominance but mutual cooperation and respect’.⁴⁸²

When the democratic government took over in 1994, it ensured that all of its interests were primarily focused on Africa.⁴⁸³ As mentioned above, one of the founding principles of South Africa's foreign policy was that it would be conducted in the interests of the African continent.⁴⁸⁴ Walaza emphasises this by noting that when South Africa enters into trade agreements it ensures that regional integration efforts, particularly in the Southern African region, are promoted.⁴⁸⁵

According to Barber, when the new South African government came into power in 1994, the major powers were eager for South Africa to take over the role of being the leader of the continent.⁴⁸⁶ He adds that the major powers perceived South Africa as ‘the best internal hope’ for the continent.⁴⁸⁷ This internal hope would encourage economic growth and also bring stability to the continent.⁴⁸⁸

However, South Africa's advocacy for Africa is a contentious issue, as the country trades more with countries and blocs outside the continent. According to Cook, South Africa is the

⁴⁸¹ See Jianzhi Jin ‘The Failure of Special and Differential Treatment in International Trade: An Indication for Future WTO Rules’ [30 August 2020] available at <https://ssrn.com/abstract=3445751> accessed on 15 October 2020.

⁴⁸² Ismail op cit note 450 above at 4.

⁴⁸³ James Barber ‘The New South Africa's Foreign Policy: Principles and Practice’ (2005) Volume 81(5) *Royal Institute of Royal Affairs* 1083.

⁴⁸⁴ Ismail op cit note 450 above at 4.

⁴⁸⁵ Walaza op cit note 451 above at 3.

⁴⁸⁶ Barber op cit note 483 above at 1083.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

US's biggest trading partner in Africa.⁴⁸⁹ Further, the EU bloc is South Africa's biggest trading partner in the world.⁴⁹⁰ South Africa's top five trading partners are China, Germany, United States, United Kingdom and Japan.⁴⁹¹ This dissertation suggests that South Africa's dedication to the African continent must not only be said to be done, but it must be seen to be done. South Africa's trade statistics and trade figures must speak for the country's dedication to regional and intra-African trade.⁴⁹²

This suggestion acknowledges that South Africa's economic and political strength continues to carry the Southern African region. Saurombe states that South Africa's leading role in the region has been of great benefit to the SADC bloc, as it expands the regions' prospects in many regards.⁴⁹³ Moreover, the country's dominance in the region could cause severe disruptions.⁴⁹⁴ The country has been accused of adopting policies to the country's benefit but the disadvantage of its neighbours.⁴⁹⁵ These accusations are the reasons why this dissertation further cites Saurombe's assertion that South Africa's attempt to balance its global, regional, continental and domestic interests places it in a dilemma.⁴⁹⁶

Despite this dilemma, this dissertation maintains that South Africa continues to advocate for the advancement of the African continent. Notably, South Africa was one of the first African countries to sign the AfCFTA agreement and during its signing, the nation's President stated:

⁴⁸⁹ Nicholas Cook *South Africa: Current Issues, Economy and U.S Relations* (2020) Congressional Research Service Report.

⁴⁹⁰ Mills Soko 'Here's why South Africa and its neighbours are anxious about EU and UK post-Brexit trade talks' *The Conversation* 18 September 2020 available at <https://www.google.com/amp/s/theconversation.com/amp/heres-why-south-africa-and-its-neighbours-are-anxious-about-eu-and-uk-post-brexit-trade-talks-146414> accessed on 27 August 2020.

⁴⁹¹ Santander Trade Compliance 'South African Foreign Trade in Figures' (2020) available at <https://santandertrade.com/en/portal/analyse-markets/south-africa/foreign-trade-in-figures#:~:text=South%20Africa's%20top%20trading%20partner%20in%20Africa> accessed 18 September 2020.

⁴⁹² See Table 3 below in the appendix for South Africa trade figures.

⁴⁹³ Amos Saurombe 'The role of South Africa in SADC regional integration: the making or braking of the organisation' (2010) Volume 5(3) *Journal of International Commercial Law and Technology* 124. See also Fritz Nganje *Policy Brief: South Africa and SADC: Options for Constructive Regional Leadership* (2014) Institute for Global Dialogue Issue at 105.

⁴⁹⁴ Ibid.

⁴⁹⁵ Barber op cit note 483 above at 1083.

⁴⁹⁶ Saurombe op cit note 493 above at 125. For this dissertation, the dilemma is how South Africa will balance its domestic interests with the continent's interests and those of the region.

‘South Africa remains committed to a coordinated strategy to boost intra-Africa trade and to build an integrated market in Africa that will see a market of over one billion people and approximately \$3.3 trillion in GDP ...’⁴⁹⁷

As mentioned above, AfCFTA was launched earlier this year and South Africa submitted its tariff offer, together with the rest of the Southern African Customs Union.⁴⁹⁸ South Africa’s commitment and participation in this continental body has also been evidenced by a South African being chosen as its secretariat. As already mentioned above, Wamukele Nene is the secretariat of this intra-African trade body.

4.3.1.4 Domestic policies

In the period of transition after 1994, the country’s policies also went through such a transition. For this dissertation, South Africa’s economy serves as a desirable model for a country whose internal environment has had a significant impact on its external environment. South Africa’s years of apartheid impacted its economy in a manner that disrupted the international scene because when the apartheid regime fell apart, instead of immediately investing in South Africa’s economy, investors held back in anticipation of what might happen after the first democratic elections.⁴⁹⁹

After the elections, South Africa did not perform as expected, as the country was faced with including its previously marginalised majority in the economy.⁵⁰⁰ The government’s attention was therefore centred on increasing the country’s self-sustainability. Thus, in 1994 a socio-economic programme termed the Reconstruction and Development Programme (RDP) was immediately adopted.⁵⁰¹ Although this policy was the bedrock of government policy, it did

⁴⁹⁷ Tralac News *SA signs African Continental Free Trade Area agreement* 3 July 2018 available at <https://www.tralac.org/news/article/13216-sa-signs-african-continental-free-trade-area-agreement.html> accessed on 17 October 2020.

⁴⁹⁸ Willemiem Viljoen *South Africa’s Implementation of the African Continental Free Trade Agreement customs arrangement and technicalities* <https://www.tralac.org/blog/article/> accessed on 13 July 2021.

⁴⁹⁹ Martin Hall *South Africa – Economy* Britannica 11 October 2011 available at <https://www.britannica.com/place/South-Africa/Economy#ref920783> accessed on 28 October 2020.

⁵⁰⁰ Ibid.

⁵⁰¹ *South Africa’s Key Economic policy changes (1994-2013)* available at <https://www.sahistory.org.za/article/south-africas-key-economic-policies-changes-1994-2013> accessed on 28 October 2020.

not perform as expected for the country's economic growth.⁵⁰² A fundamental problem was the country's overreliance on imports.⁵⁰³

To curb this problem, in 1996, the government introduced a new policy termed Growth Employment and Redistribution (GEAR), primarily aimed at enhancing economic growth.⁵⁰⁴ This programme was seen as the main engine for South Africa's economic stability, poverty alleviation and inequality.⁵⁰⁵ As stated by Mahadea, GEAR aimed to make the economy 'a more competitive outward-orientated system'.⁵⁰⁶ GEAR did not lay the RDP to rest but primarily focused on the promotion of a 'market-orientated economy',⁵⁰⁷ marking the further liberalisation of South Africa's economy.⁵⁰⁸ Although Cronje's asserts that the openness of a country's economy to trade is sound policy, with trade liberalisation being fundamental to the process,⁵⁰⁹ GEAR sustained criticism for being 'typical of an IMF structural adjustment programme'.⁵¹⁰ This reflection did not surprise South Africans, as Kahn notes that trade unions have criticised the IMF and the operation of the global financial system.⁵¹¹

The trade union's strong opposition to the international financial system was also reflected in their support of and participation in multiple protests, which took place worldwide against global international institutions. As reported by the Mail and Guardian (M&G) newspaper:

⁵⁰² Ibid.

⁵⁰³ Hall op cit note 499 above.

⁵⁰⁴ Judith C Gomersall 'The Gear legacy: Did Gear Fail or move South Africa forward in development?' (2004) Volume 21(2) *Development Southern Africa* 272.

⁵⁰⁵ Ibid.

⁵⁰⁶ Darma Mahadea 'The Fiscal System and Objectives of GEAR in South Africa – Consistent or Conflicting' (1998) Volume 1(3) *SAJEMS* 448.

⁵⁰⁷ Thembinkosi L. Lehloesa *South Africa's Growth Employment and Redistribution Strategy in the Structural Adjustment Programmes in the South* (unpublished Masters of Arts thesis, Rhodes University, 2000) 5.

⁵⁰⁸ Ibid at 5. He cited an argument made by Edward Osborn in 'Why Gear Isn't Working: An update' (1997) Volume 14(3) *Indicator South Africa* 26-30.

⁵⁰⁹ Elizabeth Cronje *The Impact of Trade Liberalisation on the South African Automobile and Textile Industries* (unpublished Magister Commercii (Economics) thesis, North-West University, 2004) 2.

⁵¹⁰ Brian Kahn 'Debates over IMF reform in South Africa' (2000) *Studies on International Financial Architecture* IMF Special, No.6 at 4. Kahn states that the presence of two World Bank members was contentious.

⁵¹¹ Ibid. COSATU was not consulted during the processes leading to the adoption of GEAR.

See Laura Kapp *The responses of trade unions to the effects of Neoliberalism in South Africa: the case of COSATU and its affiliated unions* (unpublished Masters thesis, UNISA, 2013) 7. See Donna McGuire and Christoph Scherrer 'Developing a Labour Voice in Trade Policy at the National Level' Global Labour University Working Papers [Paper No.8, February 2010]. See also Keet op cit note 456 above.

‘From November 1999 in Seattle to Davos, Bangkok, Cochabamba, Washington, Chiang Mai, Bombay, Buenos Aires, London, Istanbul, Lagos, Windsor, Johannesburg and Nice, powerful anti-globalisation demonstration have targeted the World Bank, the International Monetary Fund (IMF) and the World Trade Organisation.’⁵¹²

The M&G newspaper continued to report that upheavals were mainly against the ‘neoliberal dogma of governments’, who present no alternative except the liberalisation of markets.⁵¹³ Harvey asserts that the liberalisation of markets means that the markets of Third World countries would be further opened to powerful and rich nations, who would continue to take advantage of poorer countries, thus extending and strengthening their dominance over them.⁵¹⁴ He further asserts that this would increase the existing disparities and imbalances between wealthy and impoverished nations.⁵¹⁵ This dissertation acknowledges Harvey's assertions because as was stated in chapter one,⁵¹⁶ the liberalisation of markets continues to benefit powerful nations at the expense of less developed nations. Moreover, markets of poorer nations are eroded as they continue to succumb to the markets of powerful nations due to unfair trade terms and policies.

Reform of the WTO and of the international system is required to balance the interests of all member states, as the WTO continues to be an ‘unaccountable, corporate-led and non-democratic’ institution.⁵¹⁷ This dissertation calls for this reform, as there has been unsatisfactory improvement since Seattle. The unfair trade policies, failure on the part of SDT, the WTO's continued lack of assistance to developing countries and the current dispute settlement dilemma proves the need for reform.⁵¹⁸

⁵¹² Glenda Daniels & David Macfarlane ‘The global revival of the left’ *Mail & Guardian* 16 February 2001 at para 2 available at <https://mg.co.za/article/2001-02-16-the-global-revival-of-the-left/?amp> accessed on 18 October 2020.

⁵¹³ Ibid.

⁵¹⁴ Ebrahim Harvey ‘From Seattle to Davos and beyond’ *Mail & Guardian* 20 April 2000 available at <https://mg.co.za/article/2000-04-02-from-seattle-to-davos-and-beyond/> accessed on 18 October 2020.

⁵¹⁵ Ibid.

⁵¹⁶ See chapter one, page 11.

⁵¹⁷ Anup Shah ‘IMF & World Bank Protests, Washington DC’ 2001 *Global Issues* available at <https://www.globalissues.org/article/23/imf--world-bank-protests-washington-dc> accessed 18 October 2020.

