AfCFTA and Lex Mercatoria: Reconceptualizing International Trade Law in Africa

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Abstract

This paper focuses on the Agreement for the Establishment of the African Continental Free Trade Area (AfCFTA). It argues that commercial activities in precolonial Africa was akin to the phenomenon of *lex mercatoria* in medieval Europe. It discusses two major tenets embedded in the AfCFTA: the variable geometry principle and the dispute settlement mechanism. It argues that for structural and comparative purposes, these principles (variable geometry and dispute settlement) form the kernel of modern *lex mercatoria* in the African context. This paper concludes by advocating that the AfCFTA will enhance the principles *of lex mercatoria* by promoting African trade principles.

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1. Introduction

The direct impetus or 'politico-legal journey'[1] regarding the adoption of the AfCFTA Agreement started in 2012, when the 18th Ordinary Session of the Assembly of Heads of State and Government of the African Union (AU) accepted the decision to establish a Pan-African Free Trade Area by 2017.[2] This summit also adopted the 'Action Plan on Boosting Intra-African Trade (BIAT)' which explicitly aims to strengthen trade integration on the continent.[3] The BIAT is divided into seven clusters including trade facilitation, trade policy, productive capacities, trade related infrastructure, trade finance and factor market integration.[4] A successful implementation of these actions in the clusters is expected to considerably contribute in enhancing intra-African trade.[5]

Negotiations over what will be included in the final version of the AfCFTA was a long and tedious process. These were initiated by the African Union (AU) Heads of State and Government in June 2015 and between 2015 and March 2018, the negotiating forum met more than 10 times before the final draft of the Agreement was agreed upon.[6] The negotiations are split into phases and the first phase which has been recently concluded, focused on issues such as rules of origin (ROO), dispute settlement and the removal of non-tariff barriers and easing out excessive tariffs on goods.[7] The second phase of negotiations commenced in late 2018 and focuses on issues such as investment, competition and intellectual property rights.[8]

The Agreement establishing the AfCFTA entered into force on May 30, 2019 in the 24 countries that deposited their instruments of ratifications.[9] The aim of the AfCFTA is to develop a single market for goods and services and promote the movement of goods and persons on the African continent. The AfCFTA covers a market of 1.2 billion and a gross

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[1] Babatunde Fagbayibo, 'The African Continental Free Trade Area (AfCFTA) and the imperative of democratic legitimacy: An analysis' (2020) (Forthcoming in the Nigerian Yearbook of International Law)
[2] African Union (2012) 'Assembly of the Union: Eighteen ordinary session 29-30 January 2012 Addis Ababa, Ethiopia' <https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf> Also cited in Fagbayibo *ibid*.
[3] Generally, see Fagbayibo (n 1); African Union (2012) 'BIAT – Boosting Intra-African Trade. African Union' < https://au.int/en/ti/biat/about >
[4] AU *ibid*.
[5] AU (n 3).
[6] United Nations Economic Commission for Africa and the African Union Commission (2018) 'African Continental Free Trade Area Questions & answers' < https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers#:~:text=%20African%20Continental%20Free%20Trade%20Area%20-%20Questions,area%20provides%20great%20opportunities%20for%20trading...%20More%20 >
[7] Fagbayibo (n 1); UNECA and AUC *ibid.*
[8] UNECA and AUC (n 6).
[9] Tralac website 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#legal-texts

domestic product (GDP) of $2.5 trillion across all the States of the African Union.[10] Hence, the AfCFTA is the world's largest free trade agreement since the creation of the World Trade Organisation (WTO).[11] The AfCFTA was brokered by the African Union (AU) and was signed by 44 out of the 55 members of the AU in Kigali, Rwanda in March 2018.[12] Signatories to the AfCFTA have risen to 54 out of the 55 member states.[13] Also, to date, 30 countries have ratified the AfCFTA Agreement (more ratifications are in progress) and currently, Eritrea is the only country yet to sign up to the Agreement.[14] Arguably, due to the fact that many African countries are not major players in their respective free trade agreements (FTAs) with developed countries (and in the global trading regime), the creation of the AfCFTA has an added importance.[15]

The operational phase of the AfCFTA was unveiled during the 12th Extraordinary Session of the AU Assembly in Niamey, Niger in July 2019.[16] The AfCFTA will be governed by five operational instruments – 'the Rules of Origin; the online negotiating forum; the monitoring and elimination of non-tariff barriers; a digital payments system and the African Trade Observatory.'[17] Trading under the AfCFTA was anticipated in July 2020 but because of the current Covid-19 pandemic, this has been postponed (however a new date is yet to be confirmed by the AU Commission).[18]

The Treaty Establishing the African Economic Community (AEC) (also known as the Abuja Treaty) is the immediate forerunner of the AfCFTA.[19] The Abuja Treaty also envisages the establishment of a free trade area among AU members and arguably, the AfCFTA is a culmination of the dream or idea of continental integration in Africa.[20] Hence, the AfCFTA is one of the instruments that have been developed by the AU to enhance regional integration on the continent. According to Obeng-Odoom, the 'AfCFTA is not just another trade agreement:

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[10] African Continental Free Trade Area – Questions & Answers, United Nations Economic Commission of Africa (UNECA) (2019) < https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers > accessed 30 July 2020.
[11] *Ibid*.
[12] AfCFTA Website 'About AfCFTA'< https://www.africancfta.org/aboutus> accessed 30 July 2020
[13] *Ibid*.
[14] Tralac website (n 9).
[15] Generally, see James Gathii, 'Agreement Establishing the African Continental Free Trade Area' 58(5) (2019) *International Legal Materials* 1028.
[16] Tralac (n 9).
[17] Tralac (n 9).
[18] Tralac (n 9).
[19] Gathii (n 15).
[20] Gathii *ibid* 1028.

it is a flagship initiative by the AU to ensure the integration of Africa and African unity.'[21] The AfCFTA promotes regional integration which is an explicit norm under AU instruments including the Abuja Treaty and the Constitutive Act of the AU.[22] Article 3 of the Agreement focuses on the general objectives whilst Article 4 focuses on the specific objectives of the AfCFTA. Some of the general objectives includes the creation of a single market for goods and services, free movement of people, sustainable and inclusive development, and the creation of a continental customs union amongst others. Some of the specific objectives include the elimination of tariffs and non-tariffs barriers in goods and services, cooperating on investment, intellectual property rights and competition policy amongst others.

