# TRADE REMEDIES AS EMANCIPATORY MECHANISMS FOR COMPETITIVE PRICE DIFFERENTIATION CHALLENGES WITHIN AND OUTSIDE THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

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## Abstract

The question of whether international trade remedies remain economically, politically, and legally efficacious and relevant in the 21st century is still a lingering one. This paper makes two broad arguments in addressing this critical question. The first is that while trade remedies can have positive externalities for individual African states, African states should implement these actions through their larger regional trading arrangements and blocs, especially at the continental level within the African Continental Free Trade Agreement (AfCFTA). The second argument is embedded in the view that trade remedies, from an economic viewpoint, should first be eliminated at the multilateral level. But since the current international trading regime's political economy and geopolitical structures might not easily allow this anytime soon, the paper assumes that trade remedies as structured in the World Trade Organisation (WTO) are here to stay. The author, thus, argues that for the first objective of regional implementation of regional trade agreements (RTAs) to work appropriately, then African states should eliminate trade remedies internally. They should thereafter focus on alternative

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means of addressing the negative consequences of free trade through the creation of free trade areas (FTAs) and custom unions (CUs) such as a continental competition policy. Importantly, however, these two arguments take for granted that the current international trading system is fair and ensures economic justice for African states and the peoples of Africa. The paper begins by tracing the immiseration that the current international trading system causes in order to paint a Third World Approach to International Law (TWAIL) backdrop for the two arguments presented.

**Keywords:** trade remedies, TWAIL, anti-dumping measures, countervailing measures, safeguard measures, World Trade Organisation, AfCFTA.

## 1.0 Introduction

The World Trade Organisation (WTO) seeks to liberalise trade by eliminating and reducing tariff and non-tariff barriers to trade.[1] The WTO's objectives include: raising the standards of living and ensuring full employment by 'entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and eliminating discriminatory treatment in international trade relations'.[2] The WTO has been mostly successful in eliminating tariffs on industrial goods (mostly traded by developed countries) through reciprocal tariff mechanisms provided under the General Agreement on Tariffs and Trade (GATT).[3] Developed countries have had a 40% cut in their tariffs on industrial products, from an average of 43.8% to 3.8% since 1 January 1995.[4] Even before the WTO was established, average tariffs in industrialised countries had plunged from 40% to 6.3%.[5] Despite this development, the WTO is not only concerned with tariff liberalisation. The WTO, 1994, permits (but does not require)[6] a member state, in certain circumstances, the opportunity to impose import restrictions in the form of higher tariffs or quotas to address the harm caused to its domestic country industry from imports.[7]

The term trade remedies in international law refers to three types of permissible national laws that impose import restrictions under specified circumstances.[8] The three forms of trade remedies are anti-dumping measures,

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[1] Marrakesh Agreement on the Establishment of the World Trade Organisation [15 April 1994] LT/UR/A/2, para 5.

[2] Marrakesh Agreement on the Establishment of the World Trade Organisation, para 1.

[3] General Agreement on Tariffs and Trade [15 April 1994] LT/UR/A-1A/GATT/2, art II.

[4] The WTO, 'Tariffs: More bindings and closer to zero' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm> accessed 1 July 2019.

[5] Raj Bhala, 'Rethinking antidumping law' (1995) 29 *George Washington Journal of International Law and Economics* 1, 3.

[6] Willemien Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' in Anton Bösl, Gerhard Erasmus *et al* (eds), *Monitoring regional integration in Southern Africa,* TRALAC, 2009.

[7] James J Nedumpara, *Injury and causation in trade remedy law: A study of WTO law and country practices*, Springer 2016, 1.

[8] Alan O Sykes, 'International trade: Trade remedies' in Andrew T Guzman and Alan O Sykes (eds), *Research handbook in international economic law*, Edward Elgar, 2007, 62.

countervailing measures, and safeguard measures. The WTO system does not, therefore, offer a blank check for liberalisation of trade in goods and services without concern for harm that such liberalisation may portend for domestic industries. Governments use trade remedies as trade policy tools for remedial actions against imports that cause injury to domestic industries.[9]

Consequently, states under WTO law are allowed to take the triumvirate actions as trade remedies identified above unilaterally.[10] An anti-dumping (AD) action is taken when a foreign exporter sells a product in the foreign market at a price lower than its home market price and consequently injures the domestic industry.[11] It normally takes the form of duties/tariffs in addition to ordinary duties that are imposed to counteract the price undercut by the foreign company that eventually injures or threatens to injure domestic producers of like or directly competitive products.[12] A countervailing duty (CVD), also known as an anti-subsidy action, may be filed against foreign exporters or producers who benefit from a government subsidy in their home market, and as a result, injures the like industry in the foreign market.[13] Safeguard measures are temporary trade restrictions, typically tariffs or quotas, which are imposed in response to import surges that cause or threaten to cause serious injury to a competing industry in an importing nation.[14] Safeguards are, however, not trade remedies, strictly speaking, since they provide temporary relief from import surges under 'fair' rather than 'unfair' trade conditions.[15]

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[9] Gerhard Erasmus, 'Are trade remedies important for achieving the AfCFTA goals' TRALAC, 2018 <https://www.tralac.org/discussions/article/12764-are-trade-remedies-important-for-achieving-the-afcfta-goals.html> accessed 1 July 2019.

[10] General Agreement on Tariffs and Trade [15 April 1994] LT/UR/A-1A/GATT/2, Articles VI and XII; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [15 April 1994] LT/UR/A-1A/3; the WTO Agreement on Safeguards [15 April 1994] LT/UR/A-1A/8.

[11] Nedumpara, *Injury and causation in trade remedy law* 1.