⁵¹⁸ It has been argued that the WTO's dispute settlement system allows powerful nations to ‘adopt cross-retaliatory measures under the guise of the dispute’ and the settlement in these disputes may not favour developing countries (p.13). The current dispute settlement controversy also supports the argument that developed countries use dispute settlement mechanisms to exert their power or influence. The current controversy revolves around the US refusing to nominate Appellate Body representatives and its further blocking of the AB. See Adewale op cit note 115 at 13. See also Marianne Schneider-Petsinger *Reforming the*

4.3.2 NIGERIA

4.3.2.1 Background

Nigeria has the 26th largest economy in the world.⁵¹⁹ This West African nation is the largest oil exporter in the African continent and it was also ranked as the sixth-largest oil producer in the Organisation of Petroleum Exporting Countries (OPEC).⁵²⁰ Natural resources make a significant contribution to the country's economy.⁵²¹ Due to high oil prices, its economy has recorded a growth equivalent to seven per cent during the decade leading up to 2015.⁵²² However, the country has been termed a 'one-trick pony', due to its extensive reliance on oil.⁵²³ Ninety per cent of the country's exports earnings are from oil and seventy per cent of government revenue stems from oil.⁵²⁴ Nigeria has made attempts to diversify its economy by creating sectors such as 'agriculture, solid mineral mining and construction materials and manufacturing'.⁵²⁵ These measures have been implemented in recognition of the importance of an effective trade policy to enable better participation in both the multilateral and the regional levels in trade.⁵²⁶

Adopting effective trade policies is essential because Nigeria's economy has suffered due to decades of mismanagement.⁵²⁷ The country has suffered from flawed authoritarian rule, poorly formulated and managed government policies, and a lack of basic infrastructure.⁵²⁸

World Trade Organisation: Prospects for Transatlantic Cooperation and the Global Trade System (Chatham House Research Paper, September 2020) 2.

⁵¹⁹ World Trade Organisation (WTO) 'Nigeria and the WTO' available at www.wto.org/english/tratop_e/tpr_e/5356_sum_e accessed on 24 August 2020. See also Abubakar Dubagari op cit note 103 at 60.

⁵²⁰ Ibid. See also Elimma Ezeani 'Economic and Development Policy-Making in Nigeria' (2012) Volume 56 *Journal of African Law*. See also Gordon op cit note 101 at 42. See also John Idumange 'Rethinking Nigeria's Economic Diplomacy' *Pointblanknews* 5 June 2010 available at <http://pointblanknews.com/Articles/artopn2707.html> accessed on 25 August 2020.

⁵²¹ WTO Nigeria note 519 above. See also Ezeani op cit note 520 above at 1.

⁵²² Ibid.

⁵²³ Michael Roberts 'Nigeria's nightmare' available at <https://www.thenextrecession.wordpress.com/2019/02/24/nigerias-nightmare/> accessed on 24 August 2020.

⁵²⁴ WTO Nigeria note 519 above.

⁵²⁵ Ibid.

⁵²⁶ Rasak Bamidele 'Nigeria's Trade Policy and Economic Development: From the lens of the World Trade Organisation (WTO)' (2013) Volume 5 *Nnamdi Azikiwe University Akwa Journal of Sociology* 1.

⁵²⁷ Abubakar Dubagari op cit note 104 above at 60.

⁵²⁸ Ibid.

This has affected Nigeria's global participation. However, before the COVID-19 pandemic, the country was reported to be on its way to becoming one of the largest economies in the world.⁵²⁹ The next part of this dissertation provides a brief overview of the participation of Nigeria in the multilateral, regional and domestic spheres. It also highlights some of the challenges the country faces in these three respective spheres.

4.3.2.2 Multilateral Trading System Contribution

Nigeria signed the WTO treaty in December 1994, thus making it an original signatory to the agreement.⁵³⁰ The country has been an active participant in the organisation and it has made a significant effort to ensure effective compliance with its commitments.⁵³¹ However, Nigeria's road to multilateralism has been filled with challenges. Nigeria has previously defaulted on 20 WTO notifications,⁵³² reportedly because the country lacked laws or regulations to enable it to fulfil its obligations at the time.⁵³³

According to Abubakar Duagari, Nigeria's participation in the WTO has three main obligations:

1. To clearly reaffirm its commitment to the multilateral trading system, its rules and disciplines, and trade liberalisation;
2. To emphasise its economic and trade priorities;
3. To restate the challenges that it faces as a developing nation, to seek the concrete and technical support of the international community for fuller and more beneficial integration into the global trading system.⁵³⁴

Nigeria's participation in the WTO was to ensure the country's visibility on the global economic front and to ensure that its goods were made available in the world market.⁵³⁵ However, this came at a price, as being a signatory to WTO agreements requires compliance with the principles of trade liberalisation.⁵³⁶ Trade liberalisation inevitably meant that Nigeria's trade barriers would be removed and the country would have an open trading

⁵²⁹ Ibid. See also WTO Nigeria note 519 above.

⁵³⁰ Adewale op cit note 115 above at 6.

⁵³¹ WTO Nigeria note 519 above.

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Abubakar Dubagari op cit note 104 above at 61.

⁵³⁵ Ezeani op cit note 520 above at 118.

⁵³⁶ Ibid.

system.⁵³⁷ The removal of trade barriers was assumed to benefit the country. Hence Vijayasri notes that no country has been able to attain significant economic growth, with respect to the increase in the standard of living for its people, without opening its markets to the globe through trade.⁵³⁸

However, Nigeria's commitments to the WTO have been heavily criticised by the private sector in the country. The Organised Private Sector (OPS) in Nigeria states that WTO agreements are 'lopsided in favour of developed countries'.⁵³⁹ The OPS further maintains that the global trading system has to be reversed to ensure Nigeria's economy stays relevant in the world economic system.⁵⁴⁰ The OPS believes that the massive inflow of external goods (imports) into the country has tremendously affected and almost collapsed local industries.⁵⁴¹ The OPS echoes the same sentiments as the Pan-African Private Sector and Investment Committee (PAFTRAC), which has called for a complete reform of the WTO after criticising it for constraining African growth.⁵⁴² It outlined several reforms the WTO had to undertake for a more equitable and transparent multilateral trading system,⁵⁴³ placing much emphasis on unjust trading terms in agreements.⁵⁴⁴

Adewale argues that Nigeria has tremendously suffered from signing the WTO agreement, saying:

'Shortly after signing without a concrete study of implication therein, the nation's numerous industries, including its 100 textile firms began to experience serious production decline.'⁵⁴⁵

As was the case with South Africa, Nigerian officials (and officials from other African countries) signed the WTO agreement without fully comprehending its implications for their country.⁵⁴⁶ Apecu takes the argument further:

⁵³⁷ Ibid.

⁵³⁸ G V Vijayasri 'The Importance of International Trade in the World' (2013) Volume 2(9) *International Journal of Marketing, Financial Services and Management Research* 114.

⁵³⁹ Nnabuihe, Odunze & Okebugwu op cit note 144 above at 398.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² 'African Private Sector upbeat about the future but demands fairer and more transparent Global Trading System' *Africa News* available at <https://www.africanews.com/> accessed on 20 November 2020.

⁵⁴³ Ibid.

⁵⁴⁴ Shoshana Kede 'African Private Sector calls for WTO reform' (2020) *African Business* available at <https://africabusinessmagazine.com/sectors/trade/african-private-sector-calls-for-wto-reform/> accessed 11 November 2020.

⁵⁴⁵ Adewale op cit note 115 above at 6.

‘At the coming into force of the WTO in 1995, African WTO members were confronted with the ‘implementation challenge’ of substantive legal results of the Uruguay Round to which they had become bound, regardless of their level of participation or whether they had fully understood those commitments undertaken.’⁵⁴⁷

Further, Aremu adds that Nigeria has reached a state of 'quandary' and does not know what it will do with these agreements.⁵⁴⁸ Adewale continues to explain that there still exists a ‘thick layer of ignorance’ surrounding these agreements, yet they still prolong poverty and deprive the people of their land.⁵⁴⁹ As such, these agreements have been termed ‘another means of slavery and colonialism’.⁵⁵⁰ However, back-tracking from them would be strenuous and costly, as most African countries still rely economically on Western counterparts,⁵⁵¹ as was observed with South Africa’s trade relationship with the EU.

Abubakar Dubagari makes a statement that succinctly coincides with the premise of the dissertation. According to the author:

‘The global trading system is dominated by a few hegemonic trading powers. This minority tends to be far more interested in gaining market access to or shutting imports out from developing countries than in promoting export-orientated growth in those countries. The powers preach free trade until they come to the negotiating table with developing countries when they become mercantilists.’⁵⁵²

These scholars have thus drawn attention to important issues. First, when African countries signed the agreements to be part of the WTO, they were not fully aware of the implications that the agreements would have on the continent, the individual states, and the lives of people in those states.⁵⁵³ This post-colonial factor has prejudiced the participation of African countries in world trade, damaged their economies and most importantly, caused hardship to the people of the continent. Secondly, it appears that African governments entered into these agreements based on assumed benefits, but the opposite has been the case, as seen with the case of Nigeria. These two points underline that the multilateral trading system continues to

⁵⁴⁶ Ibid.

⁵⁴⁷ Apecu op cit note 12 above para 32.

⁵⁴⁸ Jonathan Aremu ‘Nigeria in a Quandary of Trade Negotiation under Three Main Economic Integrations’ (2019) Volume 1(1) *CIFILE Journal of International Law* 10.

⁵⁴⁹ Adewale op cit note 115 above at 7.

⁵⁵⁰ Nnabuihe, Odunze & Okebugwu op cit note 144 above at 3.

⁵⁵¹ Adewale op cit note 115 above at 7.

⁵⁵² Abubakar Dubagari op cit note 104 above at 57.

⁵⁵³ Adewale op cit note 115 above at 7.

be dominated by a few hegemonic powers that practise mercantilism and thus exert their influence on developing countries.

This dominance has even resulted in developing economies forming coalitions in the WTO to strengthen their bargaining power. Nigeria is a member of several of these coalitional groups.⁵⁵⁴ Abubakar Dubagari notes that developing country coalitions act as units in WTO negotiations.⁵⁵⁵ These countries have discovered that the 'structural power asymmetries' in the WTO hinder their participation and further isolates them in decision-making processes.⁵⁵⁶ Therefore, the coalitions are a means to 'sustain effective participation'.⁵⁵⁷ It can be argued that the formation of coalitions is an exemplar strategy to be adopted by African countries if they want to attain a dominant position.

4.3.2.3 Regional Trade Contribution

Nigeria is the founding member of the ECOWAS and it is a signatory to the AfCFTA.⁵⁵⁸ Nigeria played an instrumental role in the formation of the ECOWAS. The country's commitment to West Africa stretches back to the 1960s, after independence, when the idea of Pan-Africanism was institutionalised.⁵⁵⁹ Ojo states that:

'Nigeria's position was that economic integration must precede political union and that economic integration itself must begin at the sub regional level and proceed in stages beginning with functional cooperation and coordination and leading towards, perhaps a common market.'⁵⁶⁰

Nigeria's position immediately after independence and its position almost six decades after independence when the AfCFTA was introduced are very different. Nigeria was hesitant to sign the agreement establishing the common market, despite once having promoted its formation. Akinkugbe reports that the Nigerian government's hesitation to sign was not a rejection of the agreement. However, it was to have time to consult key stakeholders in the

⁵⁵⁴ Nigeria is a member of the African, Caribbean and Pacific countries (APC), African Group, G20, G33, G90, etc. See WTO Nigeria note 85.

⁵⁵⁵ Abubakar Dubagari op cit note 104 above at 60.

⁵⁵⁶ Carolyn Deere Birkbeck and Meg Harbourn *Developing country coalitions in the WTO: Strategies for improving the influence of the WTO's weakest and poorest members* (2011) GEG Working Paper No 2011/63 at 4.

⁵⁵⁷ Peter Draper & Razeen Sally *Developing Country Coalition in Multilateral Trade Negotiations: Aligning the Majors?* (2005) South African Institute of International Affairs 7.

⁵⁵⁸ WTO Nigeria note 520 above.

⁵⁵⁹ Olatunde J.B Ojo 'Nigeria and the formation of ECOWAS' (1980) Volume 34 *International Organisation* 572.

⁵⁶⁰ Ibid.

country, contrary to WTO processes.⁵⁶¹ The United Nations Economic Commission for Africa (UNECA) reports that at Nigeria's National Forum, held in Lagos on the African Continental Free Trade Area (AfCFTA), several issues were identified which the country needed to resolve before entering into the regional plan.⁵⁶² Two of the most pivotal were the issues of implementation and capacity constraints within the government.⁵⁶³ Other issues included unfair trading practices.⁵⁶⁴ Moreover, the Nigerian officials were concerned that the country would be flooded with low-priced goods, which would contradict its efforts to encourage local manufacturing.⁵⁶⁵

Akinkugbe further reports that regardless of the abovementioned issues, Nigeria commended the formation of the AfCFTA and it sees it as an opportunity to continue with its continental leadership role.⁵⁶⁶ Nigeria's continental leadership is exemplified in the role it has played and continues to play in the ECOWAS. This dissertation describes Nigeria as playing 'the role of saviour' to ECOWAS. This description stems from Osondu's assertion that Nigeria has kept the organisation alive over the years by committing itself fully to its enhancement.⁵⁶⁷ Yet, Nigeria has not reaped what it has sown.⁵⁶⁸ Osondu conducted a survey to prove this assertion and these were her results:

- a. In the ECOWAS member states' trading activities with Nigeria, nearly all the countries individually imported more from Nigeria. In other words, the entire ECOWAS states' imports from Nigeria were by far higher than their exports to her each year.
- b. Nigeria's national interests pursued within the context of ECOWAS are peace, national security and prestige.