Therefore, this paper contends that the development of the AfCFTA as Africa's contribution to the evolution of modern *lex mercatoria* fits within recent scholarship on international economic and trade law in Africa.[23] Furthermore, lex mercatoria can be defined as:

> …a multi-faceted term which serves both to draw boundaries around a community and its practices, and to denote a legal system. It describes the totality of actors, usages, organizational techniques, and guiding principles that animate private, transnational trading relations, and it refers to the body of substantive law and dispute resolution procedures that govern these relations.[24]

Scholars within and outside Africa, have reconceptualised international economic law as scholarship that has at its foundation, a rejection whether 'implicitly or explicitly, of non-African idioms, canons and institutions of international economic law as the basis or point of departure upon which the study, research and teaching of international economic law in Africa has to proceed from'.[25] For example, Mbengue suggests that the development of the Pan-

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[21] Franklin Obeng-Odoom, 'The African Continental Free Trade Area." *American Journal of Economics and Sociology* 79.1 (2020): 167-19, 177-179. Also see, AU Website 'Flagship Projects of Agenda 2063'< https://au.int/en/agenda2063/flagship-projects> accessed 30 July 2020

[22] Generally, Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge, 2018)

[23] For other recent innovations in International Economic Law in Africa, see Olabisi Akinkugbe et al, 'Africa's Participation in International Economic Law in the 21st Century: An Introduction' (2020) 17 (1) *Manchester Journal of International Economic Law* 1

[24] Alec Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 (5) *Journal of European Public Policy* 627, 629. However, in this modern era, academics have developed the concept of 'New Lex Mercatoria' or 'Modern Lex Mercatoria'. Generally, see Ross Cranston, 'Theorizing Transnational Commercial Law' 42 (2006) *Tex. Int'l LJ* 597; Giles Cuniberti, 'Three Theories of Lex Mercatoria' (2013) 52 *Colum. J. Transnat'l L* 369.

[25] James Gathii, 'Africa and the Disciplines of International Economic Law: Taking Stock and Moving Forward' (2016); Makane Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) *ICSID Review-Foreign Investment Law Journal* 1; Olabisi Akinkugbe, 'Reverse Contributors?

African Investment Code (PAIC) which is a wide-ranging investment code for Africa has led to the 'Africanization' of international investment law in Africa.[26]

The question this paper seeks to answer is - to what extent does the AfCFTA reflect African, global, or European understandings of lex mercatoria and what implications does this have for international trade?

To achieve its objective, the paper discusses two major tenets embedded in the AfCFTA: the variable geometry principle and the dispute resolution mechanism. Article 5 of the AfCFTA Agreement focuses on some principles which underpin member states actions under the AfCFTA. Variable geometry which is one of such principles enshrined in Article 5 provides for flexibility in the implementation of the AfCFTA by African states.[27] This paper argues that for structural and comparative purposes, these principles (variable geometry and dispute settlement) form the kernel of *lex mercatoria* in the African context.[28] Hence, the aim of this paper is to rely on the concepts of variable geometry and dispute settlement mechanism in the AfCFTA to argue that the creation of the AfCFTA has led to the development of an African-oriented slant of international trade law. The variable geometry principle has been used by several scholars to analyse the various economic integration initiatives in Africa. Furthermore, the dispute settlement mechanism of the AfCFTA is largely based on the WTO's dispute settlement system. Article 20 of the AfCFTA Agreement creates a dispute settlement mechanism (DSM) governing the disputes between state parties.

This paper is divided into five sections including this introduction. The second section focuses on the evolution of *lex mercatoria* from a western perspective. *Lex mercatoria* provides a lens or framework for analysing trading interactions from a Western/European historical perspective. The third section of the paper focuses on *lex mercatoria* in Africa. This section

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African State Parties, ICSID, and the Development of International Investment Law' (2020) 34 (2) *ICSID Review-Foreign Investment Law Journal* 434.

[26] Mbengue *ibid*; Chidebe Matthew Nwankwo, 'Balancing International Investment Law and Climate Change in Africa: Assessing Vertical and Horizontal Norms' 17 (1) (2020) *Manchester Journal of International Economic Law* 48

[27] Some of the principles of the AfCFTA are enshrined in Article 5. Article 5 states thus: 'The AfCFTA shall be governed by the following principles: (a) driven by Member States of the African Union; (b) RECs' 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-Nation (MFN) Treatment; (h) National Treatment; (i) reciprocity; 6 (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.'

[28] Furthermore, another argument that can be made here is that, arguably there is a link between the concepts (variable geometry and dispute settlement) and lex mercatoria. For example, were there earlier trade rules derived from lex mercatoria that mirror these African trade principles? For analysis of international trade in precolonial Africa, see Paul Lovejoy, 'Interregional Monetary Flows in the Precolonial Trade of Nigeria 15 (4) (1974) *The Journal of African History* 563

argues that in pre-colonial Africa, trading activities amongst traders and nations were akin to *lex mercatoria* in Western Europe notwithstanding the arguments to the contrary by some scholars such as Sempasa that Africa did not participate in the development of the modern rules on international trade.[29] The fourth section posits that the AfCFTA is arguably the epitome of an African centred approach to *Lex Mercatoria*. Also, some key principles in the AfCFTA such as variable geometry and the dispute settlement mechanism are relied upon in this section of the paper to justify that the AfCFTA is Africa's unique contribution to modern *lex mercatoria*. This paper concludes the fifth section by suggesting that the AfCFTA codifies the African perspective to *lex mercatoria* on the continent.[30]

2. Evolution of Lex Mercatoria

Lex mercatoria is a trading system that can be traced back to the activities of traders in Europe in the 11th and 12th century.[31] This trading system was a legal regime for trade in the medieval period and it was organized by the traders and their agents.[32] One of the major strengths of this trading system was that merchants or traders were able to avoid conflicts arising from different local customs and regulations with the freemasons being pivotal to this.[33] This was a voluntary trading system comprised of various principles such as good faith, conflict resolution, dispute settlement and among others.[34] By the close of the 12th century, this trading system (also called the medieval law merchant) regulated the majority of the trade in Europe via middlemen and 'their codes of conduct, at critical points along the great Mediterranean and Eastern trading routes'.[35]

[29] Samson Sempasa, 'Obstacles to International Commercial Arbitration in African countries' (1992) 41 (2) *International & Comparative Law Quarterly* 387.
[30] Scholars such as Berger and Johnson amongst others have argued that there is a rise in the codification of Lex Mercatoria in the international sphere. See Klaus Peter Berger, *The Creeping Codification of the Lex mercatoria* (Kluwer Law International, 1999); Vanessa Johnson, 'Codification of the Lex Mercatoria: Friend or Foe' (2015) 21 *Law & Bus. Rev. Am.* 151.
[31] Sweet (n 24) 629. However, Oliver Volckart and Antje Mangels, 'Are the roots of the modern lex mercatoria really medieval?' (1999) 65 (3) *Southern economic journal* 427 argue that modern day Lex Mercatoria is not based or founded on the medieval Lex Mercatoria system that can be traced to the 10th - 13th century.
[32] Sweet (n 24) 629.
[33] Sweet (n 24). However, for robust critique of *lex mercatoria*, see Emily Kadens, 'Myth of the Customary Law Merchant' (2012) 90 Tex L Rev 1153. She argues that the 'law merchant myth is false on many levels...'. Also see Ralf Michaels, 'Legal medievalism in lex mercatoria scholarship' (2011) 90 Tex. *L. Rev* 258
[34] Sweet (n 24); Chrispas Nyombi, 'The gradual erosion of the ultra vires doctrine in English company law' 56 (5) (2014) *International Journal of Law and Management* 347.
[35] Sweet (n 24) 629.