[12] Ousseni Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO' (Fifth Biennial Global Conference, University of Witwatersrand, June 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799553> accessed 1 July 2019.

[13] Nedumpara, *Injury and causation in trade remedy law* 1.

[14] Sykes, 'International trade: Trade remedies' 62.

[15] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

Accordingly, trade remedies are strategic tools for governments to reduce the political cost and domestic pressure involved in opening domestic markets to international trade.[16] National governments have been authorised, but are not required, to unilaterally, under various GATT 1994 and WTO agreements, implement such laws and set up procedures through which domestic industries and/or workers initiate petitions and use trade remedy laws' provisions.[17] Many African governments have, however, not enacted such laws nor set up such domestic procedures.[18] There is, therefore, a scarcity of the use of trade remedies in Africa as compared to other parts of the world generally, and the Global South specifically. Only Egypt, Morocco, South Africa, Kenya, Madagascar, Zambia, and Tunisia had by 2022 set up functional and operational remedy authorities and some cases employed their use to protect domestic industries.[19]

Many reasons have been offered for this state of affairs: complex rules and regulation involved in the system of trade remedies; lack of expertise, knowledge, and financial and legal capabilities to implement such rules; the predominance of agricultural goods over industrial products in Africa;[20] the availability of substitute instruments; weakness, lack of awareness and poor organisation of local producers; and domestic political factors.[21] These demerits are couched on the assumption that trade remedies ensure a level playing field in international trade by ensuring the protection of domestic industries against unfair practices and, thus, function as safety valves that encourage countries to engage in trade liberalisation.[22] This view ignores the arguments against trade remedies as flying in the face of principles of free trade and

[16] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

[17] Chad P Bown, 'Trade remedies and World Trade Organisation dispute settlement: Why are so few challenged?' (2005) 34(2) *The Journal of Legal Studies* 515, 516.

[18] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43.

[19] Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[20] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43-44.

[21] Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[22] Müslüm Yilmaz, 'Introduction' in Müslüm Yilmaz (eds), *Domestic judicial review of trade remedies: Experiences of the most active WTO members,* Cambridge University Press, 2013, 2; Terry Collins-Williams, 'The evolution of anti-dumping in a globalizing economy', in Terence P Stewart (ed), *Opportunities and obligations: New perspectives on global and US trade policy*, Kluwer Law International, 2009, 119.

efficient allocation of resources at the global level[23] and that they should be eliminated, at least, in preferential trade agreements (PTAs).[24]

Since multilateral, bilateral, and unilateral trade remedy actions are permissible under WTO law, and seeing that Africa is now entering a robust epoch in its regional trading arrangement with the coming into effect of the African Continental Free Trade Area (AfCFTA), the most pertinent question is how the implementation of trade remedies can 'improve the standards of living of Africans; ensure full employment and a large and steadily growing volume of real income and effective demand, and the optimal use of the world's (Africa's) resources in accordance with the objective of sustainable development'?[25] Simply put, can trade remedies as protective instruments ensure distributive justice for the peoples of Africa? If this question is answered appropriately, then African states, through their implementation of the trade remedies regime, would contribute towards fulfilling the emancipatory objectives of the WTO and thus promoting the multilateral system of trade through robust regional trading arrangements.[26]

This paper aims to tackle this question at two levels. The first is on the desirability and efficacy of trade remedies among individual African states. Here, there are two wide views that have emerged among international trade commentators and scholars. The first is that trade remedies promote the liberalisation of trade and thus fulfil the objectives of the WTO, while the second is that trade remedies stifle the liberalisation of international trade and thus undermine the aims of the WTO. Because of the difficulties that African states have faced and continue to face in the implementation of trade remedies, this paper argues that while trade remedies can have positive externalities for

[23] Claude Barfield, 'Anti-dumping reform: Time to go back to basics' (2005) 28 *The World Economy* 719, 720.

[24] Angela T Gobbi Estrella and Gary N Horlick, 'Mandatory abolition of anti-dumping, countervailing duties and safeguards in customs unions and free-trade areas constituted between World Trade Organisation members: Revisiting a long-standing discussion in light of the Appellate Body's *Turkey — Textiles* Ruling' (2006) 40(5) *Journal of World Trade* 909; *see* Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 43-74.

[25] Marrakesh Agreement on the Establishment of the World Trade Organisation, para 1.

[26] General Agreement on Tariffs and Trade, Article XXIV:4; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) [28 November 1979] L/4903.

individual African states, they should focus on implementing these actions through their larger regional trading arrangements and blocs especially at the continental level with the AfCFTA.

On the second level, the concern has been on whether trade remedy actions should be eliminated in PTAs or RTAs. Here, this article argues that in order for the first objective of regional implementation of RTAs to work appropriately, African states should eliminate the implementation of trade remedies internally and focus on alternative means of addressing the negative consequences of free trade through the creation of FTAs and CUs such as a continental competition or anti-trust policy. This second argument is embedded on the view that trade remedies, from an economic viewpoint, should also be eliminated at the multilateral level.

But since the political economy and geopolitical structures of the current international trading regime might not easily accept this anytime soon, the paper assumes that trade remedies as structured in the WTO are here to stay. Importantly, however, these two arguments take for granted that the international trading system as currently constituted is fair and ensures justice for African states and the peoples of Africa. This would be an inaccurate and contested proposition. This article begins by tracing the immiseration that the current international trading system causes in order to paint a backdrop for the author's theoretical understanding of the international trade law as currently structured.