⁵⁶¹ Olabisi D Akinkugbe 'Why Nigeria had good reasons to delay signing Africa's free trade deal' (2018) *The Conversation* available at <https://theconversation.com/why-nigeria-had-good-reasons-to-delay-signing-africas-free-trade-deal-100203> accessed on 28 October 2020.

⁵⁶² United Nations Economic Commission for Africa *AfCFTA forum identifies key challenges Nigeria should tackle ahead of ratification and implementation* (2019) available at <https://www.uneca.org/stories/afcfta-forum-identifies-key-challenges-nigeria-should-tackle-ahead-ratification> 28 October 2020.

⁵⁶³ Ibid.

⁵⁶⁴ Akinkugbe op cit note 561 above.

⁵⁶⁵ Balima op cit note 362 above.

⁵⁶⁶ Akinkugbe op cit note 561 above.

⁵⁶⁷ Monica Oluchi Osondu 'Membership in the Multilateral Economic Organisations: An evaluation of Nigeria's participation in ECOWAS (1985-2014)' (2015) Volume 10 *International Journal of Development and Management Review* 96.

⁵⁶⁸ Ibid.

- c. The Nigerian economy/people suffered due to the country's massive spending for the sustenance of ECOWAS.
- d. Nigeria's contribution to ECOWAS outweighs the contribution of other member states put together.⁵⁶⁹

After considering these findings, this dissertation finds that Nigeria's delays for thorough consultations were substantiated. Consultation is an essential step of any trade negotiation because the decisions taken affect the government and the people of the country. Nigeria's commitment to the lives of its people was also reflected when President Buhari refused to sign the West-Africa trade agreement. This trade partnership was intended to eliminate the restrictions on trade between the EU and ECOWAS.⁵⁷⁰ President Buhari's refusal to sign this agreement was because it would jeopardise the country's industrialisation and the need to create jobs for the youth.⁵⁷¹ This dissertation endorses the actions of President Buhari, first because he put his people first and secondly because this agreement would have had the potential to limit and undermine intra-African trade.

4.3.2.4 Domestic policies

Nigeria is the largest country in Africa, with a population of around 200 million, yet its level of social advancement is deficient.⁵⁷² This is largely due to the country having suffered from decades of misrule, thus creating an unstable political environment.⁵⁷³ Repeated disruption to the country's political environment (including a period of military rule) has also resulted in development-related regulations and trade policies undergoing multiple changes.⁵⁷⁴

The underlying source of conflict in Nigeria has been the uneven distribution of wealth from its oil revenue.⁵⁷⁵ Reportedly, Nigeria receives approximately US\$45 billion a year in oil

⁵⁶⁹ Ibid at 106.

⁵⁷⁰ Chris Giles 'Nigeria rejects West Africa-EU free trade agreement' *CNN* 6 April 2018 available at <https://www.google.com/amp/s/amp.cnn.com/cnn/2018/04/06/africa/nigeria-free-trade-west-africa-eu/index.html> accessed on 13 October 2020.

⁵⁷¹ Jacques Berthelot 'The EU caught in the trap of Nigeria's refusal to sign the West Africa Economic Partnership Agreement and the Continental Free Trade' (2018) *CADTM* 9 May 2018 available at <https://www.cadtm.org/The-EU-caught-in-the-trap-of> accessed on 15 October 2020.

⁵⁷² Ezeani op cit note 520 above 110. See also Roberts note 523 above.

⁵⁷³ Gordon op cit note 101 above at 41.

⁵⁷⁴ Ezeani op cit note 520 above at 111.

⁵⁷⁵ Gordon op cit note 101 above 39-40.

revenue, but the average Nigerian worker brings home US\$1.149 per capita income a year.⁵⁷⁶ Inequality is a huge factor in Nigeria, as the country is reported to have a Gini coefficient of income inequality over 40, and out of 180 countries it was also listed as the 144th least corrupt state by Transparency International's corruption index in 2018.⁵⁷⁷

Political, social and developmental considerations have played an immense role in Nigeria's economic development, resulting in the country having to go through severe regulatory and policy changes. For example, it is reported that between 1960 and 1985, the country endured four development plans.⁵⁷⁸ These development policies failed primarily because Nigeria, (like other African countries) declined to address its economic issues after independence through effective diplomatic policy.⁵⁷⁹ Further, Nigeria faced a series of social, economic and political challenges, including a civil war, lack of good governance and a mono-economic policy.⁵⁸⁰ This dissertation reveals that the adoption of any national policy programmes will fail if the domestic institutions or conditions do not allow or accommodate the policy to flourish. Nigeria is the primary example of this argument.

Nigeria's trade policies can be divided into two regimes, the pre-structural adjustment programme (SAP) era and the post-structural adjustment programme era.⁵⁸¹ The four development policies mentioned above fall under the pre-SAP era. The SAP was introduced by the Bretton Woods Institutions, which consists of the World Bank and the International Monetary Fund, in 1986, to address economic imbalances and thus lead to economic prosperity.⁵⁸² The SAP created further problems for Nigeria's social and economic development and left a considerable impression on the country's economy.⁵⁸³ Like other

⁵⁷⁶ Ibid.

⁵⁷⁷ Roberts note 523 above.

⁵⁷⁸ Ezeani op cit note 520 above at 115-6. These four development policies fell under the pre-Structural adjustment policy regime. The First National Development Plan (1962-1968); the Second National Development Plan (1970-1974); the Third Development Policy (1975-1980) and the Fourth Development Plan (1975-1980). See Tolu Lawal & Abe Oluwatoyin 'National Development in Nigeria: Issues, challenges and prospects' (2011) Volume 3(9) *Journal of Public Administration and Policy Research* at 238-9.

⁵⁷⁹ John Idumange 'Rethinking Nigeria's Economic Diplomacy' (2010) *Pointblanknews* available at <http://pointblanknews.com/Articles/artopn2707.html> accessed on 25 August 2020.

⁵⁸⁰ Lawal and Oluwatoyin op cit note 578 above at 238-9.

⁵⁸¹ Sylester Anani Anaba *Trade Policy Reforms in Nigeria* available at http://www.academia.edu/7342179/TRADE_POLICY_REFORMS_IN_NIGERIA accessed on 4 September 2020.

⁵⁸² Ibid.

⁵⁸³ Ibid.

African countries that adopted this programme, Nigeria incurred a major balance of payment deficits due to excessive loans from these developed-country-orientated institutions to fulfil the budgetary requirements for the programme.⁵⁸⁴

The SAP cements two arguments that this dissertation made in the previous chapter. First, this dissertation sees the SAP as a means by Western countries to legitimise their access to African countries through agreements and excessive loans.⁵⁸⁵ African countries had no way of paying substantial resultant deficits, mainly because they had just attained their independence. They could repay these loans by either borrowing more money (meaning more debt) or their resources would have to stand as security for their debt. Secondly, this dissertation highlights how the imposition of a European model on African realities will always yield the same outcome – an outright failure for the continent. African solutions are required for African problems.

In 2004, Nigeria implemented the National Economic Empowerment Development Strategy (NEEDS), which aimed to raise the standard of living through various reforms.⁵⁸⁶ NEEDS recognised that Nigeria's trade policies were not in line with those of the rest of the region and other developing countries.⁵⁸⁷ It therefore envisioned a move to the ECOWAS Common External Tariff and the removal of ad hoc non-tariff barriers in Nigeria.⁵⁸⁸ This policy recognised Nigeria's participation in both regional trade and global trade, as it de-regularised and liberalised its trade policies.⁵⁸⁹ The trade policy in Nigeria aimed to promote the

⁵⁸⁴ Ibid.

⁵⁸⁵ This dissertation argues that law has always been used as an instrument to subjugate, oppress, and exploit African countries. See Stephen Ocheni & Basil C Nwankwo 'Analysis of Colonialism and its impact in Africa' (2012) Volume 8(3) *Cross Cultural Communication* 48. They argue that Europeans believed that to have 'effective and efficient management, as well as maximisation of the capitals transported to the African colonies, there was need for their home governments either to take direct control of the African economy and political administration of the area or grant them permission through a charter'. (at 48)

⁵⁸⁶ Abubakar Dubagari op cit note 104 above. NEEDS was based on three pillars: (a) empowering people and improving social service delivery; (b) fostering economic growth, in particular in the non-oil private sector, and (c) enhancing the effectiveness and efficiency of government and improving governance. See *Nigeria Joint IDA-IMF Staff Advisory Note on the National Economic Empowerment and Development Strategy* (October, 6 2005) Report No. 33305-NG at 2.

⁵⁸⁷ Ibid (Staff advisory) at 5.

⁵⁸⁸ Ibid at 5.

⁵⁸⁹ Bamidele op cit note 526 above. See also Nigeria Joint IDA-IMF Staff Advisory Note note 586 above at 80-2. See also Sobho Khan Jamali and Lawal Mohammed Anka 'Trade Policy in Developing Countries: A Case Study of Nigeria and Pakistan' (2011) Ontario International Development Agency ISSN 1923 – 6662 at 45.

production and distribution of goods and services, to reassure its commitment to domestic and international markets.⁵⁹⁰ However, this policy yielded insignificant results.⁵⁹¹

When President Muhammadu Buhari was elected, the Economic Recovery and Growth Plan (ERGP) was developed as a medium-term plan from 2017-2020, by the administration of the President.⁵⁹² This plan was in response to Nigeria's economic recession, with the objectives of 'restoring growth, investing in people and building a globally competitive economy'.⁵⁹³ What is of concern to this study is that the President instructed that the borders of Nigeria be closed to increase local production and prevent the smuggling of imports.⁵⁹⁴ Reportedly, these borders will only open once neighbouring African countries adhere to the rules of origins within ECOWAS, created to curb the dumping of cheap Western and Chinese goods.⁵⁹⁵

However, Nigeria's actions have raised questions. Although the country's actions benefit its development interest, there are concerns about whether it benefits the region. As a member of ECOWAS, it is bound by the principle of free movement of people, goods and services.⁵⁹⁶ Furthermore, as the AfCFTA is also based on the principle of free movement, Nigeria has

⁵⁹⁰ Jamali & Anka op cit note 589 above at 45.

⁵⁹¹ Lawal & Abe Oluwatoyin op cit note 578 above at 238.

⁵⁹² Damilola Salawu et al 'International trade in goods and services in Nigeria: overview' *Thomas Reuters* available at [https://uk.practicallaw.thomsonreuters.com/w-016-4262?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a617629](https://uk.practicallaw.thomsonreuters.com/w-016-4262?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a617629) accessed on 25 August 2020.

⁵⁹³ See Ejeh Adoyi Williams & Orokpo Francis. 'The Economic Recovery and Growth Plan (ERGP) as Developmental State Paradigm: An Introspection' (2019) Volume 5(3) *International Journal of Public Administration and Management Research (IJPAMR)* 12. To ensure the realisation of these objectives, the key execution priorities are as follows: 'stabilising the macro-economic environment with low inflation, stable exchanges rate and sustainable fiscal and external borders. This will be achieved by aligning monetary, trade, and fiscal policies coherently and effectively. Non-oil revenue will be accelerated through improved and customs administration and the introduction of a tax on luxury items. Cost-cutting measures will be pursued through rationalisation of overheads and recurrent expenditures and sub-national fiscal coordination'. See Salawu et al. op cit note 588 above.

⁵⁹⁴ Tope Alake 'Nigeria President Extends Border Closure to Jan.31, Punch Says' *Bloomberg* 3 November 2019 available at <https://www.bloomberg.com/amp/news/articles/2019-11-03/nigeria-president-extends-border-closure-to-jan-31-punch-says> accessed on 17 September 2019.

⁵⁹⁵ Salawu et al op cit note 592 above.

⁵⁹⁶ John Campbell 'Buhari Orders Land Borders Closed in Long-Running Efforts to Boost Rice Production' *Council on Foreign Relations* 17 October 2019 available at <https://www.cfr.org/blog/buhari-orders-land-borders-closed-long-running-effort-boost-rice-production> accessed on 17 September 2019.

acted contrary to both.⁵⁹⁷ The actions of Nigeria set an example of how difficult it will be to implement the free trade area and it also shows that aspirations are different from reality.⁵⁹⁸

Accordingly, this dissertation poses a question: should African countries part of the AfCFTA place their self-interest or the continent's interests first? Nigeria's actions were for the country's benefit, yet it was contrary to the ethos of the region. For this dissertation, it is significant that Nigeria's economy would not have recovered or improved from its post-recession position had it not closed its borders. This was the most effective solution. This dissertation also suggests that one keeps in mind that for Nigeria to participate in both regional and global trade effectively, it needs to be backed by a strong economy. The abovementioned questions show how complex the execution of the AfCFTA will be.