The medieval concept of *lex mercatoria* has been replaced in the modern times with what has been termed 'New Lex Mercatoria'[36] or 'Modern Lex Mercatoria'.[37] The medieval *lex mercatoria* is radically different or distinct from the new *lex mercatoria*. As highlighted earlier, medieval *lex mercatoria* was utilised amongst merchants or traders for the regulation of their trading activities in Western Europe during the middle ages.[38] It was also transnational because it could not be solely identified with specific national legal systems.[39] However, around the 18th and 19th centuries, *lex mercatoria* lost its transnational nature and ended up being codified into different national legal systems.[40] Hence, the modern *lex mercatoria* has been defined as 'set of rules for border-crossing transactions developed autonomously by the international business community and applied by arbitrators in the case of trade disputes.'[41] Notwithstanding that the modern *lex mercatoria* might be difficult to decipher, some commonalities or key principles such as reasonableness, good faith, compensation, set-off and duty to negotiate amongst others can be identified.[42]

Lex mercatoria has undergone different transformations culminating in its current iteration as a new *lex mercatoria*. Scholars have divided the fall and rise *of lex mercatoria* into three epochs.[43] The first stage of epoch is medieval or ancient *lex mercatoria* (which later fell into disuse). The second stage involved the rise of *lex mercatoria* in the 20th century. The final and third (current) stage in the development of *lex mercatoria* which moves from flexible soft law framework to a more formalised system with codified rules (for example, UNIDROIT

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[36] Sweet (n 24); Nikitas Hatzimihail, 'The many lives-and faces-of lex mercatoria: history as genealogy in international business law' (2008) 71 *Law & Contemp. Probs.* 169 'This legal phenomenon is in fact often described as the "new" lex mercatoria, as distinguished from the "ancient" law merchant, which purportedly flourished in medieval and early modern Europe.'

[37] Volckart and Mangels (n 31). According to Hatzimihail (n 36), the two founding fathers of the modern *lex mercatoria* are Clive Schmitthoff and Berthold Goldman.

[38] Gbenga Bamodu, 'Exploring the Interrelationships of Transnational Commercial Law, the New Lex Mercatoria and International Commercial Arbitration' (1998) 10 Afr. J. Int'l & Comp. L. 31

[39] Bamodu *ibid.*

[40] Bamodu (n 38). However, see Okezie Chukwumerije, 'Applicable Substantive Law in International Commercial Arbitration' (1994) 23 Anglo-Am L Rev 265, 271 who states thus 'The medieval law merchant did not, however, completely lose its character, as it was still possible in most jurisdictions to incorporate new customs and usages into contract law.'

[41] Volckart and Mangels (n 31). However, some scholars such as Mustill have argued that there is no generic or general definition of Lex Mercatoria. Lord Mustill contends that Lex Mercatoria 'means different things to different scholars. Generally, see Michael Mustill 'The New Lex Mercatoria: The First Twenty-Five Years' in Maarten Bos and Ian Brownlie (eds) *Liber Amicorum for Lord Wilberforce* (1987)88; Antonius Hippolyte, 'A Power Struggle or the Assertion of Rights: Application of the Lex Mercatoria in International Commercial Arbitration' (2011) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936192 > accessed 30 July 2020.

[42] Cranston (n 24) 598; Sweet (n 24)

[43] Ralf Michaels, 'The True Lex Mercatoria: Law beyond the State' (2007) 14 (2) *Ind. J. Global Legal Stud* 447, 448; Hatzimihail (n 36).

Principles of International Commercial Contracts) and 'strongly institutionalized court-like international arbitration'.[44]

Furthermore, the new *lex mercatoria* is created outside the authority of the states.[45] Hence some scholars have argued that modern *lex mercatoria* is a-national, that is global law without States.[46] However, Michaels argues that modern lex mercatoria is an emergent global 'commercial law that freely combines elements from national and non-national law. The true lex mercatoria marks the shift in global law from segmentary differentiation in different national laws to a functional differentiation. It is a law beyond, not without, the state.'[47] New or modern *lex mercatoria* is thus an exemplar of an a-national system of law, and this is often highlighted in arbitration awards arising from international commercial tribunals.[48]

This section of the paper suggests that *lex mercatoria* is a concept which remains an integral part of international trade law. The next section discusses whether precolonial Africa played any role in the development of *lex mercatoria*.

3. Lex Mercatoria and Africa

As highlighted earlier, the concept of *lex mercatoria* is not a recent development. Various scholars have traced the history of *lex mercatoria* to different epochs and civilisations such as originating in the Roman *ius gentium*[49], ancient Egypt, and the Greek and the Phoenician sea trade amongst others.[50] Due to the Eurocentric[51] or western nature of the evolution of *lex*

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[44] Michaels (n 43) 448.
[45] Michaels (n 43); Johnson (n 30); Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed) Global Law without a State (Brookfield 1996) 1 argues that *lex mercatoria*, which is the transnational law of economic transactions, 'is the most successful example of global law without a state'
[46] Michaels (n 43) Generally, see Hatzimihail (n 36) for some of the criticisms of *lex mercatoria*.
[47] Michaels (n 43) 447
[48] Bamodu (n 38). Also, Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 Int'l & Comp LQ 747 states that in continental Europe 'arbitrators more and more frequently apply lex mercatoria to international disputes.'
[49] This was a regime of laws regulating the trading relationships between Romans and foreign traders.
[50] Generally, see Hippolyte (n 41).
[51] For an extensive analysis of the Eurocentric nature of lex Mercatoria, see Gbenga Oduntan, 'The Reimaginarium of Lex Mercatoria: Critique of the Geocentric Theory about the Origins and Episteme of the Lex Mercatoria' (2016) 13 (1) *Manchester J. Int'l Econ. L* 63. Also, scholars from the Global South have developed the Third World Approaches to International Law (TWAIL) which 'provides a substantive critique of both the politics and the scholarship of international law, in addition to exploring the extent to which international law has legitimated global processes of marginaluzation and domination of the peoples of the third world, as well as how third world peoples and countries can overcome these challenges.' Generally, see James Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL).' Forthcoming in Jeffrey Dunoff and Mark Pollack (eds) International Legal Theory: Foundations and Frontiers, (Cambridge University Press, 2019) 3 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767 > accessed 30 July 2020.