## 2.0 International trade law and the immiseration of Africa

The WTO specifically and the international trade law system generally do not adequately and effectively protect the interests of developing countries despite being founded on the ideas of juridical equality of states, operating a rule of consensus decision-making system, and allowing economically small countries to challenge even the economically largest members through a dispute resolution that has been termed the crown jewel of the international dispute adjudication systems.[27] The WTO, thus, in the guise of creating a rules-

[27] John Linarelli, Margot E Salomon, and Muthucumaraswamy Sornarajah, *The misery of international law: Confrontations with justice,* Oxford University Press, 2018, 100-144; Richard

based multilateral system, institutionalises inequality between the developed countries and the developing countries of the world by applying neo-liberal market principles.[28] The WTO and the Bretton Woods Institutions (the World Bank Group and the International Monetary Fund) disguise contemporary imperialism as permissible neo-liberal globalisation.[29] The economic reasons for this are historical: first, this view is tied to and strongly agrees with Friedrich List's historical lessons on economic policy. List argued that leading economic powers in the Global North accepted the internationalised liberal trading system only after years of benefiting from protectionism themselves. The second reason is also historical and is tied to colonialism and its continuities[30] that make the juridical equality of states in a consensus-based decision-making system only illusory.

Friedrich List, using the historical approach to economics, argued for a three-stage process of the lessons we can learn from the history of international trade policies.[31] First, that historically, navigation and manufacturing power (trade) have been contingent upon a free society, and nations should adopt free trade with advanced nations as a means of raising themselves from a state of barbarism.[32] Second, countries must then put up commercial restrictions (in other words, protectionism), then lastly, after reaching the highest degree of wealth and power, they can revert to free trade.[33] List argues, therefore, for infant industry protection and protectionism as a means towards economic

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Peet, *Unholy trinity: The IMF, World Bank, and WTO*, (2nd edn) Zed Books, 2009, 178-243; James Smith 'Inequality in international trade? Developing countries and institutional change in WTO Dispute Settlement' (2004) 11(3) *Review of International Political Economy* 542-573.

[28] Antony Anghie, *Imperialism, sovereignty, and the making of international law* Cambridge University Press, 2005, 258-262 (likening the international financial institutions conditionalities to the 19th century system of capitulations); Hibourbe A Watson, 'Liberalism and neo-liberalism capitalist globalization: Contradictions of the liberal democratic state' (2004) 60(1) *GeoJournal* 43.

[29] Antony Anghie, *Imperialism, sovereignty, and the making of international law* 258-262; Jessica Whyte, *The morals of the market: Human rights and the rise of neoliberalism,* Verso, 2019.

[30] Kwame Nkrumah, *Neo-colonialism: The last stage of imperialism,* International, 1996.

[31] Friedrich List, *The national system of political economy*, Longmans, Green and Co, 1909, Chapter X <https://oll.libertyfund.org/titles/list-the-national-system-of-political-economy > accessed 8 March 2021.

[32] *See also* Alexander Hamilton, 'Report on manufacturers' (5 December 1791) available at <https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007> accessed 8 March 2021. (Providing another classical argument on this view of infant industry protectionism).

[33] Hamilton, 'Report on manufacturers.'

development and shows how countries such as Britain and the United States of America (USA), today's leading proponents of liberal economic policies, themselves practiced little of 'free trade' as they were in their developing country stage.[34] List also argues that free trade was beneficial among countries at similar levels of industrial development.

Against the current contemporary orthodoxy, the WTO is an organisation that cannot succeed or, more specifically, cannot achieve its stated objectives for developing countries, according to List. In other words, trade liberalisation as currently conceptualised cannot lead to the objectives of the WTO of raising standards of living, ensuring full employment and a large and steady growing volume of real income, and sustainable development listed in the preamble to the WTO Agreement. Thus, according to List, arguments based on the use of sovereign equality, consensus, and an accessible dispute resolution system for all, would only amount to developed countries preaching nationalistic purposes cast as a generalistic language for economic development or gain.

List's ideas have greatly influenced Ha-Joon Chang's theory on 'Kicking away the ladder'[35] and the 'Bad Samaritan theory'.[36] Chang argues that trade liberalisation is one of the prominent aims of the WTO. The WTO members are encouraged to use this as a set of 'good policies' as part of the package of the Washington Consensus for economic development.[37] Yet, when current developed countries were themselves developing, they used protectionist measures such as high tariffs, infant industry protections, lack of intellectual property protections, and export subsidies to reach their current level of eco-

[34] Hamilton, 'Report on manufacturers.'

[35] Ha-Joon Chang, *Kicking away the ladder: Development strategy in historical perspective*, Anthem Press, 2002.

[36] Ha-Joon Chang, *Bad Samaritans: The myth of free trade and the secret history of capitalism,* Bloomsbury Press, 2007.

[37] John Williamson, 'A short history of the Washington Consensus' in Narcis Serra and Joseph E Stiglitz (eds), *The Washington Consensus reconsidered: Towards a new global governance,* Oxford University Press, 2008, 14-30; Joseph E Stiglitz and Andrew Charlton, *Fair trade for all: How trade can promote development*, Oxford University Press, 2005 (arguing that the Washington Consensus included policies such as privatisation, fiscal discipline, trade liberalisation, and deregulation. In the 1990s these policies were vigorously advocated by several powerful economic institutions located in Washington, including the International Monetary Fund, the World Bank, and the US Treasury. These policies blithely exhorted developing countries to liberalise their markets rapidly and indiscriminately and thus did not cause economic development).

nomic development.[38] Countries such as Britain, USA, Germany, France, Sweden, Belgium, Korea, Japan, and China have all used protectionist measures that are now anathema in the WTO rules to achieve economic development.[39] The WTO is, thus, an institution that, under the guise of sovereign equality, consensus decision-making, and a so-called 'rules-based' dispute settlement system, perpetuates inequality by making it even more difficult for developing countries to reach the economic development of the developed countries.