4.3.3 KENYA

4.3.3.1 Background

Kenya attained its independence in 1963 and it became a republic in 1964.⁵⁹⁹ Since then, it has undergone immense political and economic changes.⁶⁰⁰ Immediately after independence, the Kenyan government pursued the 'Kenyanization' of the economy, which followed a capitalist framework.⁶⁰¹ The government presented the strategy as African socialism to outmanoeuvre Vice President Odinga and his Kenyan left.⁶⁰² As such, Kenya has had issues

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Miriam W.O Omolo, Ruth Wanjia and Stephen Jairo *Comparative study of Kenya, US, EU and China Trade and Investment Relations* (2016) Institute of Economic Affairs available at <https://www.africaportal.org/publications/comparative-study-kenya-us-eu-and-china-trade-and-investment-relations/> accessed on 25 August 2020.

⁶⁰⁰ Tiyaambe Zeleza 'Economic Policy and Performance in Kenya since independence' (1991) Volume 20 *Trans African Journal of History* at 35.

⁶⁰¹ Ibid. Kenyanization was mainly aimed at replacing foreign workers who worked in critical areas of the economy with Kenyan nationals. See T J Aldington et al *The economics of Kenyanization* (1968) Nairobi: Institute for Development Studies, Discussion Paper 64. See also Maria S Muller 'The National Policy of Kenyanisation of Trade: Its Impact on a Town in Kenya' (1981) Volume 15(2) *Canadian Journal of African Studies* 239-301.

⁶⁰² Zeleza op cit note 600 above at 36.

of governance, which have impacted its economic performance. However, it remains one of the most developed and fast-growing countries in the eastern region.⁶⁰³

Kenya has been an active member of the WTO since its inception.⁶⁰⁴ The country's trade mission in Geneva is one of the most active missions and the country is the most active member of the Africa Group in the WTO.⁶⁰⁵ Regionally, the country leads the East African region in terms of trade, with mechanisms in place to open up its markets to both regional and international markets.⁶⁰⁶ Kenya is also an active member of multiple international and regional arrangements.⁶⁰⁷ This is discussed in the next section.

4.3.3.2 Multilateral Trading System Contribution

Kenya joined the WTO in 1995, making it a founding member of the organisation.⁶⁰⁸ Before that, Kenya was a member of GATT, having signed the agreement in 1964.⁶⁰⁹ Kenya is a signatory to all of the WTO's agreements.⁶¹⁰ Although Kenya has signed all these agreements, its participation in the WTO revolves around agriculture, the backbone of its economy.⁶¹¹ However, the lack of effective measures for consultation and coordination in the country has undermined Kenya's attempts to engage its stakeholders in the decision-making process.⁶¹² Regardless, the country has shown a keen interest in participating in global trade.

⁶⁰³ World Trade Organisation 'Trade Review Policy: Kenya' (2000) available at https://www.wto.int/tpr_e/tp124_e accessed on 25 August 2020.

⁶⁰⁴ International Trade Centre *ITC by Country Report: Kenya* (2014) at 3 available at <https://www.intracen.org/country/kenya/> accessed on 25 September 2020.

⁶⁰⁵ Gichinga Ndirangu 'The WTO Agenda from a Kenyan Point of View' in Sebastian Sperling (ed) *A changing global order: Eastern African Perspectives* Friedrich Ebert Stiftung Kenya (2007) 28.

⁶⁰⁶ Omolo, Wanja and Jairo op cit note 599 above.

⁶⁰⁷ Some of the regional and international arrangements that Kenya is part of are: it is the signatory to the WTO; member of the ACP group; signatory of the EAC; signatory of the AfCFTA.

⁶⁰⁸ Omolo, Wanja and Jairo op cit note 599 above.

⁶⁰⁹ Ambassador Nelson Ndirangu *Presentation on Kenya's experience at the WTO – 28 August 2017* available at https://www.wto.org/ndirangu_sess1PDF accessed on 25 September 2020.

⁶¹⁰ This includes Agreement on Agriculture (AOA); the General Agreement on Trade in Services (GATS); the Agreement on Textiles and Clothing (ATC) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS). Kenya completed the notification process for all these agreements on 31 December 1994. See Walter Odhiambo, Paul Kamau & Dorothy McCormick *Kenya's Participation in the WTO: Lesson Learned' in Managing the Challenges of WTO Participation* Cambridge University Press (2005).

⁶¹¹ Food and Agriculture Organisation of the United Nations 'FAO in Kenya' (2020) available at <https://www.fao.org/kenya/foa-in-kenya/kenya-at-a-glance/en/> accessed on 30 September 2020.

⁶¹² Odhiambo, Kamau & McCormick op cit note 610 above.

In line with its commitment to the WTO, the Kenyan government established the Permanent Inter-Ministerial Committee (PIMC), which advises the government on its WTO commitments.⁶¹³ Initially, it excluded key stakeholders from the private and civil society,⁶¹⁴ but in 1997 the government reformed this committee to include both the initially excluded sectors and it was renamed the National Committee on WTO (NCWTO).⁶¹⁵ Kenya's inclusion of its citizens in decision-making processes is in line with the people-inclusive approach to negotiations advocated by this dissertation. In this regard, Kenya sets a primary example of how important it is to make citizens aware of decisions that affect them and include them in making those decisions.

Kenya's keen interest in participating in global trade was also shown during the Seattle Round when Kenya coordinated the Africa Group, and the country was among the developing countries that did not allow the introduction of new issues.⁶¹⁶ The country was more concerned with implementation concerns that arose from the Uruguay Round.⁶¹⁷ Kenya's concern with implementation prompted the country to play an active role in creating and forming multiple WTO agendas during negotiations.⁶¹⁸ Some of these agendas included agriculture, SDT provisions and development issues.⁶¹⁹ In fact, during the Doha Round, Kenya participated on paragraph 44 issues on strengthening SDT.⁶²⁰ Kenya, with 11 other African countries, demanded an effective framework for SDT.⁶²¹ Alternative formulations of SDT were put forward by this group, with respect to the understanding of the technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) agreements and the understanding of dispute settlement.⁶²²

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ Ibid.

⁶¹⁶ Ambassador Ndirangu op cit note 609 above.

⁶¹⁷ Ibid.

⁶¹⁸ Ndirangu op cit note 605 above at 28.

⁶¹⁹ Ibid.

⁶²⁰ Ambassador Ndirangu op cit note 609 above.

⁶²¹ Other countries include Dominican Republic, Cuba, India, Honduras, Malaysia, Indonesia, Sri Lanka, Pakistan, Uganda, Zimbabwe and Tanzania.

⁶²² Some of the remedies offered by this group were: (a) special treatment should be legally binding and enforceable before the Dispute Settlement Body; (b) each future agreement should provide an evaluation of the development dimension according to verifiable goals (such as the UN Millennium Development Goals); (c) each future agreement should contain a cost estimate for financial and technical assistance; (d) transition periods are to be linked to objective economic criteria (debt level, industrial development, Human Development, etc)

Kenya's participation is primarily centred on making the WTO responsive to the needs of developing countries.⁶²³ However, this dissertation shows that at the 10th Ministerial Conference in Nairobi, Kenya's support for and promotion of developing countries was dubious. The 10th Ministerial Conference was meant to display Kenya's diplomacy and captaincy for the region; however, the conference ended up portraying the country as rather 'weak and naive'.⁶²⁴ Campbell reports that Kenya received immense pressure from the US not to include 'Africa issues', but to instead include an information technology agreement (ITA) in the agenda.⁶²⁵ Hence Kenya was placed in a position where it had to turn its back on other developing countries, displaying weakness and lack of consultation with other African countries.⁶²⁶

At the 12th Ministerial Conference, Kenya acted jointly with other members of the Africa Group. Before the Ministerial Conference, African countries called on the WTO to address the imbalances existing within the multilateral trading system.⁶²⁷ On the day of the conference, ministers from African countries repeated their demands.⁶²⁸ The Africa Group called for 'meaningful development outcomes' in different areas such as agriculture and special safeguard measures.⁶²⁹ Moreover, they demanded that SDT should be a feature of any outcome from negotiations.⁶³⁰ Hence, they called for the relaxation of some WTO rules to allow Africa to adopt measures to assist in its structural economic transformation.⁶³¹

This dissertation believes that if African countries continue to allow other powerful developed countries to dictate or influence their decisions, they will continue to assume a marginal role in global trade. As seen with Kenya during the Nairobi Conference, once

and social criteria (literacy level, life expectancy, etc.); (e) trade policy measures in developing countries must not be prohibited unless there is clear proof of trade-distorting effects; (f) the principle of single undertaking is not automatically applied to developing countries. See Thomas Fritz *Special and Differential Treatment for Developing Countries* (2005) Global Issues Paper No.18 at 36.

⁶²³ Ndirangu op cit note 605 above at 28.

⁶²⁴ Horace Campbell 'How Kenya confirmed the deathbed of WTO' *Pambazuka News* 8 January 2016 available at <https://www.pambazuka.org/global-south/how-kenya-confirmed-deathbed-wto> accessed on 08 October 2020.

⁶²⁵ Ibid.

⁶²⁶ Ibid.

⁶²⁷ Sylvester Bagooro 'What next for Africa after another disappointing WTO Ministerial?' (2018) Volume 21(1) *Africa Agenda* 6.

⁶²⁸ Ibid.

⁶²⁹ Third World Network 'Africa Group calls for development outcomes at MC12', *SUNS* #9028 27 November 2020 available at <https://www.twn.my/title2/wto.info/2019/ti191121.htm> accessed on 17 November 2020.

⁶³⁰ Ibid.

⁶³¹ Bagooro op cit note 627 above at 6.

African countries act per the will of developed countries, they tend to neglect the interests of the rest of African countries. However, when African countries work together, as illustrated in the 12th Ministerial Conference, they produce significant outcomes for the continent.

4.3.3.3 Regional Trade Contribution

Whilst Kenya is a signatory to the EAC, COMESA and the AfCFTA,⁶³² this dissertation focuses on its role in the AfCFTA and EAC, as Kenya assumes a dominant role in the East African body.⁶³³ The EAC recognises that unity, security, and stability are the only ways effective economic integration can be achieved in the Eastern region.⁶³⁴ The EAC was founded in 1967, collapsed in 1977 and was revived in 2000.⁶³⁵ Kenya's 'dominance and divergent political positions and ideologies' were one of the causes of the EAC's collapse.⁶³⁶ Kenya rejoined the newly formed EAC in July 2000, thus making it a founding party to the treaty.⁶³⁷

Since the EAC's inception, Kenya has led the region in terms of trade.⁶³⁸ It is reported that around 46 per cent of the exports and 41 per cent of the imports of the East African region are from Kenya, thus making it a major importer and exporter for the region.⁶³⁹ The EAC is dependent on Kenya, as the regional power, for the continuation of its progress. This is because the continued drive and interest that the Kenyan government and its private sector have for regional integration have contributed to the region's success.⁶⁴⁰ However, Kenya's dominance was one of the reasons why the EAC collapsed in 1977.⁶⁴¹ Therefore, for history

⁶³² Kenya joined COMESA on 21 December 1981.

⁶³³ Kenya, with Uganda, Tanzania, Rwanda, South Sudan and Burundi are members of the EAC. See About EAC 'Overview of Eastern African Community' available at <https://www.eac.int/overview-of-eac> accessed on 15 October 2020.

⁶³⁴ Ibid.

⁶³⁵ Craig Mathieson *The Political Economy of Regional Integration in Africa – The East African Community Report* (2016) available at <http://ecdpm.org/peria/eac> accessed on 10 October 2020.

⁶³⁶ Ibid.

⁶³⁷ About EAC 'Republic of Kenya' available at <https://www.eac.int/eac-partner-states/kenya> accessed on 15 October 2020.

⁶³⁸ Omolo, Wanjia & Jairo op cit note 599 above.

⁶³⁹ Andrew Mold and Anthony Mveyange The impact of Covid-19 crises on trade: Recent evidence from East Africa *Brookings Institute* 7 July 2020 available at <https://www.brookings.edu/research/the-impact-of-the-covid-19-crisis-on-trade-recent-evidence-from-east-africa/> accessed on 12 August 2020.

⁶⁴⁰ Mathieson op cit note 635 above.

⁶⁴¹ Ibid.

not to repeat itself, this dissertation supports the view of Mathieson that Kenya needs to establish a balance between being a driver and a dominator of the EAC.⁶⁴²

This dissertation suggests that Kenya should continue being the main driver of progress in the region, but it must be careful not to dominate. This suggestion is in the light of the arguments of the previous chapters, based on the notion that the cooperation of all members of regional bodies is essential for the success of the regional body and to also ensure that all members effectively benefit from its work. The relationship between Kenya and the EAC is mutually beneficial, as the EAC has also become a major destination for Kenya's exports.⁶⁴³ It is reported that 53 per cent of Kenya's total exports to the rest of Africa in 2010 were accounted for by the EAC and the EAC accounted for 20 per cent of its total exports to the globe.⁶⁴⁴ This evidence reflects Kenya's commitment to regional integration and the success of the continent.