mercatoria in mainstream academic literature, many African academics have rejected the concept of *lex mercatoria*.[52] Bamodu argues that the concept of medieval *lex mercatoria* raises suspicions or reservations among African academics arguably due to the apparent lack of participation of Africa in the development of this concept.[53] Also, some African scholars contend that due to Africa's lack of meaningful participation in the development of many of the principles and standards utilised under many modern-day arbitral tribunals, it is used to bypass municipal laws in Africa.[54] The Eurocentric nature of medieval *lex mercatoria* fits within the mainstream Western scholarly works or publications in the 18th and 19th centuries which neglected Africa and overly accentuated its Western origins.[55]

Arguably, the criticisms by a plethora of African scholars against the medieval *lex mercatoria* have been mitigated by recent developments in the international commercial law and international trade law arenas. Furthermore, many scholars have highlighted that the origin of *lex mercatoria* cannot be solely traced to Europe. Commercial trading amongst traders was a common occurrence in different parts of the world (including Africa) and many of these communities had systems of resolving disputes based on their customs or rules.[56] An example of a trading arrangement in pre-colonial Africa is the "Wangara Trading Network", which according to Professor Ochonu was an:

> ...extensive business and trading empire that Mande-speaking merchants, trade brokers, and financiers built and ran across West Africa between the fourteenth and nineteenth centuries. The Wangara feature prominently in the economic and mercantile history of West Africa because they pioneered intra-regional long-distance trading and investments. They faced and overcame obstacles to trade and investments in diverse cultural and political settings, leaving a legacy that is instructive for current discussions about Africans investing and trading across Africa.[57]

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[52] Gbenga Bamodu, 'Transnational law, unification and harmonization of International Commercial Law in Africa' (1994) 38 (2) *Journal of African Law* 125; Bamodu (n 38); Samuel Asante, 'The Perspectives of African Countries on International Commercial Arbitration' (1993) 6 (2) Leiden J. Int'l L. 331; Sempasa (n 29)

[53] Bamodu (n 52)

[54] Bamodu (n 38). Also, see Uche Ewelukwa Ofodile, 'The Past and Future of African International Law Scholarship: International Trade and Investment Law', (2013) 107 *American Society of International Law Proceedings* 194, 195

[55] Oduntan (n 51); Dakas CJ Dakas, 'Interrogating Colonialism: Bakassi, the Colonial Question and the Imperative of Exorcising the Ghost of Eurocentric International Law' (2017) *Nigerian Yearbook of International Law* 113

[56] This was common in the Benin Kingdom (now in present day Nigeria) during trading activities amongst the people or with foreign traders (including British, Dutch, and Portuguese amongst others). Also, Oduntan (n 51) 68 argues that 'To pay scant recognition to the interactions and contributions of various African and Asian nations to international trade and to unfairly exclude them from the discourse of *lex mercatoria* is to render a manifestly inaccurate account of the history of this significant concept and of international trade itself.'

[57] Moses Ochonu, 'The Wangara Trading Network in Precolonial West Africa: An Early Example of Africans Investing in Africa' in Terence McNamee et al (eds) *Africans Investing in Africa*. (Palgrave Macmillan 2015) 9. Also, many intellectual concepts or theories developed by precolonial African scholars have been relegated in

Furthermore, Oduntan highlights the fact that commercial interactions between Africans and foreign traders (including Arabs and Europeans) was quite a sophisticated process and it was accepted by the foreign traders and explorers.[58] He further asserts that there were some wholly indigenous trading devices or mechanisms that related to commercial trading in precolonial era in Africa, which unfortunately have gone into oblivion**.**[59] Moreover, in the precolonial era, through the growth of formal and informal rules, Africans created a region-wide market that involved the trading of different goods such as firearms and salt amongst others.[60] Also, trading interactions in precolonial Africa led to the creation and usage of cross-border currencies such as cowrie shells and gold dust which were accepted means of exchange.[61] Also, according to Kufuor, the pre-colonial commercial activities that African traders, kingdoms and communities were engaged in, therefore 'mirrored the phenomenon of European law merchant [lex mercatoria] that was at the heart of Western Europe's commercial revolution that spanned the 13th to 18th centuries.'[62] Hence, this paper argues that notwithstanding the assertion that *lex mercatoria* can majorly be traced to Europe, precolonial African kingdoms (and traders) were also involved in similar trading interactions and producing unique ideas akin to what was occurring in the Europe in that era. Precolonial African societies and institutions also developed structures and norms that embodied the uniqueness of their own trading arrangements. This paper contends that precolonial Africans and foreign traders engaged in trading activities in Africa akin to lex mercatoria notwithstanding that there was no explicit reference to the concept of lex mercatoria in that era in Africa.[63]

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academic discourse. For example, the contributions of Ibn Khaldun (an Islamic politician and scholar in precolonial Africa in the middle ages) to the development of modern-day economics is largely ignored in mainstream western works. Generally, see Daniel Oláh, 'The amazing Arab scholar who beat Adam Smith by half a millennium' (2017) < https://evonomics.com/amazing-north-african-scholar-beat-adam-smith-half-millennium/> accessed 30 July 2020.

[58] Oduntan (n 51).

[59] Oduntan (n 51) 73 states that an example of a trading device in this era was the 'silent trade', which shows that '… it was possible to transact business with merchants who were not present at designated ports but who left their valuables on the shore and in the open.' Also, according to Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge, 2015) 7 states that 'Letters of credit, for instance, existed among the black civilisations along the Nile including ancient Egypt. In time the concept spread through the ancient Greek to Roman civilisations, the Islamic civilisations and ended up in the modern manifestations we have in the world today.'

[60] Kofi Oteng Kufuor, 'The African Continental Free Trade Agreement and the Importance of a Two-Level Approach to its Success', Afronomicslaw Blog (22 April 2019) < https://www.afronomicslaw.org/2019/04/21/the-african-continental-free-trade-agreement-and-the-importance-of-a-two-level-approach-to-its-success/ > accessed 30 July 2020.

[61] Kufuor ibid; Moses Ochonu (ed) *Entrepreneurship in Africa: A Historical Approach* (Indiana University Press, 2018); Lovejoy (n 28).

[62] Kufuor (n 60).