The very foundation of the system, trade liberalisation, did not make and is yet to make any country economically developed, at least not in the style of the currently developed states.[40] How it is now the main orthodoxy of the international trading system shows how developed countries are kicking away the ladder of economic development from the reach of developing countries after achieving economic development for themselves.[41] Developing countries that have turned the tide, like China, South Korea, and Singapore have done it mainly by using the same protectionist measures of the Global North before later joining the WTO.[42] It is also important to mention that List's link of economic development to freedom (presumably, political freedom) has currently been disproved by China's rise to economic and manufacturing power under a political system that is not a liberal democracy or Republican or even based on the kinds of political freedoms List (or the so-called "fathers" of political liberalism like John Locke) would have expected or predicted.[43]

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[38] Williamson, 'A short history of the Washington Consensus' 14-30; Stiglitz and Charlton, *Fair trade for all*.

[39] Williamson, 'A short history of the Washington Consensus' 14-30; Stiglitz and Charlton, *Fair trade for all*, chapter 2.

[40] Chang, *Kicking away the ladder: Development strategy in historical perspective*.

[41] Chang, *Kicking away the ladder: Development strategy in historical perspective*.

[42] Chang, *Kicking away the ladder: Development strategy in historical perspective*; Inderjeet Parmar, 'The US-led liberal order: Imperialism by another name?' (2018) 94(1) *International Affairs* 151-172; Muthucumaraswamy Sornarajah, *International law on foreign investment* (3rd ed) Cambridge University Press, 2010, 2 (arguing that 'though initially it was thought that these states achieved prosperity by the adoption of liberalisation measures, this view has since been queried, with many holding the view that astute interventionist measures by the state combined with selective liberalisation measures and regulation of foreign investment were the reason for the growth.')

[43] Stefan Halpher, *The Beijing Consensus: How China's authoritarian model will dominate the Twenty-First Century*, Basic Books, 2012.

The relationship between imperialism and sovereign equality of states sanctioned through international law is ignored in many discourses of international law.[44] The prevalent view in modern international law is that sovereign states are equal and have sovereign power over their own territory, which includes internal jurisdiction and immunity from other states' jurisdictions.[45] In the colonial times (from the 16th to mid-20th century), this sovereignty was allegedly extended to colonised states, many of whom are today's developing countries. The apogee of this extension was the mass decolonisation of African countries in the 1960s that ushered these countries into the "international society."[46] With this view, colonialism and imperialism are things of the past that have been defeated by the equalising power of the United Nations (UN) system.

Antony Anghie has persuasively shown how international law has been used and continues to be used as an instrument for perpetuating the 'civilising mission'.[47] He uses the dichotomising conceptual framework termed the 'dynamic of difference' to offer this explanation. He defines this dynamic of difference as: 'the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilised and the other as 'particular' and uncivilised, and seeking to bridge the gap by developing techniques to normalise the aberrant society.'[48] This dichotomising concept can be compared to Mahmood Mamdani's concept of defining citizen and subject[49] and Boaventura De Sousa Santos' abyssal line: the line dividing metropolitan and colonial realities.[50] It is this dichotomy that has created the binary between developed

[44] Antony Anghie, 'The evolution of international law: Colonial and postcolonial realities' (2006) 27(5) *Third World Quarterly* 739; James T Gathii, 'Imperialism, colonialism, and international law' (2007) 54 *Buffalo Law Review*, 1013; BS Chimni, 'Capitalism, imperialism and international law in the Twenty-First Century (2012) *Oregon Review of International Law*, 17.

[45] Samantha Besson, 'Sovereignty', *Max Planck Encyclopaedia of International Law* (2011) para 2.

[46] Hedley Bull and Adam Watson (eds), *The expansion of international society*, Oxford University Press, 1984.

[47] Anghie, 'The evolution of international law' 739.

[48] Anghie, 'The evolution of international law' 4.

[49] Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, 1996.

[50] Boaventura de Sousa Santos, 'The resilience of abyssal exclusions in our societies: Toward a post abyssal law' (2017) 22 *Tilburg Law Review* 237-258.

countries on the one hand, and developing and least developed countries on the other hand. Thus, while juridically states are supposed to be equal in the WTO, the history of imperialism, colonialism, and their current continuities make it impossible for developing countries to benefit from any real semblance of sovereign equality, especially from an economic viewpoint.

### 2.1.0 Trade remedies in Africa and maintaining immiseration

The WTO Agreement on Implementation of Article VI/WTO Anti-Dumping Agreement (AD Agreement),[51] the Subsidies and Countervailing Agreement,[52] and the Safeguards Agreement[53] require members to notify the WTO of their domestic procedures that govern the initiation and conduct of the respective investigations. As of 25 June 2019, fourteen (14) African countries had notified the WTO of their trade remedy legislation.[54] Of the fourteen (14), some have comprehensive legislation which provides the precise procedure to be followed in anti-dumping, subsidies, and safeguards investigations. These include South Africa,[55] Morocco,[56] Egypt,[57] Madagascar,[58] Kenya,[59] and Mauritius.[60] On the other hand, some of the notified legislation only provides

[51] The WTO Agreement on Implementation of Article VI, Article 16.5.

[52] The WTO Agreement on Subsidies and Countervailing Measures [15 April 1994] LT/UR/A-1A/9, Article 12.6.

[53] The WTO Agreement on Safeguards, Article 3.

[54] Data compiled from WTO Documents online <https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_009.aspx?TopLevel=1435#/> accessed 25 June 2019.