Kenya's commitment to continental success was also reflected when the country signed the AfCFTA. However, this commitment was cast in doubt when the country decided to sign a US-Kenya free trade agreement.⁶⁴⁵ Kenya's signing of this deal was heavily criticised by members of the AfCFTA and the EAC,⁶⁴⁶ primarily because of its potential to undermine intra-regional trade and thus lead to the gradual collapse of these regional bodies.⁶⁴⁷ This view is supported by this dissertation, especially in light of the formation of the AfCFTA. The AfCFTA will ensure that all African countries receive equal pieces of the continental pie. Therefore, African countries should be focusing on uniting and finding solutions to continental issues. Nevertheless, Kenya, similar to South Africa and its tie to the EU, chose to

⁶⁴² Ibid.

⁶⁴³ Augustus Muluvi et al *Kenya's Trade within the East African Community: Institutional and Regulatory Barriers* (2016) Kenya Institute for Public Policy Research and Analysis available at <https://www.brookings.edu/2016/07/PDF> accessed on 12 August 2020.

⁶⁴⁴ Ibid.

⁶⁴⁵ The negotiations for this FTA launched on 8 July 2020. The aim is to reach an agreement that will build from the objectives of AGOA and one which will increase trade and investment between US-Africa. See Moses Ogutu 'Caught between Africa and the West: Kenya's proposed US free trade agreement' 2020 *Africa Portal* available at <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/> accessed on 17 November 2020.

⁶⁴⁶ Ibid.

⁶⁴⁷ Jack Caporal, John Hoffner and Sanvid Tuljapurkar 'Going Solo: What is the significance of a US-Kenya Free Trade Agreement?' 2020 *Centre for Strategic and International Studies* available at <https://csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement> accessed on 11 August 2020.

pursue an agreement with the US bearing in mind that its trading relationship with the US is asymmetrical. This is evidenced by a 2018 report listing Kenya as the 98th largest trading partner of the US and yet the US was Kenya's third-largest export market.⁶⁴⁸ Kenya is a party to more than one asymmetrical trade agreement (as in the case of South Africa) – the country's major trading partner is still the EU.⁶⁴⁹ Thus, reflecting a pattern of trade conduct used by developed countries in their negotiations with developing countries.

4.3.3.4 Domestic policies

In 1963, when Kenya attained its independence, the government adopted a trade policy from the colonial government based on import substitution.⁶⁵⁰ At that time, agriculture was the primary trading commodity in the country.⁶⁵¹ Since then, the country has undergone multiple policy changes, influenced by internal and global economic and political factors.⁶⁵² At the international level, globalisation has influenced policy change, and internally the changing political set-up of the country has influenced policy changes.⁶⁵³

Similarly to Nigeria and other developing countries, Kenya adopted the SAP of the IMF and the WB.⁶⁵⁴ The IMF and the WB exercise considerable power over African economies because they are major donors and if any country needs financial assistance, their approval is needed.⁶⁵⁵ As mentioned above, the effects of the SAP resulted in appalling conditions in African countries and Kenya was no exception. The lives of Kenyan people were severely disrupted,⁶⁵⁶ as they experienced unemployment, inflation, income inequality, retrenchment and lowered standards of living.⁶⁵⁷ Mwega states that since the 1970s, Kenya has failed to

⁶⁴⁸ Ogutu op cit note 645 above.

⁶⁴⁹ World Trade Organisation 'Trade Review Policy: Kenya' (2000) available at https://www.wto.int/tpr_e/tp124_e accessed on 25 August 2020.

⁶⁵⁰ Geoffrey Gertz 'Kenya's Trade Liberalization of the 1980s and 1990s: Policies, Impact and Implications' (2010) available at <https://www.carnegieendowment.org/filesPDF> accessed on 10 March 2020.

⁶⁵¹ Ibid.

⁶⁵² Verena Fritz and the Kenya Institute for Public Policy Research and Analysis *Trade Policy-making process in Kenya: The Institutional Arrangements and Interactions of Actors* (May 2017 Report) accessed at <https://www.odi.org/publications/1188-trade-policy-making-process-kenya-institutional-arrangements-and-interaction-actors> accessed 12 August 2020.

⁶⁵³ Fritz & the Kenya Institute for Public Policy Research and Analysis op cit note 652 above.

⁶⁵⁴ Zeleza op cit note 600 above at 38.

⁶⁵⁵ Ibid.

⁶⁵⁶ Joseph K. Jono 'The impact of the structural adjustment programmes on Kenyan society' (2002) Volume 17 *Journal of Social Development in Africa* 81.

⁶⁵⁷ Ibid.

reach its full potential.⁶⁵⁸ Mwega notes that after 1970 and 1971, Kenya experienced its first balance of trade deficit and an oil shock two years later.⁶⁵⁹

In order to revitalise its economy, the Kenyan government responded with the Fourth Development Plan in 1979.⁶⁶⁰ This policy-making process reflected a change in the government's approach, as it chose to pursue an open strategy.⁶⁶¹ This policy-making process was strongly controlled by the government, as other groups such as the private sector and civil society were not allowed to participate in this process.⁶⁶² Mwega provides that although Kenya adopted an open strategy, the credibility of the policies adopted were questionable, as they could also be subjected to reversals.⁶⁶³ Further, the country's exports were subjected to major supply constraints.⁶⁶⁴ In the result, while the targeted yearly growth rate of the Fourth National Development Plan was set to be 6.3 per cent, this figure was decreased by 0.9 per cent to make it attainable for the country.⁶⁶⁵ Even with the reduced percentage, the country still suffered severe shortfalls.⁶⁶⁶ The most significant cause of the major failures, other than the availability of means and resources, was the implementation failure.⁶⁶⁷ Failure by the government to carefully and effectively orchestrate its visions led to unsatisfactory results.

Despite seeking policy reforms since the early 1990s, the outcomes have not been satisfactory due to internal challenges in the country. However, there are signs of progress in certain sectors. The country's adoption of the National Trade Policy in 2017 was an intervention,⁶⁶⁸

⁶⁵⁸ Francis M. Mwega and Njuguna S. Ndungú 'Explaining African Economic Growth Performance: The Case of Kenya' (2008) AERC Working Paper No.3 available at https://www.researchgate.net/publication/2386947727_Explaining_African_Economic_Growth_Performance_The_Case_of_Kenya/link/569d0eb808ae78356e563d55/download Accessed on 12 August 2020.

⁶⁵⁹ Gertz op cit note 650 above.

⁶⁶⁰ Fritz & the Kenya Institute for Public Policy Research and Analysis op cit note 652 above.

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Mwega & Ndungú op cit note 658 above.

⁶⁶⁴ Ibid. Mwega and Ndungu continue to provide that some of these supply constraints included the unavailability and/or high cost of credit, infrastructural deficiencies and an adverse regulatory framework, increasing transaction costs and undermining the country's competitiveness. (at.3)

⁶⁶⁵ Seth Omondi Gor and Kennedy O Osoro 'An assessment of the implementation of national development plans in Kenya: The case of education sector programmes' (2013) Volume 8(15) *Academic Journals* 1200.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ 'Kenya National Trade Policy: Transforming Kenya into a competitive export-led and efficient domestic economy' (2017) *Tralac News* available at <https://www.tralac.org/news/article/11897-kenya-national-trade-policy-transforming-kenya-into-a-competitive-export-led-and-efficient-domestic-economy.html> accessed on 11 August 2020.

which came at a time when Kenya's economy had faced gridlock, thus facing a major balance of trade deficit.⁶⁶⁹ As stated by the National Treasury Cabinet Secretary, Henry Rotich:

‘The new Trade Policy articulates provisions that are geared toward promoting efficiency in the growth of domestic trade through transformational measures that address the constraints impeding against the development of the wholesale, retail and informal...’⁶⁷⁰

The argument presented is that the trade policy will propel existing regional and multilateral arrangements pursued by the country, and it will strengthen Kenya's commitments in these two spheres.⁶⁷¹ Kenya has made significant improvements since the adoption of the National Trade Policy. The country's economic growth was averaged at 5.7 per cent in 2019, signifying its position as one of the fast-growing economies in sub-Saharan Africa.⁶⁷² However, the Kenyan economy, similar to the Nigerian and South African, has been hit hard by the Covid-19 global pandemic. Before the pandemic, the country had already been suffering supply and demand shocks on both internal and external fronts.⁶⁷³ However, with the launch of the AfCFTA, Kenya's improved performance is highly anticipated.

4.4 CONCLUSION

This chapter has provided a succinct overview of South Africa, Kenya and Nigeria's participation in the multilateral and regional spheres. It has also discussed trade policies adopted by these countries to help improve their performance in the region and global markets. This chapter has also viewed some of the post-colonial era challenges these countries face in these three respective spheres. The chapter further demonstrates how these three spheres are intertwined and thus have a significant impact on one another and the political, economic, and social climate. This impact was revealed through a brief discussion of how the domestic conditions of a state impact its trade performance. It further set the three countries mentioned above as primary examples of this. The multilateral trading system remains dominated by a strong-willed, powerful and wealthy minority, who place their interests above the majority's interests. This minority uses its power and wealth to influence

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² The World Bank 'The World Bank in Kenya' (2020) available at

<https://www.worldbank.org/en/country/kenya/overview> accessed on 10 August 2020.

⁶⁷³ Ibid.

the decisions of the majority. However, African countries need to remain focused on what is important: sustainable economic growth through regional integration.

One of the reasons why Nigeria, South Africa and Kenya participate in trade is to improve their economies and thus provide favourable standards of living for their citizens. Furthermore, in the greater context of the AfCFTA, the people of the continent remain the most important part of this entire process because they continue to suffer from the government's poor decision-making at both the multilateral, regional and domestic trade levels. Therefore, it is essential for African governments always to place the interests of their people first, as this will ensure that governments make the best decisions.

CHAPTER 5

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

What underpins this research is that there exists an imbalance in the multilateral trading system between developed and developing countries, with the marginalisation of African countries in this system being a reflection of that imbalance. African countries' role in the current system is still understated, as not much emphasis is placed on the role that these countries play. African countries constitute approximately 27 per cent of the WTO.⁶⁷⁴ Nevertheless, they have not benefitted from expansion in world trade and have not performed relatively well in world trade.⁶⁷⁵ Africa's performance is still lower than other developing country regions,⁶⁷⁶ despite the WTO's core purpose being to ensure that each country is allowed to trade freely and thus enhance its growth and stability.⁶⁷⁷ Moreover, the Preamble to the WTO recognises the need for 'developing and least developed countries to secure a share in the growth of international trade'.⁶⁷⁸

The WTO's core purpose has led to critics calling for the organisation to reform. Developing countries, which constitute approximately 35 per cent of the WTO, have also criticised the organisation's framework.⁶⁷⁹ The basis of the criticism is that the world changed immensely from the formation of the GATT in 1947 and the WTO in 1994.⁶⁸⁰ They argue that the organisation's administration needs to take this transition into account, pointing to the inherent inequality between developing and developed countries in the multilateral trading system.⁶⁸¹ This inequality is not addressed primarily because of the role that power assumes in the multilateral trading system and the power that particular developed countries exert.

⁶⁷⁴ Apecu op cit note 12 above at para 1.

⁶⁷⁵ Kessie & Apea op cit note 14 above at 6.

⁶⁷⁶ Apecu op cit note 12 above at para 1.

⁶⁷⁷ Jobodwana op cit note 16 above 244.

⁶⁷⁸ The Preamble to the WTO.

⁶⁷⁹ See chapter four above, page 74.

⁶⁸⁰ See chapter two above, page 29.

⁶⁸¹ See chapter two above, page 29.

5.2 FINDINGS

This section provides a brief overview of the findings of the dissertation. It begins by highlighting the aim of the dissertation. It further sets out the objectives and research questions set for each chapter and the answers to those questions.

This dissertation aimed to discuss the participation of particular African countries in the multilateral trading system. It highlighted how the global trading system continues to legitimise Africa's marginality, due to the system's foundations being embedded in Eurocentricity. This Eurocentricity is part of why African countries' interests continue to be subordinated to European interests.⁶⁸² In light of this, the first objective was to discuss the multilateral trading system's historical development and legal framework. In setting this objective, this dissertation answered how the multilateral trading system was formed and the primary legal principles that formed the core of this system. It further analysed how these principles have been enforced.