[63] Also see George Chukwuemeka Nnona, 'Customary Corporate Law in Common Law Africa' 66 (3) (2018) *The American Journal of Comparative Law* 639, 640. For example, Nnona argues that the notion that corporate law is alien to precolonial Africa, '…is incomplete and incorrect, the roots of the corporation and corporate law in

Arguably, the development of the AfCFTA is Africa's contribution to the expansion of new *lex mercatoria* to include unique African perspective or principles on international trade law as accentuated in Article 5 of the AfCFTA Agreement. Hence, the view that Africa is not a major player in the international sphere has been mitigated by the development of the AfCFTA (and other recent developments) which involved a plethora of relevant stakeholders (such as States, businesses, CSOs and informal organisations) during its negotiation process (which is yet to be fully completed)

4 The case for AfCFTA as an African variant of Lex Mercatoria

According to Kuhlmann and Agutu, the AfCFTA is unique and it is 'an alternative model for trade and development law.'[64] Likewise, Obeng-Odoom posits that the AfCFTA is 'Africa's own theory of free trade' and hence it is aimed at creating resource sovereignty on the continent.[65] Kuhlmann and Agutu further aver that one distinctive characteristic of the AfCFTA is that the timing of its creation is pertinent due to the current crisis in the global trading regime accentuated with the imbroglio created by Brexit, the WTO crisis, and the worsening state of the US-China trade relationship which has impacted negatively on international trade law.[66] Another unique characteristic of the AfCFTA is the design and this includes its negotiating processes and reliance on concepts such as flexibility and variable geometry.[67] Another unique trait of the AfCFTA is its large scale or size which will enhance regional integration and Africa's trading prospects.[68] If the AfCFTA is successfully implemented, it will have positive impacts on the global trading system or international trade law.

One of the major obstacles to Africa's economic development is the problem of the multiplicity or diversity of laws on the continent.[69] This also impacts negatively on commercial

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precolonial customary law institutions and commerce being delineable.' Customary law regulated corporations in some parts of precolonial Africa and unfortunately, customary corporate law is now in disuse. He further asserts that the notion of customary corporate law existed in precolonial Africa and this system is consistent with modern-day corporate law.

[64] Katrin Kuhlmann and Akinyi Agutu, 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' (2020) 51 (4) *Georgetown Journal of International Law* 1. However, see Fagbayibo (n 1) for some of the criticisms of the AfCFTA.

[65] Odoom (n 21) 180.

[66] Kuhlmann and Agutu (n 64).

[67] Kuhlmann and Agutu (n 64).

[68] Kuhlmann and Agutu (n 64).

[69] Bamodu (n 52).

activities between African businesses and foreign firms.[70] Hence, 'diversity of international commercial laws among African countries is likely to impede the achievement of the objectives of the economic integration schemes.'[71] Arguably, with the development and coming into effect of the AfCFTA, some of the aforementioned barriers or obstacles will be mitigated on the continent.

Furthermore, in international commercial law, transnational (or global law) has been equated to *lex mercatoria* which comprises universally accepted standards or principles of commercial law relation to international commercial transactions.[72] Hence, Article 5 contains the universally accepted standards and principles that will govern trade disputes arising from the provisions of the AfCFTA. These principles are African-oriented, and they can be argued to reflect the African or African Union's approach to resolving state or international trade disputes. Some of the principles enshrined in Article 5 of the AfCFTA Agreement includes the fact the process is driven by AU states, the regional economic communities (RECs) Free Trade Areas (FTAs) are the building blocks of the AfCFTA, variable geometry, flexibility and special and differential treatment, transparency, national treatment, consensus in decision-making and reciprocity amongst others.

Arguably, the above principles enshrined in Article 5 amplify the view that the AfCFTA is Africa's contribution to modern *lex mercatoria* or international trade law. For example, Gathii suggests that it is imperative to appreciate African RTAs (Regional Trade Agreements) 'on their own terms, because they have contextualizing imperatives grounded in African history, politics and realities that defy being strapped into the straitjacket of European or other non-African experiences.'[73] Therefore, the provisions enshrined in Article 5 of the AfCFTA Agreement are bold and aim for a 'rules based continental trading system.'[74] One major criticism of *new lex mercatoria* is that its precise nature or remit is unclear.[75] On the other hand, Article 5 of the AfCFTA Agreement expressly lists the principles governing the AfCFTA. This is one of the major strengths of the AfCFTA and hence, there is no ambiguity in respect of the remit or legal regime governing the AfCFTA. However, this paper focuses on the principles of

[70] Bamodu (n 52).
[71] Bamodu (n 52).
[72] Bamodu (n 52); see Lando (n 48).
[73] James Gathii, African *Regional Trade Agreements as Legal Regimes* (Cambridge University Press, 2011) xxvii
[74] Olabisi Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment' (2019). Available at SSRN website <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745 > accessed 30 July 2020.
[75] Generally, see Bamodu (n 38) for the various views on this point. Also, Bamodu (n 52) divides the different theories and meanings of new *lex mercatoria* into narrow and broad conceptions of new *lex mercatoria*.

variable geometry (Article 5) and the dispute settlement mechanism as provided in Article 20 of the AfCFTA Agreement.

4.1 Variable Geometry and AfCFTA

Variable geometry is one of the foremost principles embedded in the AfCFTA. The variable geometry principle has been used to analyse various economic integration projects or initiatives in Africa. The variable geometry principle is embedded in Article 5 of the AfCFTA. According to Gathii[76]

> In the African context, variable geometry refers to rules, principles, and policies adopted in trade integration treaties that give member states, particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of regionwide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks.

Thus, Gathii also argued in some of his writings that variable geometry and flexibility are at the crux of regional integration in Africa.[77] Notwithstanding that a major critique of variable geometry is that it leads or creates inefficiency in trade amongst African states, it is a strategy which has been adopted by African Regional Trade Agreements (RTAs) 'to adjust the benefits and burdens of trade adjustment among themselves.'[78]Furthermore, the AfCFTA Agreement, similar to the prevailing nature of RTAs in Africa enshrines the principle of variable geometry in Article 5. Also, by virtue of Article 5, AfCFTA Agreement is administered by the principles of variable geometry, flexibility, and special and differential treatment (SDT). Like other

[76] James Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes' (2009) 35 *North Carolina Journal of International Law and Commercial Regulation* 571, 609.

[77] Gathii was one of the earliest academics to critically apply the variable geometry principle to the analysis of regional integration projects/initiatives in Africa. Generally, see Gathii (n 76) and Gathii (n 15).

[78] Gathii (n 73) 41.