[55] South Africa, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (20 January 2004) G/ADP/N/1/ZAF/2 and G/SCM/N/1/ZAF/2.

[56] Morocco, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (1 March 2013) G/ADP/N/1/MAR/3, G/SCM/N/1/MAR/3 and G/SG/N/1/MAR/2.

[57] Egypt, Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements (22 August 2008) G/ADP/N/1EGY/2/Rev.1+Rev.1/Suppl.1; G/SCM/N/1/EGY/2/Rev.1+Rev.1/Suppl.1, and G/SG/N/1/EGY/Rev.1+Rev.1/Suppl.1.

[58] Madagascar, Notification of Laws and Regulations under Articles 18.5, 32.6 and 12.6 of the Agreements (20 November 2018) G/ADP/N/1/MDG/2, G/SCM/N/1/MDG/1 and G/SG/N/1/MDG/2.

[59] Kenya, Notification of Kenya on Trade Remedy Act 2017 (21 May 2019) G/ADP/N/1/KEN/3, G/SCM/N/1/KEN/3, G/SG/N/1/KEN/2.

[60] Mauritius, Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements (25 March 2019) G/ADP/N/1/MUS/3 and G/SCM/N/1/MUS/3.

that trade remedy duties may be imposed but do not include procedures to be undertaken in such investigations.[61] WTO members are required to notify the respective committees upon initiation of trade remedy investigations[62] and imposition of measures, including preliminary measures.[63]

Outside of the WTO rules, which embody an emanation of the globalist neo-liberal model, the question for African states' usage, or non-usage of the trade remedies should be assessed against the backdrop of trade liberalisation and its effects on African states. Between 1970 and 2000, the period covering the triumph of neo-liberalism and the founding of the WTO, real income growth in Sub-Saharan Africa (SSA) failed to keep pace with population growth.[64] In 2000 the growth of income per capita in SSA was at a similar level as 1970 at 0.7%. In the past 20 years, there has been a relative growth largely led by an increase in commodities trade (between 1.6 to 1.8%). In 1960, Africa's share of world poverty was 15%. In recent years (2016-2020), approximately more than 40% of people in Africa live below the poverty line of US dollar (USD) 1.90.[65]

The former UN Special Rapporteur on extreme poverty, Phillip Alston, has severely criticised this international poverty line by the World Bank as seriously flawed.[66] He argues that 'the international community mistakenly gauges the progress in eliminating poverty by reference to a standard of miserable subsistence rather than an even minimally adequate standard of living.'[67] He strongly cautions against the pre-Covid-19 pandemic triumphalism that extreme poverty has been eradicated, pointing out that the international poverty line by the World Bank relies on a measure that has been misappro-

[61] See, for example, Zambia, Notification of Laws and Regulations under Article 18.5 of the Agreement (27 April 1995) G/ADP/N/1/ZMB/1.

[62] The Agreement on Safeguards, art 12.1.

[63] The WTO Agreement on Implementation of Article VI, art 16.4; the WTO Agreement on Subsidies and Countervailing Measures, art 25.11 and the WTO Safeguards Agreement, art 12.1.

[64] Jomo Kwame Sundaram and Rudiger von Arnim, 'Economic liberalization and constraints to development in Sub-Saharan Africa' (2008) DESA Working Paper No. 67.

[65] Zachary Donnenfeld, 'What is the future of poverty in Africa' (*Institute for Security Studies*, 2 March 2020).

[66] Human Rights Council, 'The parlous state of poverty eradication' Report of the Special Rapporteur on Extreme Poverty and Human Rights (3 July 2020) A/HRC/44/40.

[67] Human Rights Council, 'The parlous state of poverty eradication.'

priated for a purpose it was never intended for.[68] He shows that if a more realistic yardstick is used, it will reveal that extreme poverty has only marginally decreased in the past 30 years and that billions all over the world still face few opportunities, countless indignities, unnecessary hunger, and preventable death: remaining too poor to enjoy basic human rights.[69] Thus, speaking about inequality, Harry Frankfurt has argued 'that inequality itself is not objectionable, what is objectionable is poverty.'[70] He argues that the focus should be on reducing poverty and excessive affluence.[71]

While the trade world was optimistic with the possibility of the Doha Development Agenda in 2000, the Cotonou Agreement spear-headed by the European Union (EU) in 2001, and the African Growth and Opportunity Act (AGOA) in 2000, in 2020 at the height of the Covid-19 pandemic, the situation of many African states is still bleak. For international trade, the United Nations Economic Commission for Africa (UNECA) has shown that while Africa's exports and imports expanded more than fourfold over twelve years (as of 2013), it was nonetheless sobering to note that the bulk of the expansion in imports and exports has stemmed from a price effect, rather than a volume one.[72] By volume, the growth of exports was increasingly outpaced by imports. Additionally, over the last 10-15 years, Africa's main exports have been commodity products, and in sectors where African countries display a revealed comparative advantage, African producers are often relegated to low-value-add products.[73]

Thus, if international trade among African states remains at the low-value commodity levels and intra-African trade remains low, the use of trade

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[68] Human Rights Council, 'The parlous state of poverty eradication.'; Steven Pinker, *Enlightenment now,* Penguin/Random House, 2018, 116.

[69] Human Rights Council, 'The parlous state of poverty eradication.'; Pinker, *Enlightenment now* 116.

[70] Harry G Frankfurt, *On inequality,* Princeton University Press, 2015.

[71] *Also see* Frankfurt, *On inequality.*

[72] United Nations Economic Commission for Africa (UNECA), 'Building trade capacities for Africa's transformation: A critical review of aid for trade' (2013) <https://repository.uneca.org/bitstream/handle/10855/22153/b10717808.pdf?sequence=1&isAllowed=y> accessed 11 March 2021.