In chapter two, this dissertation noted that per the views of Van Grassiek, the multilateral trading system required three significant preconditions to enable it to operate efficiently.⁶⁸³ However, evidence proves that such ideas were not implemented; moreover, these founding principles excluded African countries and thus contributed to their marginalisation in the global trading system. The first principle of sovereignty was contradicted by the current system's dispute settlement mechanism, which threatens the sovereignty of African countries, as developed countries use this mechanism to assert their authority over developing countries.⁶⁸⁴ The second principle of trade based on mutual interests was also nullified. The liberalisation of markets continued to function to the benefit of the influential players in this system.⁶⁸⁵ In addition, these influential players enter into asymmetrical agreements with African countries, legitimised by the system.⁶⁸⁶ This evidences that trade is not based on mutual interests but rather on the interests of developed countries. This second finding also overlaps with the third idea, which concerns power – the role of economic authority or influence in the multilateral trading system. The very foundations of the multilateral trading

⁶⁸² See chapter one, page 7, 8 & 9 and chapter three, page 34 & 35 for full discussion.

⁶⁸³ See chapter two, page 16,17 &18. See Van Grassiek op cit note 112.

⁶⁸⁴ See chapter one, page 11 and chapter two, page 17.

⁶⁸⁵ See chapter four, page 77.

⁶⁸⁶ See chapter three, page 44 discussion and see examples in chapter four case study.

system were built on the influence of two powerful hegemonies (US and EU). Moreover, other developed countries such as Italy and Canada also played a significant role in the formation of our current system,⁶⁸⁷ while African countries and other developing countries assumed a minimal role.

The second chapter went on to discuss the legal principles forming the core of this system. This dissertation found that the principles of non-discrimination and reciprocity form the foundations of the multilateral trading system. The Preamble to the GATT makes explicit reference to the principle of reciprocity. This principle plays a fundamental role in negotiating processes, as most agreements in the GATT/WTO are propelled by it. However, this dissertation also found no way in which reciprocity can be measured or balanced, as the rules do not provide for such.⁶⁸⁸ By this omission, it can be argued that the GATT Treaty was designed to favour developed nations as creators of the system. Moreover, this Treaty reflects the minimal role played by developing countries.

This minimal role did not end with the GATT Treaty. However, it was also reflected in the Uruguay Round, where most negotiations occurred between developed countries, as the Treaty ensuing from this round was primarily debated amongst developed countries.⁶⁸⁹ Of relevance to this study is that most African countries signed the agreement establishing the WTO without understanding the consequences of these agreements on their states. Others signed under the persuasion of developed countries.⁶⁹⁰

As such, the WTO has faced substantial criticism due to its inherent inequality and the organisation's failure to adequately equate the needs of all its members. The WTO's failure in this regard has been ascribed to the imbalance that existed in the negotiations when the organisation was formed, caused by the influence of developed countries and the two hegemonies (EU and US). The global trading system has greatly changed since its formation, with the emergence of developing countries having made a significant impact. Therefore developing countries should be allowed to adequately participate in the WTO, as their inadequate participation could potentially affect the legitimacy and credibility of the organisation.

⁶⁸⁷ See chapter two, Stiles op cit note 173 above. See also Steger op cit note 199 above.

⁶⁸⁸ See chapter two, Finger & Winters op cit note 163 above.

⁶⁸⁹ See chapter two, Stiles op cit note 173 above.

⁶⁹⁰ See chapter two, Adewale op cit note 115 above.

The second objective of this dissertation was to determine the extent of the participation of African countries in the multilateral trading system. This chapter also aimed to discuss the proliferation of the regional trade agreements in the continent. In setting these objectives, this dissertation sought to ascertain the extent to which African countries participated in forming the trading system and the proliferation of regional trade agreements in the continent.

The timeline on Africa's participation in the multilateral trading system set out in chapter three demonstrates that African countries participation is across three periods: the pre-colonial, the colonial and the post-colonial era. This dissertation found that the choices made in the first two eras impacted or at least influenced those made in the post-colonial era, stemming from the very foundations of the current system being embedded in the development of Western culture and political organisation.⁶⁹¹ As such, African countries find it difficult to depart from these choices, as they are embedded in the system; moreover, they have negatively impacted the African continent. These factors serve to curtail the effective participation of African countries in the multilateral trading system.

This dissertation found that out of the nine rounds of trade negotiations held by GATT/WTO, African countries participated in the last two rounds.⁶⁹² Even during these rounds, there were complaints about the inadequate participation of African countries.⁶⁹³ Against this background and due to the challenges of Western domination, African countries projected all of their efforts into regional integration. African countries have had multiple regional initiatives since independence. However, these initiatives have not been successful due to regional challenges and problems in their respective countries. One of the most prominent continental challenges is the diverseness of African countries, which has led to the proliferation of small and fragmented currencies. Other challenges that have hindered African regional integration include the financial constraints in regional bodies and also financial constraints faced by African countries.⁶⁹⁴

The third chapter concluded by providing a brief overview of the future of regional integration in the African continent. This dissertation found that the AfCFTA is the biggest free trade area globally and will be a driver of political and economic change in Africa.

⁶⁹¹ See chapter three, page 34.

⁶⁹² See Appendix **Table 1**, page 142.

⁶⁹³ See chapter three, page 41-45.

⁶⁹⁴ See chapter three, page 53.

However, this dissertation also found that the formation of the AfCFTA has been presented with some challenges.⁶⁹⁵

The third objective focused on South Africa, Nigeria, and Kenya's role in the multilateral trading system and the regional trading system, in line with the dissertation's TWAIList approach. The study further analysed the domestic policies that these countries have adopted to improve their trade performance in the MTS and the regional trading system. Moreover, the discussion also confronted the challenges faced by these countries in the post-colonial era, which affect their capacity to trade and their trade performance.

The fourth chapter highlighted the importance of domestic institutions in trade law, finding that states are the driving force behind the engine of trade. Therefore, the internal conditions of domestic institutions have a significant impact on a state's trade performance. This point was illustrated through the case studies of South Africa, Nigeria, and Kenya, highlighting the participation and influence of these three countries in their respective regions and portraying how developed countries have exerted and continue to exert their influence over African countries.

This dissertation found that South Africa is an active participant in the multilateral sphere of trade and has undertaken an active role as a representative of African countries. However, the country has been torn between being the representative of the interests of Africa and pursuing its interests at the WTO.⁶⁹⁶ Although South Africa leads the SADC, the country has been trading more with countries of other regions.⁶⁹⁷ The country has also been accused of adopting policies that disadvantage its neighbours. Domestically, the country has also sustained a fair deal of criticism for its policies. An example of such policy was the GEAR programme, which was centred on neoliberalism and was thus criticised by South African trade unions.⁶⁹⁸ The main thrust of the criticism stemmed from the liberalisation of markets, meaning that the markets of Third World countries, like South Africa, would be open to powerful, rich nations that could and would continue to take advantage of poorer countries.⁶⁹⁹

⁶⁹⁵ See chapter three, page 58.

⁶⁹⁶ See chapter four, page 71.

⁶⁹⁷ See chapter four, page 72.

⁶⁹⁸ See chapter four, page 73.

⁶⁹⁹ See chapter four, page 74.

In the discussion of the role played by Nigeria, this dissertation found that the country is one of the strongest economies in the African continent. Nigeria has played an instrumental role in forming regional trade in the West African region, and the country continues to lead the region. However, the West African country has suffered several economic setbacks due to some of the WTO agreements to which it is a signatory. Moreover, the internal domestic conditions in the country have contributed to the country having suffered several economic setbacks, due to decades of mismanagement at the hand of corrupt leaders and misguided policies. An example of such policy was the Structural Adjustment Programme of the 1980s, which was started by the Bretton Woods institutions and was adopted by most African countries.⁷⁰⁰ These policies left a significant balance of payment deficit due to excessive borrowings.

This dissertation discussed the role played by Kenya, finding that it is one of the fastest-growing economies in Africa.⁷⁰¹ Moreover, Kenya has shown keen interest in participating in global trade, primarily centred on making the WTO an organisation that is responsive to the needs of developing countries. Further, this dissertation found that Kenya leads the EAC region, as the region is dependent on it as a regional power to continue its progress.⁷⁰² However, although Kenya leads the region, it has suffered several domestic challenges that have severely disrupted its economy. One of the contributing factors to these challenges was the Structural Adjustment Programme that Kenya (like Nigeria) adopted in the 1980s. This programme led to unemployment, inflation, income inequality, retrenchments and lowered standards of living.⁷⁰³

In summation, developed countries' influence over developing countries in the global trading system has been a golden thread running through each chapter of this dissertation. This influence has led to the marginalisation of African countries, demonstrated by their lack of effective participation in the rounds of negotiations, with their participation curtailed by the hegemonic powers in the trading system. The multilateral trading system continues to exist and operate within Eurocentricity, which is not ideal for African countries. African countries need African solutions to their African problems, mainly because the global trading system is

⁷⁰⁰ See chapter four, page 83.

⁷⁰¹ See chapter one, page 86.

⁷⁰² See chapter four, page 89.

⁷⁰³ See chapter four, page 91.

dominated by a strong-willed, powerful and wealthy minority, contributing to Africa's marginalisation. As such, the unification of African countries is the most feasible means of overcoming this domination.

5.3 RECOMMENDATIONS

5.3.1 *Introductory remarks*

It must first be acknowledged that with the current increased rate of globalisation, small developing countries are left with no choice but to integrate into global markets if they want their economies to thrive and succeed.⁷⁰⁴ This is also the case with the African continent, as it is filled with small developing economies.⁷⁰⁵ However, what can be proposed is that before integrating into global markets, African countries should first work on integrating the small markets of the continent. Hence, this dissertation proposes regional integration as the solution to African countries' economic problems. In this way, African countries will ensure that they are backed by a robust market capable of dealing with the challenges of globalisation. Moreover, this will enhance their bargaining power in the multilateral trading system.

While it could be maintained that African countries should be removed from the neoliberal markets of the global economy, the importance of the global economy and its impact on the African continent has to be acknowledged.⁷⁰⁶ Due to the global economy's impact on the continent, this dissertation advocates regional integration in the continent. Further, it proposes a reform in global trade and global markets. This reform will enable effective participation for African countries in global trade, and this effective participation will be to the benefit of the regional and domestic spheres of African states.

As mentioned in chapter three, this dissertation aims to take a reformist approach in providing recommendations.⁷⁰⁷ These recommendations are set out in this subsection. First, recommendations are suggested for African countries, and then secondly for the African region. Lastly, the reformist approach is expanded.

⁷⁰⁴ Souleymane Coulibaly 'Six steps to start changing how Africa does development' *Brookings* 19 July 2017 available at <https://www.google.com/amp/s/www.brookings.edu/blog/future-development/2017/07/19/six-steps-to-start-changing-how-africa-does-development/amp/> accessed on 09 November 2020.

⁷⁰⁵ Ibid.

⁷⁰⁶ See chapter four, page 64.

⁷⁰⁷ See chapter three, page 39.

5.3.2 Recommendations to African countries

It is well-known that the public debt of African countries remains relatively high and is increasing rather than decreasing.⁷⁰⁸ Moreover, increased indebtedness results in more unsatisfactory domestic conditions.⁷⁰⁹ African countries suffer from balance of payments deficits and balance of trade deficits, which are consequences of entering into asymmetrical trade agreements.⁷¹⁰ For instance, as mentioned in chapter four above, Nigeria's economy suffered severely because of the agreements entered into at the multilateral sphere of trade. In this respect, this dissertation recommends that African governments need to be aware of the agreements they enter into. They further need to be aware of the choices they have. For genuine and effective change to occur in the continent, African governments need to understand that their decisions significantly impact their country's economic performance and citizens. On this note, this dissertation commends Nigeria for setting an excellent example by refusing to sign the West-Africa trade agreement due to the impact that it would have on the country and for the citizens.⁷¹¹

African governments need to understand that decisions made concerning the country's management, the country's public spending budget, and the agreements that the countries enter into have a severe impact on citizens.⁷¹² This dissertation highlights this issue because, as mentioned in chapter four, Nigeria is one of the African countries that has suffered from

⁷⁰⁸ Misheck Mutize 'African countries aren't borrowing too much: they're paying too much' 2020 *The Conversation* available at <https://theconversation.com/amp/african-countries-arent-borrowing-too-much-theyre-paying-too-much-for-debt-131053> accessed on 10 November 2020.

⁷⁰⁹ Alex Danso 'The causes and impact of the African debt crisis' (1990) Volume 19 *The Review of Black Political Economy* 5. See also George M. Chipumbu 'The Impact of External Debt on African Economies' (1993) Volume 10(1) *International Journal on World Peace* 43.