African RTAs, the AfCFTA consequently provides flexibility for member states to pursue the aims and harmonisation objectives of the Agreement at their own or slower pace.[79]

Under the WTO, the negotiating model is that all members are supposed to sign up to all the stages or phases of a negotiation.[80] However, recent WTO agreements typically do not provide for corresponding obligations for all WTO members.[81] Instead, the agreements provides for examples of what is referred to as special and differential treatment (SDT).[82] These SDT provisions contain reduced expectations for developing countries and least developed countries (LDCs) in some instances.[83] Furthermore, differential treatment for developing countries and LDCs is an integral part of the WTO negotiating process and developing countries are expected to have lower tariffs cuts than the developed countries.[84] Also, some WTO agreements allow LDCs and developing countries grace periods with regard to the domestic implementation of minimum standards. For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains a transitional period for LDS to implement most of their obligations under the TRIPS.[85] This transitional period was originally for 10 years until 2005.[86] However, this was later extended to 2013 and recently, it has been extended to 2021.[87] Transitional period provides the opportunity for poorer members of the WTO to implement their minimum obligations under TRIPS.[88]

On the other hand, some scholars have advocated that principle of variable geometry should be fully adopted by the WTO.[89] Variable geometry is flexible and the adoption of variable geometry by WTO will lead to members only implementing obligations focusing on their interests, rather than requiring a 'single undertaking', to which all Members are required to commit.[90] Furthermore, Lewis argues that a variable geometry approach 'would lead to some

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[79] Gathii (n 15); Amao (n 22) 68 on the utility of harmonisation in economic integration, states that '…while respecting the peculiarities of the various national legal systems, harmonisation gives the opportunity to reduce differences in selected areas and to enhance legal cooperation between countries.'

[80] Meredith Lewis, 'The Origins of Plurilateralism in International Trade Law' 20 (5) (2019) *The Journal of World Investment & Trade* 633.

[81] Lewis ibid.

[82] Lewis (n 80).

[83] Lewis (n 80).

[84] Lewis (n 80).

[85] Lewis (n 80).

[86] Lewis (n 80).

[87] Lewis (n 80).

[88] Another example is the Trade Facilitation Agreement which permits developing countries to implement the substantive provisions at their own pace. Generally, see Lewis (n 80).

[89] Bernard Hoekman and Petros Mavroidis 'WTO 'à la carte'or 'menu du jour'? Assessing the Case for More Plurilateral Agreements' 26 (2) (2015) *European Journal of International Law* 319; Lewis (n 80).

[90] Lewis (n 80) 635.

agreements only being joined by a subset of the WTO membership and would entail negotiating with this outcome in mind.'[91] Thus, it would be valuable if the principle of variable geometry is fully embedded in the WTO.[92]

The principle of variable geometry is a key aspect of the AfCFTA Agreement. Under the AfCFTA, the principle of variable geometry allows for concerns and agreements to be divided into parts and approached in phases or stages, thereby tailoring the impact of the AfCFTA on the continent.[93] Hence, the principle of variable geometry accentuates the AfCFTA's approach as an incremental or gradualist trade agreement.[94] However, there have been different interpretations on the relevance of variable geometry to the various African economic integration projects.[95] On the one hand, the argument is that the concept of variable geometry has deepened regional integration initiatives in Africa by enhancing the flexibility for different countries to pursue or align with the regional integration projects at their own pace.[96] Ansong has argued persuasively that Article 19(1) of the AfCFTA which focuses on the relationship between the AfCFTA and RECs in Africa has operationalised the variable geometry principle in its framework.[97] Ansong further argues that even if the drive for greater integration is ineffectual at the AfCFTA level, the RECs can still engage in a deeper integration because of the well-ingrained structures and rules at the regional level.[98] However, this may lead to the relegation of AfCFTA in the scheme of regional economic or integration initiatives in Africa.

On the other hand, there have been strident criticisms on the impact of variable geometry in the AfCFTA.[99] For example, Fasan avers that variable geometry (wherein states integrate at different levels) could hinder the establishment of a single market in Africa as its application

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[91] Lewis (n 80).
[92] Currently, variable geometry only applies to plurilateral agreements in the WTO. According Hoekman and Mavroidis (n 89) 319, 'Plurilateral agreements in the context of the World Trade Organization (WTO) allow subsets of countries to agree to commitments in specific policy areas that only apply to signatories and thus allow for 'variable geometry' in the WTO.'
[93] Kuhlmann and Agutu (n 64) 23.
[94] Kuhlmann and Agutu *ibid.*
[95] Akinkugbe (74). The concept of variable geometry is of limited use in European integration projects. However, variable geometry is said to be the mainstay of integration initiatives in developing countries. Generally, see Elisa Tino, 'The Variable Geometry in the Experience of Regional Organizations in Developing Countries.' 18 (2013-2014) *Spanish Yearbook of International Law* 141.
[96] Generally, see Gathii (n 73).
[97] Alex Ansong, 'International Economic Law in Africa: Is the African Continental Free Trade Area a Viable Project?' Available at SSRN website < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285290 > accessed 30 July 2020.
[98] Ansong *ibid.*
[99] Olu Fasan, 'Why AfCFTA may not be a credible forerunner of single African market' AfronomicsLaw Blog (6 February 2019) < https://www.afronomicslaw.org/2019/02/06/why-afcfta-may-not-be-a-credible-forerunner-of-single-african-market/> accessed 30 July 2020.

might clash with the aim of the member states operating at identical levels of obligation and implementation or domestication of the AfCFTA.[100] Thus, for AfCFTA to succeed, African leaders must show the requisite political will to fully implement the Agreement.[101]

The next section focuses on resolution of disputes under the AfCFTA. Hence, a well-functioning dispute settlement system enhances the utility of trade agreements.

4.2 Dispute Settlement in the AfCFTA

Article 20 of the AfCFTA Agreement establishes a Dispute Settlement Mechanism (DSM) which shall apply to settlement or resolution of disputes arising between State Parties.[102] Also, the DSM shall be administered in line with the Protocol and Procedures on the Settlement of Deputes under the AfCFTA. Furthermore, under Article 20, the Protocol on Rules and Procedures on the Settlement of Disputes shall establish a Dispute Settlement Body (DSB).

The AfCFTA dispute settlement mirrors the WTO settlement processes and mechanisms.[103] Unlike many of the regional courts in Africa which are modelled on the Court of Justice of the EU, AfCFTA is based on the WTO Dispute Settlement Understanding (DSU).[104] Arguably, this might lead to conflict of jurisdiction issues. Hence, Ofodile argues that the future of Investor-State Dispute Settlement (ISDS) 'in the architecture of the AfCFTA is presently unclear. The question of whether the Investment Protocol, when finalized, will

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[100] Fasan ibid, Fagbayibo (n 1) 7. Furthermore, Fasan states that '… variable geometry, which suggests a multi-speed integration, is not consistent with consensus in decision-making, another principle of the AfCFTA, as some states could hold back those willing to make faster progress.'

[101] Generally, see Olu Fasan, AfCFTA: Africa is moving too slowly towards a Single Market'. LSE Blog (11 February 2019) < https://blogs.lse.ac.uk/africaatlse/2019/02/11/afcfta-africa-is-moving-too-slowly-towards-a-single-market/> accessed 30 July 2020.