[73] United Nations Economic Commission for Africa (UNECA), 'Building trade capacities for Africa's transformation'.

remedies to counter trade liberalisation will not change much of the economic and social development situation in Africa. Despite this bleak view of trade liberalisation generally and trade remedies specifically, the next section proceeds to argue from a legal formalistic and economic angle that the use of trade remedies can be enhanced to marginally benefit African countries. But this will not in any way engender the kind of economic development that African states would want to see in the near future.

## 3.0 The undesirability of maintaining unilateral trade remedies in Africa

To determine the undesirability of the unilateral imposition of trade remedies by African states, the question of the role played by these actions in international trade law should be revisited. For many WTO Member States, the only legitimate weapon in the quiver of protectionism was and remains to be tariffs. Since the use of tariffs has progressively waned over the years, only a few weapons for protectionism remain in the quiver. And the economically powerful states are able to use them more readily than developing and least-developed states. From the data presented above, African countries use the weapon of unilateral trade remedies sparingly. There are also few, but slowly growing number of countries in Africa setting up national laws on trade remedies. By the 1980s, developed countries were already actively using trade remedies (anti-dumping, specifically) as a potent weapon for protectionist purposes.[74] By 1988, the use of anti-dumping actions by developed states was described as the emerging chemical weapon of the world's trade wars.[75] In this regard, the WTO Agreement on Implementation of Article VI (AD Agreement was described as undesirable in the following terms:

> [The AD Agreement] will add new layers to the arbitrary rules governing the use of anti-dumping measures but will do little to assuage the concerns of exporters and import-competing industries alike about the abuse of trading rules. Indeed, as these changes promote the adoption of anti-dumping laws in more and more countries, the number of anti-dumping actions is likely to expand rapidly. This

[74] Raj Bhala, 'Rethinking antidumping law' (1995) 29 *George Washington Journal of International Law and Economics* 1, 4.

[75] 'The anti-dumping Dodge' *The Economist,* 10 September 1998, 77.

> will undoubtedly lead to more trade disputes among [World Trade Organization] trading partners. In short, the agreement provides a bandage to a festering sore of trade policy…[76]

This prophecy made before the birth of WTO while assessing the Uruguay Round negotiations seems to have been fulfilled in recent times. The current impasse in the WTO Appellate Body (AB),[77] which has seen '…the very existence of the dispute settlement system threatened by a decision of the [USA's] Trump Administration to block the appointment of any new members to the WTO's dispute settlement system's highest court, the Appellate Body.'[78] More trade disputes have arisen over trade remedies, and the USA has, since the inception of the WTO dispute resolution system, raised substantive concerns of the AB's interpretation of subsidies, anti-dumping (especially the zeroing cases), and countervailing duties.[79] According to Jennifer Hillman, a lion's share of the USA's complaints stem from decisions by the AB relating to trade remedy decisions – challenges to anti-dumping, anti-subsidy or safeguard measures.'[80] If such is the acrimonious nature of trade remedy-related disputes that they have been one of the causes of the demise of the AB through attrition,[81] then they should surely be undesirable for unilateral implementation among African states.

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[76] Effrey J Schott, *The Uruguay Round: An assessment,* Institute for International Economics, 1994, 12.

[77] Markus Wagner, 'The impending demise of the WTO Appellate Body: From centerpiece to historic relic?' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen, *The Appellate Body of the WTO and its reform,* Springer, 2019; Geraldo Vidigal, 'Living without the Appellate Body: Multilateral, bilateral and plurilateral solutions to the WTO dispute settlement crisis' (2019) 20 *Journal of World Trade & Investment* 862-890.

[78] Jennifer Hillman, 'Three approaches to fixing the World Trade Organisation's Appellate Body: The good, the bad and the ugly', Institute of International Economic Law, 2019 <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> accessed 4 July 2019.

[79] Office of the United Stated Trade Representative (USTR), 'The President's 2018 trade policy agenda', March 2018, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> accessed 4 July 2019, cited in Robert McDougall's, *Crisis in the WTO: Restoring the WTO dispute settlement function,* Centre for International Governance, Innovation Paper no 194, 2018.

[80] Terence P Stewart and Elizabeth J Drake, 'How the WTO undermines US trade enforcement', Alliance for American Manufacturing, 2017.

[81] The WTO Appellate Body is effectively inactive since December 2019.

Additionally, the AD Agreement and national anti-dumping legislation such as the USA's Title II, Subtitle A of the Uruguay Round Agreement[82] have failed to resolve 'the central crisis facing anti-dumping law [and possibly other trade remedies]: the abuse of the law by protectionists who use it as a non-tariff barrier to trade.'[83] There is absolutely no reason why African states will not soon ride on this bandwagon against each other. This would possibly be exacerbated with the entry into force of the AfCFTA and its implementation, as well as the race of African states putting up trade remedies legislation. Kenya, which has recently enacted the Trade Remedies Act, 2017,[84] for example, should have this vital consideration in mind moving forward. Economic theory predicts that anti-dumping action would increase when other protective barriers are introduced.[85] The elimination of tariffs and other restrictive regulations of commerce is one of the main consequences of entering into an FTA or CU.[86] Both this kind of regional reduction or elimination of tariffs and other restrictive regulations of commerce leave strong sectors of any country's economy exposed to regional competition.

### 3.1.0 The economic critique of maintaining trade remedies

In its widest sense, dumping can be characterised as international price discrimination.[87] The stricter and more recent definition of dumping is that it occurs when a product 'is introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'[88]

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[82] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4842-4901 (1994).