⁷¹⁰ South Africa suffered a balance of trade deficit that amounted to US\$17.52 billion in 2019. See Statista 'South Africa Trade balance from 2009 to 2019' available at <https://www.statista.com/statistics/578960/trade-balance-of-south-africa/#:~:text=Trade%20balance%20of%20South%20Africa%202019> accessed on 10 November 2020. Kenya suffered a balance of trade deficit that amounts to US\$11.39 billion. See Statista 'Kenya-trade balance 2019' available at <https://www.statista.com/statistics/451163/trade-balance-of-kenya/#:~:text=Trade%20balance%20of%20Kenya%202019&text=In%202019%2C%20> accessed on 10 November 2020. Nigeria's balance of trade deficit was US\$2.2 billion in June 2020, which is higher than the deficit of May 2020, which was US\$1.6 billion. See CEIC Data 'Nigeria Trade Balance' available at <https://www.google.com/amp/s/www.ceicdata.com/en/indicator/nigeria/trade-balance/amp> accessed on 11 November 2020.

⁷¹¹ See discussion in chapter four, page 84.

⁷¹² Pityana note 445 above.

decades of mismanagement.⁷¹³ However, Nigeria is not the only African country to experience this, as other African countries have also experienced corruption by government officials.⁷¹⁴ If African governments allow greed to outweigh the needs of their people, then the African continent will remain backwards and continue to suffer.

As seen in the case of Kenya and Nigeria, and other African countries that adopted SAP, the agreements intended to benefit African countries left them in severe debt,⁷¹⁵ incurred as a result of the excessive borrowings from developed-country-orientated institutions. This underlines the need for African governments to understand the agreements that they enter into. As asserted by Abubakar Dubagari:

‘The global trading system is dominated by a few hegemonic trading powers. This minority tends to be far more interested in gaining market access to or shutting imports out from developing countries, than in promoting export-oriented growth in those countries. The powers preach free trade until they come to the negotiating table with developing countries when they become mercantilists.’⁷¹⁶

The argument of Abubakar Dubagari highlights the importance of African governments adequately being aware of and understanding the agreements they enter into. In making this recommendation, this dissertation is not placing an extra burden on African governments, as this recommendation is consistent with the principles of good governance.

The argument of Abubakar Dubagari also touches on the role of power, which plays a significant role in the multilateral trading system and also in the management of a country's internal affairs. As such, this dissertation further recommends that African governments should be careful not to misapprehend their powers when in office. This recommendation is relevant to most African countries, as they have suffered and continue to suffer at the hands of their most trusted leaders. As illustrated in chapter four, Nigeria's decades of misrule resulted in an unstable political environment.⁷¹⁷ Mimiko succinctly explains what happened in Nigeria:

⁷¹³ See chapter four above, page 75.

⁷¹⁴ See the investigation conducted by Transparency International: ‘Citizens speak out about corruption in Africa’ 11 July 2019 available at <https://www.transparency.org/en/news/citizens-speak-out-about-corruption-in-africa#> accessed on 15 November 2020.

⁷¹⁵ See chapter four above, page 82.

⁷¹⁶ Umar Abubakar Dubagari ‘An Appraisal of Nigeria’s membership and Participation in the World Trade Organisation (WTO)’ (2016) Volume 21 *IOSR Journal of Humanities and Social Sciences* 57.

⁷¹⁷ See chapter four above, page 75.

‘The decolonisation allowed the crop of leaders that aligned with colonial power to take over Nigeria. This ensured the sustenance of a neo-colonial economy even after political independence. On the assumption of power, these leaders quickly turned up the repressive machinery of the colonial state rather than dismantling it. Significantly, they had no vision of development to accompany the efficient instrument of repression they inherited. All they were interested in was access to power and privileges and not development.’⁷¹⁸

In line with Mimiko’s explanation above, this dissertation believes that Nigeria’s internal affairs signify the importance of good governance and having an accountable government that places the interests of the people first. Hence, this dissertation provides that good governance is essential for developing African countries’ domestic institutions.

5.3.3 Recommendations to the African continent

As emphasised throughout this dissertation, regional integration is the most feasible solution for African countries’ regional and continental trade and economic challenges. African countries need to authentically find African solutions to African problems. Emphasis is placed on ‘authentically African solutions’, primarily because African countries should be wary of trying to fit European integration models into African realities.

It must be acknowledged that the most authentically African solution has been tried and tested when the first generation of African leaders chose to adopt a model of regional integration rooted in Pan-Africanism. Pan-Africanism is one of the most authentically African solutions, and there is no call here for its eradication. Instead, what is proposed is another authentically African solution, which is Black Consciousness. Black Consciousness and Pan Africanism are similar ideologies as they both expound on African unity. If Africa’s regional integration initiatives are rooted in the idea of all African countries uniting and realising one common goal, these initiatives will be successful.

As mentioned in chapter three, these regional initiatives have faced multiple challenges, such as the reluctance of African leaders to promote and participate in these initiatives for fear of loss of sovereignty.⁷¹⁹ Moreover, Africa’s multiplicity of ethnicities contributes to making regional integration challenging. However, this dissertation maintains that if regional integration is rooted in the idea of Black Consciousness, it will be successful. The essence of Black Consciousness is the realisation that Black people need to rally together as brothers and

⁷¹⁸ Lawal & Oluwatoyin op cit note 578 above at 239.

⁷¹⁹ See chapter three above, page 53.

sisters,⁷²⁰ meaning the only way Africa can win the global economic and trade war is through unity. In essence, what is proposed in the dissertation is that Black Consciousness be used as an instrument to deal with some of the divisions that exist in the continent. The idea of Black Consciousness is rooted in RI, Agenda 2063 and the AfCFTA.

As mentioned above, one of the reasons why regional integration has faced problems over the years has been African governments' lack of commitment to the initiative. Whilst regional integration efforts have been rejected due to the impracticality of establishing one continental union, AfCFTA was launched earlier this year. It took the continent approximately six decades to finally pursue an idea introduced by Kwame Nkrumah at the founding of the OAU in 1963. Nkrumah laid down a plan of action for continental unity, yet his ideas and plans were rejected. Instead, African countries chose to pursue too broad and western orientated versions of regional integration, such as the Lagos Plan of Action and other plans mentioned in chapter three. Africa's failed attempts at regional integration signify that a new strategy needs to be adopted.

The ideal regional integration plan is rooted in Black Consciousness. It incorporates the following: First, the principles of good governance – this is where accountability and transparency in African governments will come in. This point needs no further explanation here, as this dissertation has provided a detailed explanation of the importance of good governance and the impact that the lack thereof has had on the African continent.

Secondly, the strategy must be people-centred, as the people of the continent are affected by government decisions. Moreover, including citizens in the development strategy also reinforces and reaffirms the principle of good governance. This principle recognises that a state's exercise of sovereignty should always reflect the people's will.⁷²¹ The inclusion of citizens also legitimises government policies. On this point, as already mentioned in chapter three, the people-centred approach to integration by Mpya, Lehloenyana and Ngang is suggested.⁷²² This approach was also recommended by the Director of the United Nations Division for Social Policy and Development, who remarked that special attention should be

⁷²⁰ Excerpt from Steve Biko's address at a Black Theology seminar in Pietermaritzburg, 28 August 1971 available at <https://www.sahistory.org.za/article/defining-black-consciousness> accessed on 16 November 2020.

⁷²¹ Tshipaka op cit note 369 above at 42.

⁷²² See chapter three above, page 52.

given to the people-centred approach and its achievement through public policies and strategies aimed at development.⁷²³ The people-centred approach requires:

- a. An improved understanding and administration of the social facet of globalisation;
- b. The remodelling of domestic and global macroeconomic policies to be geared towards the attainment and fulfilment of social goals;
- c. The extension of national government's capacity to follow their own social plans or strategies.⁷²⁴

The people-centred development is primarily aimed at the people. The 'people' include:

'Ordinary citizens, women, indigenous people, small-scale farmers, migrants, socio-economically disadvantaged groups and other most affected grassroots actors'.⁷²⁵

Hence, the public becomes the central focus in these regional integration initiatives.⁷²⁶ The people-centred approach marks a shift from the traditional state-centred approaches, where the people are beneficiaries rather than active participants.⁷²⁷ What is suggested is the bottom-up approach to regional integration, which allows citizens to be part of decisions that affect them solely because the traditional top-down approach has proven not to be successful. This suggestion is made because states have been the main actors in regional integration efforts and thus, the time has come for a transition in Africa's regional sphere. Moreover, the inclusion of citizens in integration efforts will increase the legitimacy of these regional bodies.

Lastly, this dissertation proposes that this strategy must be firmly rooted in developmental integration, linking trade to development in the continent. In this way, the integration efforts in Africa will also be in line with the current demands of the world and the growing needs of African people. This point on developmental integration is closely related to the people-centred approach, in that the focus is on social plans and strategies. Developmental

⁷²³ United Nations Press Release by General Assembly Third Committee 'People-centred Development requires better integration of economic, social policies, third committee told, as it begins current session' 4 October 2004 *Press Release GA/SHC/3777*.

⁷²⁴ Ibid.

⁷²⁵ Tshimpaka op cit note 369 above at 15.

⁷²⁶ Ibid.

⁷²⁷ Ibid at 38.

integration focuses on adopting 21st century approaches to solving 21st century issues.⁷²⁸ Moreover, developmental integration extends cooperation among states beyond trade and trade facilitation, extending to research, development and investment. It further includes policies directed at developing regional infrastructure and regional industrial development.⁷²⁹ African countries must harmonise their domestic industrial policies with those of the region, as this will enhance complementarities in commodities made and traded in the African continent.⁷³⁰

It is acknowledged that regional integration is being recommended as a solution to African trade when 'seamless movements of goods remains a challenge in Africa', and this challenge exists regardless of geographical proximity.⁷³¹ Walaza argues that African countries have chosen to place preference on addressing 'barriers that have limited intra-African trade'.⁷³² However, trade statistics from the 2019 Economic Development in Africa Report show that:

- a. The total trade from the African continent to the globe was equivalent to US\$760 billion in 2015-2017;
- b. The total share of exports from the African continent to the rest of the world was between 80 per cent to 90 per cent in the period 2000-2017;
- c. Out of the total exports in Africa in 2017, only 16.6 per cent of those exports were intra-African exports;
- d. Between 2015-2017 intra-Africa trade was approximately 20 per cent of the total.⁷³³

Although these figures show that intra-African trade has remained relatively low, African countries should increase it. While there has been a slight increase in intra-regional trade, there is still room for improvement, particularly with the formation of the AfCFTA.⁷³⁴ Thus, the launch of the AfCFTA signifies the beginning of a remedial process to the challenges faced by Africa with respect to regional integration and intra-African trade.

⁷²⁸ UNCTAD Press Release 'Shift from traditional approach to integration to 'developmental regionalism' report urges' 11 July 2013 *UNCTAD/PRESS/PR/2013/034*.

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ Walaza op cit note 451 above at 15.

⁷³² Ibid.

⁷³³ UNCTAD Press Release 'Facts and Figures: Economic Development in Africa Report 2019' *UNCTAD/PRESS/IN/2019/2/Rev.1*.

⁷³⁴ The Economic Development in Africa Report 2019 shows that Africa and Asia have shown a rising trend in intra-regional trade since 2008.

It should be noted that Africa's trade statistics remain relatively low, partly because the continent struggles in ensuring that growth is 'inclusive and sustainable'.⁷³⁵ This is why only a few African countries are leading economies, whilst others struggle. For example, two of the most powerful economies are South Africa and Kenya, with the latter being one of the fastest-growing economies in Africa. However, these countries have traded more with outside powers rather than with other African countries. As mentioned, South Africa's biggest trading partner is the EU and South Africa is also a member of BRICS.

South Africa's external relations have earned it the role of 'gateway' to Africa.⁷³⁶ However, Moore provides that South Africa's role in BRICS (Brazil, Russia, India, China and South Africa) should be questioned as it could bring significant problems for the country and the continent.⁷³⁷ This relationship could create fiercer competition over African resources, placing the interests of every African country, including South Africa, in jeopardy.⁷³⁸ This dissertation found that BRICS shares common interests with the EU and other developed countries.⁷³⁹ They aim to maintain the status quo of the global economy as established by the WTO,⁷⁴⁰ which is not ideal for African countries. Therefore, South Africa finds itself in the dilemma of weighing its interests and those of the continent, as is the case with other leading African countries. They have to decide whether to place the needs of the continent or the needs of their countries first. Quite often, these countries have chosen the latter, as illustrated through their trade partnerships. This is why the African continent continues to experience growth that is not inclusive.

⁷³⁵ Ron Sondray 'Mega regional trade agreements and South Africa's Trade Standing: Implications for the Tripartite Free Trade Area Negotiation' occasional paper SAIIA at 6.

⁷³⁶ Candice Moore 'BRICS partnership: A case of South-South Cooperation? Exploring the roles of South Africa and Africa' (2018) *Institute for Global Dialogue* available at <https://www.igd.org.za/206-brics-partnership-a-case-of-south-south-cooperation-exploring-the-roles-of-south-africa-and-africa> accessed on 11 November 2020.

⁷³⁷ Ibid.

⁷³⁸ Ibid.