[102] At the time of writing, the AfCFTA DSM is yet to come into force. Furthermore, Simo states that AfCFTA-DSM 'is only accessible to States, either as parties to the dispute or as third parties. Therefore, only states have standing and the right of direct participation in the proceedings.' Regis Simo, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism' AfronomicsLaw Blog (19 August 2019) <https://www.afronomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism/> accessed 30 July 2020.

[103] Akinkugbe (n 74); Emilia Onyema, 'Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement' (2019) *World Trade Review* 1.

[104] Akinkugbe (n 74). However, the sub-regional and regional groupings in Africa based on the Court of Justice of the European Union (CJEU) have been stridently criticized by scholars due to the judicialization of disputes under their frameworks.

provide for an ISDS mechanism is likely to prove controversial.'[105] However, the AfCFTA-DSM is not the first African regional dispute mechanism that is based on the WTO-DSU.[106]

Furthermore, if the AfCFTA is going to achieve the much-desired economic integration in Africa, it is critical that the projected dispute settlement resolution mechanism is effective. The AfCFTA adopts a WTO-styled dispute resolution system. However, the WTO DSM has come under intense criticisms in recent times. So, the question is, with a WTO styled dispute resolution mechanism, would investors be confident enough to invest? Ofodile argues that given the mounting fears about the ISDS, African states may decide to opt for an 'active state-state dispute settlement mechanism as an alternative or strong complement to an ISDS mechanism. State-state dispute settlement as an alternative to ISDS is gaining in popularity and increasingly found in BITS.'[107]

As highlighted earlier, the AfCFTA DSM is principally based on the WTO DSU. This is not unexpected because the WTO dispute settlement has performed reasonably well, and it is said to be the 'crown jewel of the multilateral trading system.'[108] Notwithstanding the current crisis bedevilling the WTO dispute settlement and the strident criticisms of the WTO dispute settlement system, it has largely been successful in guaranteeing that WTO rules are respected and implemented.[109]

The AfCFTA DSM is not the first step in dispute settlement under the AfCFTA. The first step is the consultations stage which is an informal mechanism to resolve disputes between state parties.[110] Notwithstanding that the AfCFTA provides a highly judicialised and legalized dispute settlement process, the consultations stage can be harnessed by States and this would augment the AfCFTA-DSM procedures.[111] This is highly important due to the apathy of African states to engage with trade dispute settlement mechanisms under different regimes

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[105] Generally, see Uche Eweluka Ofodile, 'Dispute Settlement under the African Continental Free Trade Agreement: What do investors need to know' Kluwer Arbitration Blog (29 September 2019) http://arbitrationblog.kluwerarbitration.com/2019/09/29/dispute-settlement-under-the-african-continental-free-trade-agreement-what-do-investors-need-to-know/
[106] Generally, see Akinkugbe (n 74).
[107] Ofodile (n 54).
[108] Collins Ajibo, 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects' 53 (5) (2019) *Journal of World Trade* 871, 892. However, for some of the criticisms or weakness of dispute settlement under WTO, see Linimose Anyiwe and Eghosa Ekhator, ''Developing countries and the WTO Dispute Resolution System: A Legal Assessment and Review' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 121.
[109] Generally, see Yenkong Ngangjoh-Hodu, 'Regional Trade Courts in the Shadow of the WTO Dispute Settlement System: The Paradox of Two Courts' (2020) 28 Afr J Int'l & Comp L 30, 39-41
[110] Akinkugbe (n 74)
[111] Akinkugbe (n 74).

around the world.[112] For example, African countries rarely litigate against each other in regional (including sub-regional courts) in Africa[113] and international fora such as the WTO.[114] Hence, Akinkugbe argues that the AfCFTA-DSM 'will be nestled in a culture of African States that does not pursue formal settlement of trade disputes before judicial or quasi-judicial bodies.'[115] This is evident in the judiciaries in Regional Economic Communities (RECs) in Africa (especially the Court of Justice of the Economic Community of West African States - ECCJ and the East African Court of Justice - EACJ amongst others), are known for their protection and promotion of human rights rather than trade or economic integration.[116] Thus, the consultation stage of the AfCFTA-DSM can mitigate the weaknesses inherent in the highly judicialised dispute settlement system in the AfCFTA. Arguably, the informal nature of the consultation process under the AfCFTA fits within the remit of the notion of 'African Solutions to African Problems' and hence in Africa, many states emphasise peaceful settlement of disputes over judicial solutions wherein political solutions via the prism of conciliation and negotiation are the vehicles.[117]

The AfCFTA DSM has been stridently criticised by several scholars.[118] A major weakness of the AfCFTA-DSM is that it does not provide access to non-state actors such as businesses, individuals, or members of the informal sector to bring claims to it.[119] This is unlike the position in many of the regional and sub-regional bodies in Africa which grant access to individuals, non-governmental organisations (NGOs) and sometimes even businesses to bring

[112] John Gathii, 'Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement' AfronomicsLaw Blog (10 April 2019) < https://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/ > accessed 30 July 2020. However, according to Onyema (n 103) 12 recent statistics highlight that 'African investors are increasingly becoming claimants in investment arbitration and conciliation disputes.'
[113] Mihreteab Tsighe, 'Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental Free Trade Area?' AfronomicsLaw Blog (8 April 2019) < https://www.afronomicslaw.org/2019/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/ > accessed 30 July 2020.
[114] Simo (n 102); Generally, see Olabisi Akinkugbe, 'What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution' AfronomicsLaw Blog (8 April 2019) < https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/ > accessed 30 July 2020.
[115] Akinkugbe (n 114).
[116] Generally, see Solomon Ebobrah, 'Courts of Regional Economic Communities in Africa and Human Rights Law' in Stefan Kadelbach, Stefan Rensmann and Thilo Rieter (eds), Judging International Human Rights (Springer 2019).
[117] Generally, see Simo (n 102); Tiyanjana Maluwa, 'The Peaceful Settlement of Disputes among African States, 1963–1983: Some Conceptual Issues and Practical Trends' (1989) 38 (2) *International & Comparative Law Quarterly* 299
[118] Gathii (n 112); Onyema (n 103).
[119] Generally, see Gathii (112) for the various weaknesses in the AfCFTA Agreement.

claims or cases to the various dispute resolution fora.[120] The authors suggest that the AfCFTA-DSM should follow or mirror the dispute resolution frameworks adopted by the regional and sub-regional judiciaries in Africa especially the ECCJ and EACJ wherein individuals, NGOs and governments can access the courts for ventilation of issues. Hence, the AfCFTA-DSM should grant access to informal trade groups, NGOs, businesses amongst others to enhance the legitimacy of the dispute settlement under the AfCFTA. Here, Article 21 of the AfCFTA which expressly states that the DSM, 'shall apply to the settlement of disputes arising between the State Parties' should be revised to include businesses and other relevant stakeholders. Furthermore, Onyema argues that notwithstanding that traders or business do not have direct access neither can they utilise the AfCFTA-DSM, states are acting on behalf of business interests under the AfCFTA.[121] This paper suggests that businesses and other relevant stakeholders should be granted direct access to the AfCFTA-DSM, rather than riding on the shoulders of State-Parties.