[83] Raj Bhala, 'Rethinking antidumping law' 1, 6.

[84] Kenya Trade Remedies Act (No 32 of 2017).

[85] Bruce Yandle and Elizabeth M Young, *Dumping, anti-dumping and efficiency,* World Bank Internal Discussion Paper Report No lDP-101987.

[86] General Agreement on Tariffs and Trade, Articles XIV(8)(a) and (b).

[87] Jacob Viner, *Dumping: A problem in international trade,* University of Chicago Press, 1923, 3.

[88] The WTO Agreement on Implementation of Article VI (AD Agreement), Article 2.

One of the main economic arguments, maybe even the only plausible one, in favour of anti-dumping is applied if the foreign company is involved in predatory pricing. Predatory pricing occurs when 'foreign firms dump their goods in an effort to drive their competition out of business, with the object of cartelising the market in their goods.'[89] While this process crystallises the anti-dumping duties, it also creates the possibility of a 'vicious trade remedies cycle.' This is because the state where the dumping is taking place now has an opportunity for subsidisation of the specific industry that is the target of the harm. This, in turn, irks the producers of the dumped products, who, with sufficient push, can lobby for countervailing duties from their home state or invoke a trade-based dispute resolution process. Thus, economists argue that apart from the predation of prices, dumping is 'basically harmless for the importing country.'[90]

Additionally, domestic producers have great incentives to use trade remedies for anticompetitive purposes. An example from the USA will suffice here:

> In the early 1990s, ferrosilicon producers in the United States, who had formed a price-fixing cartel faced an obstacle when Brazilian producers begun exporting the metal cheaply in the US. The US cartel members soon asked Brazilian exporters to join their cartel under the threat of an anti-dumping petition in which the former would argue that the latter had unfairly dumped their ferrosilicon in the US market. When Brazilian producers rejected the offer, the US producers successfully executed their threat. Upon the US producers' petition, the US government imposed anti-dumping duties on Brazilian ferrosilicon, effectively excluding all Brazilian ferrosilicon producers from the US market. This anti-dumping remedy was revoked only after a whistleblower later divulged the cartel's existence.[91]

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[89] Alex Hummer, 'Dumping: An evil or an opportunity', *Foundation for Economic Education,* 1 April 1989 <https://fee.org/articles/dumping-an-evil-or-an-opportunity/> accessed 4 July 2019.

[90] Alan V Deardorff, 'Economic perspectives on antidumping law', in Robert M Stem (ed) *The multilateral system: Analysis and options for change,* University of Michigan Press, 1993, 135; see also, Alan V Deardorff, *Economic perspectives on antidumping law* RSIE Post-Print Paper 7, 1989.

[91] Richard J Pierce Jr. 'Antidumping law as a means of facilitating cartelisation' (2000) 67 *Antitrust Law Journal* 726-728 cited in Sunjoon Cho, 'Anticompetitive trade remedies: How anti-dumping measures obstruct market competition' (2009) 87 *North Carolina Law Review* 359.

When states unilaterally impose anti-dumping duties, this kind of nefarious anticompetitive practice becomes possible. States are therefore allowed to 'neutralise the import price competitiveness under the euphemistic rhetoric of remedying unfair trade'.[92] This allows for two kinds of effects: the first is the *de facto* price fixing described above; the second is that the anti-dumping regime restrains trade through a strategy labelled 'non-price predation'.[93] There is, therefore, further tension between anti-dumping law and competition law.

So why have states maintained anti-dumping and other trade remedies laws domestically, regionally, and in the multilateral trading system? The answer to this question lies in the words 'unfair trade'. The idea here is that anti-dumping and countervailing duties are intended to create a 'level playing field' for domestic industries that face unfair import competition.[94] Subsidisation distorts resource allocation by diverting resources from higher-value to lower-value uses.[95] Anti-dumping and countervailing laws in these cases ensure a level playing field by offsetting artificial sources of competitive advantage.[96] Instead of fulfilling this theoretical aim, however, anti-dumping laws penalise foreign producers for engaging in commercial practices that are perfectly legal and unexceptionable when conducted by domestic companies.[97]

Literally, anti-dumping duties discourage foreign competition in order to maintain domestic protection. This is the very practice that competition law frowns upon domestically is now allowed and sanctioned by the state when foreign products are involved. The theoretical economic argument is, therefore, fundamentally flawed. It is surprising, from a purely economic angle and competition law-based angle, why states would keep this ostensibly illegitimate arrow in the quiver. The only plausible explanation seems to be that with the liberalisation introduced by the significant reduction or elimination of tar-

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[92] Bernard M Hoekman and Michael P Leidy, 'Antidumping and market disruption: The incentive effects of antidumping laws' (2000) 67(3) *Antitrust Law Journal* 725-743.

[93] Sunjoon Cho, 'Anticompetitive trade remedies' 360-361.

[94] Brink Lindsey and Daniel J Ikenson, *Antidumping exposed: The devilish details of unfair trade law*, Cato Institute, 2003, vii.

[95] Alan O Sykes, 'The economics of WTO Rules on Subsidies and Countervailing Measures' (2003) John M Olin Law & Economics Working Paper No 186.

[96] Lindsey and Ikenson, *Antidumping exposed*, vii.

[97] Lindsey and Ikenson, *Antidumping exposed,* ix.

iffs and other non-tariff barriers to trade, states still seek avenues for maintaining disguised protectionism. The protectionism, in this case, is unfortunately sanctioned by the WTO itself. And if the economically strong countries have incentives to set up these remedies, the immiseration of developing countries continues unabated even in the WTO.