⁷³⁹ John Ross 'BRICS dependent on free trade for development' (2018) *China.org.cn* 26. Available at http://www.china.org.cn/opinion/2018-07/26/content_57826829.htm accessed on 11 November 2020.

⁷⁴⁰ Ibid.

5.3.4 Recommendation of reform of the multilateral trading system

The debate over the WTO's reform is not new. There have been several calls for Western institutions, including the WTO, to reform and pay more regard to Africa's needs.⁷⁴¹ The WTO has attempted to accommodate Africa's needs, as the Doha Round was primarily focused on developing and least-developed countries. Moreover, this dissertation also acknowledges that special and differential treatments were enacted for developing and least-developed countries.⁷⁴²

However, the WTO has attempted to accommodate rather than include African countries in the global trading system. The argument presented is that there is a difference between accommodating and being inclusive. The Oxford dictionary defines accommodation as 'a convenient arrangement, a settlement or compromise'. In contrast, inclusion is defined as 'the practice or policy of providing equal access to opportunities and resources for people who might otherwise be excluded or marginalised'.⁷⁴³ African trade agreements need to be inclusive, as emphasised by the former South African Minister of Trade and Industry, Rob Davies, who stated that the WTO needs to ensure that it caters to the needs of all countries.⁷⁴⁴ The minister remarked that the WTO's reform should be focused on inclusivity and development.⁷⁴⁵ Moreover, outstanding issues should be addressed and resolved.⁷⁴⁶

The WTO needs to be inclusive primarily because one-quarter of the WTO's membership is from Africa. Chemutai and Low state that 'it is important that the WTO works for and with Africa, particularly in tackling the continent's economic, social and political realities'.⁷⁴⁷ As illustrated in this dissertation, these realities have also impacted Africa's performance in the global economy. Therefore, to ensure that Africa actively participates and benefits from the

⁷⁴¹ As already mentioned in this research: the Seattle Protests called for the WTO's reform; African countries and other developed countries also called for reform before the Doha Round; African Ministers also raised the point of reform before the 12th Ministerial Conference.

⁷⁴² The topic of special and differential treatments (SDT) remains controversial. In the 12th Ministerial Conference, African countries still demanded the effective implementation of SDT provisions.

⁷⁴³ Oxford Languages' (2020) *Oxford University Press*.

⁷⁴⁴ Xinhua News 'S.Africa reiterates calls for WTO reform' 25 May 2019 available at http://www.xinhuanet.com/english/2019-05/25/c_138087108.htm accessed on 11 November 2020.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid.

⁷⁴⁷ Vicky Chemutai and Patrick Low 'African Perspective on trade and the WTO' (2017) Volume 5(6) *GREAT Insight Magazine* available at <https://ecdpm.org/great-insights/shifts-trade-development/african-perspective-trade-wto/> accessed 11 November 2020.

WTO, the challenges faced by African countries in these three areas should be addressed.

The views for reform provided by the Pan-African Private Sector Trade and Investment Committee (PAFTRAC) should be accepted. The PAFTRAC has criticised the world trading system for operating in a manner that restricts Africa and thus limiting the growth and development of Africa.⁷⁴⁸ As such, the PAFTRAC has called for:

1. A considerable increase in the transparency of rules and regulations of the organisation;
2. An improvement in Africa's access to foreign exchange and capital;
3. The Special and Differential Treatment which the WTO affords to developing countries must be improved to allow greater flexibility and adequate policy space to assist local industries and enhance development.⁷⁴⁹

Moreover, the PAFTRAC believes that an African candidate should be elected as the Director-General of the WTO. It would drive the necessary reform to the WTO and thus make the global system inclusive.⁷⁵⁰ On March 1, 2021, Dr Ngozi Okonjo-Iweala was chosen as the Director-General, making her the first woman and first African to occupy this position.⁷⁵¹ This dissertation supports the election of an African candidate. Africa needs a candidate that will advance Africa's interests in the WTO, especially with the formation of the AfCFTA.⁷⁵² Africa needs to ensure that its interests are promoted.

Although the election of an African candidate marks a historic and significant moment for the WTO, this dissertation ponders why it has taken this trade institution such a long time to acknowledge its internal transformation. African countries have constituted 27 per cent of this trade body for decades and developed countries within this institution have benefitted from their relationship with African countries during these decades, as expanded on by the dissertation above. However, the WTO seeks internal transformation now. Is it just a

⁷⁴⁸ Shoshana Kede 'African Private Sector calls for WTO reform' *African Business* 11 September 2020 available at <https://africabusinessmagazine.com/sectors/trade/african-private-sector-calls-for-wto-reform/> accessed 11 November 2020.

⁷⁴⁹ Ibid.

⁷⁵⁰ Ibid.

⁷⁵¹ World Trade Organisation 'History is made: Ngozi Okonjo Iweala chosen as Director General' (2020) available at www.wto.org/english/news_e/news21_e/dgno_15feb21_e.htm accessed 11 July 2021.

⁷⁵² 'World Trade Organisation: How an African head could make a difference' *BBC News* 8 September 2020 available at <https://www.bbc.com/news/amp/world-africa-54058640> accessed on 11 November 2020.

coincidence that an African candidate has been elected at the time when the AfCFTA, the biggest free trade area in the world by number, has just been launched in the continent? Is the election of an African candidate another means to an end, or is the WTO honestly acknowledging its internal transformation? Lest we not forget that the credibility of this trade-related body has also been at stake.

Before the election of an African candidate, former foreign minister and veteran of the UN system Amina Mohammed also called for a reform of the WTO, as its credibility is at stake.⁷⁵³ Mohammed, who has chaired multiple committees of the WTO, was also one of the candidates in the director-general elections. Mohammed argued that the WTO needs to be revitalised to ensure that all members have confidence in the organisation.⁷⁵⁴ Mohammed further argued that it is essential for globalisation to be evenly spread out among nations and within nations and that gains must be evenly distributed.⁷⁵⁵ These views and recommendations are supported by the dissertation, with the caveat that members regaining confidence in the WTO will not be an easy task, as there are several outstanding issues. The prolonged negotiations of the Doha Round, issues of implementation of SDT and the controversy surrounding the dispute settlement system are some of these issues.

The significance of the arguments set out in this dissertation is that they constitute a coherent and convincing third world approach to the role of Kenya, Nigeria and South Africa in the multilateral trading system. In order to show how these arguments may be applied, recommendations to some of the challenges faced by these countries have been presented.

⁷⁵³ Patrick Smith 'Amina Mohammed: The WTO needs to be reformed, its credibility is at stake' 2020 *The Africa Report* 25 available at <https://www.theafricareport.com/38890/amina-mohamed-the-wto-needs-to-be-reformed-its-credibility-is-at-stake/amp/> accessed 11 November 2020.

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

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APPENDIX

YEAR	ROUND OF WTO NEGOTIATIONS	COUNTRY PARTICIPATION
1947	Geneva Round	South Africa, Southern Rhodesia
1949	Annecy Round	Liberia, South Africa, Southern Rhodesia
1951	Torquay Round	South Africa, Liberia, Southern Rhodesia,
1956	Geneva Round	South Africa
1960-61	Geneva Dillon Round	Nigeria, South Africa, Southern Rhodesia, Tunisia
1963-67	Geneva Kennedy Round	Nigeria, Rhodesia, Sierra Leone, South Africa, Malawi
1973-79	Geneva Tokyo Round	Tunisia, Nigeria, Cote d'Ivoire, Ghana, South Africa, Sudan
1986-94	Geneva Uruguay Round	Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, the Central African Republic, Chad, Ivory Coast, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Togo, Tunisia, Uganda, Tanzania, Zaire, Zambia, Zimbabwe.

2001	Doha Development Round	<p>The Doha Round was largely characterised by its coalitions and alliances among developing countries. African countries participated in various groups and there was at times overlapping membership between these groups.⁷⁵⁶</p> <p>The Africa Group covered 41 countries. Subsets of the Africa Group are also members of the Commodities Group, Cotton-4 Group, the Developing Country Grouping, the G20, G33, NAMA 11 and LDC Group. African countries were also represented in the African, Caribbean and Pacific group.⁷⁵⁷</p>
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Table 1. above illustrates the number of African countries who participated in each round of trade negotiations in the GATT/WTO.⁷⁵⁸

⁷⁵⁶ Peter Kleen 'So alike and yet so different: A comparison of the Uruguay Round and the Doha Round' (2008) European Centre for International Political Economy at 17.

⁷⁵⁷ Mareike Meyn 'The WTO Doha round impasse: Implications for Africa' [Briefing Paper, Overseas Development Institute, September 2008].

⁷⁵⁸ Source is World Trade Organisation 'GATT bilateral negotiating material by Round' available at https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm accessed on 27 August 2020.

Table 2. below illustrates some of the regional schemes that are in existent in Africa.⁷⁵⁹

REGIONAL TRADE INITIATIVE	YEAR IN WHICH RTA ORIGINATED	YEAR IN WHICH RTA WAS SIGNED	MEMBER COUNTRIES TO THE RTA
Arab Maghreb Union	1998	1989	Algeria, Libya, Mauritania, Morocco, Tunisia
Agadir Agreement	2001	2004	Egypt, Jordan, Morocco and Tunisia
Central African Economic and Monetary Community (CEMAC)	1959	1994	Gabon, Cameroon, the Central African Republic (CAR), Chad, the Republic of Congo, Equatorial Guinea
Common Market for Eastern and Southern Africa	1994	1999	Burundi, D.R Congo, Djibah, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zimbabwe, Zambia
East African Community		1999	Burundi, Kenya, Rwanda, South Sudan, Uganda and Tanzania
Economic Community of West African States	1965	1975/93	Benin, Burkina Faso, Cabo Verde, Cote D'Ivoire, The Gambia, Ghana, Guinea, Bissau,

⁷⁵⁹ Source: Jaime De Melo and Yvonne Tsikata 'Regional Integration in Africa: Challenges and Prospects' (2014) WIDER Working Paper 2014/037 Page 6.

			Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
Southern African Customs Union	1910	2001	Botswana, Swaziland, Lesotho, Namibia, South Africa
West African Economic and Monetary Union		1994	Benin, Burkina Faso, Cote d'Ivoire, Guinea, Bissau, Mali, Niger, Senegal, Togo
Southern African Development Community	1980	1992	Angola, Botswana, Comoros, DRC, Swaziland, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe.

ANNEXURE ONE

PROVISIONS FROM THE AGREEMENT ESTABLISHING THE AFRICA CONTINENTAL FREE TRADE AREA

Article 3

Article 3 provides that these are the general objectives governing the free trade area:

- a) create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan-African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;
- b) create a liberalised market for goods and services through successive rounds of negotiations;
- c) contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;
- d) Lay the foundation for the establishment of a Continental Customs Union at a later stage;
- e) promote and attain sustainable and inclusive socio-economic development gender equality and structural transformation of the State Parties;
- f) enhance the competitiveness of the economies of State Parties within the continent and the global market;
- g) promote industrial development through diversification and regional value chain development, agricultural development and food security; and
- h) resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

Article 4

Article 4 provides for the specific objectives which are for the purposes of fulfilling and realising the objectives set out in Article 3, state parties shall:

- a) progressively eliminate tariffs and non-tariff barriers to trade in goods;
- b) progressively liberalise trade in services;
- c) cooperate on investment, intellectual property rights and competition policy;
- d) cooperate on all trade-related areas;
- e) cooperate on customs matters and the implementation of trade facilitation measures;

- f) establish a mechanism for the settlement of disputes concerning their rights and obligations; and
- g) establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

Article 5

Article 5 stipulates the principles governing the AfCFTA, the principles are as follows:

- a) driven by Member States of the African Union;
- b) REC's Free Trade Areas (FTAs) as building blocs for the AfCFTA;
- c) variable geometry;
- d) flexibility and special and differential treatment;
- e) transparency and disclosure of information;
- f) preservation of the acquis;
- g) Most-Favoured (MFN) Treatment;
- h) National Treatment;
- i) reciprocity;
- j) substantial liberalisation;
- k) consensus in decision-making; and
- l) best practices in the RECs, in the State Parties and International Conventions binding the African Union.

ANNEXURE TWO

ARTICLE XXIV of GATT, 1947

Territorial Application — Frontier Traffic — Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

- (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
- (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of

an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

- (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
- (c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
 - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
 - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
- (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement

believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this

Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

*'Until the lion has its own storytellers, the tale of the hunt will always
glorify the hunter' – An African Proverb*

Miss Nosiphiwo Nzimande (216018341)
School Of Law
Howard College

Dear Miss Nosiphiwo Nzimande,

Protocol reference number: 00009176

Project title: 'A Third World Approach to the role of South Africa, Nigeria and Kenya in the multilateral trading system

Exemption from Ethics Review

In response to your application received on 18/09/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely



Mr Simphiwe Peaceful Phungula
Research and Higher Degrees Committee
School Of Law

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