Scholars have suggested different mechanisms to replace or mitigate the weaknesses in the AfCFTA-DSM.[122] For example, Onyema advocates a 'modern dispute resolution mechanism that will support the growth of intra-African trade'.[123] She suggests two reforms to enhance Africa's regional arbitration framework.[124] Her first proposal is attaching some of the Regional Arbitration Centres (RACs) to the eight RECs recognised by the AU in Africa.[125] The second proposal is the creation of a regional African Commercial Court (ACC) which will have the jurisdiction to make arbitral awards in Africa.[126] However, arguably the adoption of a WTO-inspired DSM by the AfCFTA shows the willingness of African states in favouring a robust system of dispute settlement to ensure compliance with the obligations enshrined in the AfCFTA Agreement.[127]

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[120] However, the ECOWAS Court of Justice in *SERAP v Federal Government of Nigeria* (Judgment No. ECW/CCJ/JUD/18/12) declined jurisdiction over oil multinational corporations (MNCs) because corporations are not parties to the ECOWAS treaties. For a contrary view, see Matthew Happold and Relja Radović, 'The ECOWAS Court of Justice as an Investment Tribunal' 19 (1) *The Journal of World Investment & Trade* 95.
[121] Onyema (n 103).
[122] Generally, see Gathii (n 112); Onyema (n 103); Simo (n 102); Chrispas Nyombi, 'A Case for a Regional Investment Court for Africa' (2018) 43 (3) *North Carolina Journal of International Law* 66.
[123] Onyema (n 103).
[124] See Onyema (n 103) an extensive analysis of these proposals.
[125] Onyema (n 103).
[126] Onyema (n 103).
[127] Generally, see Gathii (n 112).

As highlighted in the early part of this section, the AfCFTA-DSM is not the sole dispute resolution system under the AfCFTA unlike the WTO regime.[128] This is evident in Article 3(2) of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes which states thus:

> This Protocol shall apply subject to such special and additional rules and procedures on dispute settlement contained in the Agreement. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the Agreement, the special or additional rules and procedures shall prevail.

According to Gathii, an example of a measure under the above Article is embedded in Annex 5 to the AfCFTA which is titled 'Non-Tariff Barriers'. This provision provides for the creation of a measure for 'identifying, reporting, resolving, monitoring and eliminating Non-Tariff Barriers, (NTBs).' [129] This measure unlike the rigid or judicialized dispute settlement entrenched in the Protocol on the Rules and Procedures for Dispute Settlement under AfCFTA opens this mechanism to a plethora of non-state actors including academic scholars, National Focal Points and State Parties business arms amongst others.[130] Africa should not always look to Europe to transplant ideas into its systems or legal regimes. Africa already has effective and resilient frameworks developed on the continent to resolve and settle trade disputes.[131] Hence, the AfCFTA-DSM should be reformed to embed these unique African characteristics and the NTBs reflect an African-oriented creation of international trading law mechanisms to mitigate the weaknesses in its extant dispute settlement system under AfCFTA. However, arguably, the development of AfCFTA-DSM will lead to a new period of predictability, certainty, and the rule of law and the conduct of trade in Africa.[132] David Luke, who is the head of African Policy Centre (ATPC) and the UN Economic Commission for Africa avers that with the creation of the AfCFTA, 'trade governance in Africa has entered the 21st century.'[133]

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[128] Gathii (n 112). According to Gathii 'a major difference between the AfCFTA and the World Trade Organization's Dispute Settlement systems is that dispute settlement in the WTO does not have competing mechanisms for resolution of disputes. Under Article 23(1) of the WTO's DSU, it is the sole forum for the authoritative determination of disputes among WTO members.'
[129] Gathii (n 112).
[130] Gathii (n 112).
[131] Generally, see Gathii (n 73).
[132] Generally, see Gerhard Erasmus, 'Alternative Dispute Settlement Procedures for Trade-related Disputes in Africa' Tralac blog (01 October 2018) < https://www.tralac.org/blog/article/13527-alternative-dispute-settlement-procedures-for-trade-related-disputes-in-africa.html> accessed 30 July 2020
[133] David Luke, 'Making the Case for the African Continental Free Trade Area' (January 15, 2019) AfronomicsLaw blog < https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/> accessed 30 July 2020**.**

5 Conclusion

This paper has undertaken a critical review of the evolution and present state of *lex mercatoria*. It discussed some of the important principles (variable geometry and dispute settlement) embedded in the AfCFTA. It has been argued in this paper that the recent development of the AfCFTA is an important milestone and contribution of Africa to international trade law. Arguably, the AfCFTA represents Africa's contribution to modern *lex mercatoria*. Notwithstanding its various criticisms, the AfCFTA akin to the various market or 'industry-specific private legal systems'[134], is the latest legal regime that will govern trade disputes amongst African states. Furthermore, the AfCFTA is a codification of *lex* mercatoria rules applicable to trade disputes amongst African states. Hence, the successful implementation of the AfCFTA will enhance regional integration and harmonisation of standards and rules in AU member states. Arguably, the AfCFTA will enhance the principles of *lex mercatoria* akin to encouraging unity in the AU, promoting African customs and legal principles amongst others.

Furthermore, dispute resolution is an integral aspect of *lex mercatoria*. In respect of the AfCFTA-DSM, this paper contends that it has led to the codification of lex mercatoria rules on dispute settlement from an African perspective. Codification of lex mercatoria is one of the innovations ascribed to the concept by several scholars.[135] Thus, the successful implementation of the AfCFTA will lead to harmonised lex mercatoria rules on the continent. This will aid the predictability and certainty of the legal rules enshrined in the AfCFTA Agreement. However, for the AfCFTA-DSM to be successful, direct access should be granted to private parties including business, informal organisations, CSOs and multinational corporations.

This paper aligns with the view by other scholars that the 'implementation of the agreement, which has been a major problem in previous regional economic integration schemes in Africa, is critical to its success.'[136] It concludes that the AfCFTA should be fully operationalised otherwise it will end up as a paper tiger.

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[134] Gralf-Peter Calliess, 'Lex mercatoria' in Juurgen Basedow et al (eds) *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017). An example is *Lex maritima* which is said to be the framework governing the shipping industry.

[135] Johnson (n 30); Berger (n 30). For example, Michaels (n 43) 448 argues that *lex mercatoria* has moved 'from an amorphous and flexible soft law to an established system of law with codified legal rules... and strongly institutionalized court-like international arbitration.'

[136] Akinkugbe (n 74) 5