Fundamentally, therefore, since African states are in different economic positions in their levels of development and natural endowment,[98] competitive differences in prices in intra-African trade is inevitable. This explains, for example, the attractiveness of the use and the arguable success of the principle of variable geometry in African RTAs.[99] The need for the imposition of anti-dumping duties by African states against each other will soon emerge. But with this background, how then can comparative advantage-based competitive prices be fairly levelled, yet the idea of comparative advantage is the premium gas that fuels international trade. In that case, then, these differences cannot be levelled, and neither should states, especially African states who now have a renewed psyche for regional integration, be allowed to neutralise these prices through trade remedies. Since in international law, states are the main players, the idea of 'states not being allowed' is fallacious. It is only through effective state action either unilaterally by the states or through bilateral, regional, or multilateral that these actions can be implemented. The entry into force of the AfCFTA offers a perfect opportunity for African states to rethink their stance on trade remedies. Seeing that they are already the least users of these measures, there is ample opportunity to get it right. And while politically divisive, at least domestically, 'market economy forces dictate that domestic industries losing their competitive edges should give places in the market to more efficient and innovative competitors, be they foreign or domestic'.[100]

[98] Paul R Krugman, 'What do undergrads need to know about trade?', (1993) 83 *American Economic Review* 23.

[99] James T Gathii, *African regional trade agreements as legal regimes,* Cambridge University Press, 2011, 34-62.

[100] Sunjoon Cho, 'Anticompetitive trade remedies' 371.

### 3.2.0 Maintaining cooperative external regional trade remedy actions in Africa

At the onset, it is important to mention that the external imposition of trade remedies in PTAs is not a plausible alternative to the unilateral imposition of trade remedies by African states. It is a mere stop-gap measure necessitated by practical and political considerations to address the myriad challenges faced by African states mentioned in the first part of this contribution. African states have, therefore, faced tremendous difficulties in setting up trade remedy investigation agencies in order to impose unilateral trade remedy actions.[101] Since the world [international law][102] is not fair and trade remedies are arguably here to stay, African states will want to use trade remedies as the only remaining arrow in the quiver, not for legitimate purposes, but mainly for protectionist purposes. This is because developed states will continue their high usage of these actions. And while two wrongs do not make a right, WTO law allows such imposition.

Consequently, the argument here is that even though the economic rationale for trade remedies is skewed because developed states use these trade remedies as disguised protectionism,[103] African states can effectively and efficiently use these actions if employed in RTAs. It is important to understand that the argument here is for the external imposition of trade remedies against third parties (non-PTA members). This contribution reinforces the argument that trade remedies are part of Other Restrictive Regulations of Commerce that must be eliminated in PTAs pursuant to Article XXIV of GATT 1994.

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[101] Ousseni Illy, 'African countries and the challenges of trade remedy mechanisms within the WTO.'

[102] Martti Koskenniemi, *From apology to utopia: The structure of international legal argument,* Cambridge University Press, 2006; Makau Mutua, 'What is TWAIL?' (2000) 94 American Society for International Law Proceedings 31, 40; James T Gathii, 'TWAIL: A brief history of its origins, its decentralised network, and a tentative bibliography' (2011) 3(1) *Trade Law & Development* 26.

[103] Michael J Finger, 'The origins and evolution of antidumping regulation' (2001) Policy, Research, and External Affairs Working Papers Series 783; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The law and economics of contingent protection in the WTO,* Edward Elgar, 2008.

The African RTAs terrain can currently be said to be a two-tracked terrain. Track-one consists of the traditional RTAs based on the Abuja Treaty of 1991,[104] while track-two consists of the wider emergent FTAs that seek to amalgamate the traditional Regional Economic Communities (RECs)[105] and to create a continental FTA.[106] The emergent FTAs consist of the COMESA-SADC-EAC Tripartite Free Trade Area (AfTFTA) that amalgamates three existing RECs: the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC), and the latter, the African Continental Free Trade Area (AfCFTA) that seeks to establish an FTA that covers the entire continent.

The traditional RTAs in Africa number approximately 30, which include both FTAs and CUs. As noted by United Nations Conference on Trade and Development (UNCTAD), continental integration has been a priority on the African agenda ever since African countries gained political independence and started deliberations on a united Africa in all spheres of society.[107] However, both the two-terrains can be said to be roads that will eventually merge to establish the African Economic Community (AEC), which is the main aim of the Abuja Treaty.[108] The COMESA, EAC, and SADC Tripartite areas have trade remedy provisions in their respective establishing instruments.[109]

Despite the economic-based arguments on the undesirability of trade remedies, a safeguard option in a trade agreement can facilitate greater tariff reductions and provide insurance against unforeseen developments.[110] With

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[104] Treaty Establishing the African Economic Community, 3 June 1991.

[105] East African Community, 'COMESA-EAC-SADC Tripartite' <https://www.eac.int/tripartite> accessed 14 March 2021.

[106] African Union, 'AfCFTA – African Continental Free Trade Area' <https://au.int/en/ti/cfta/about> 28 April 2017.

[107] UNCTAD, *Building the African Continental Free Trade Area: Some suggestions on the way forward,* United Nations, 2015, 7.

[108] Treaty Establishing the African Economic Community.

[109] Francis Mageni, 'Customised trade remedies in Africa: The case of the COMESA-EAC-SADC Tripartite Area' *TRALAC*, 15 August 2017.

[110] Meredith A Crowley, 'Why are safeguards needed in a trade agreement?' in Kyle W Bagwell, George A Bermann *et al* (eds), *Law and economics of contingent protection in international trade,* Cambridge University Press, 2010, 380-382; John H Jackson, *The world trading system: Law and policy of international economic relations,* (2nd edn), MIT Press, 1997.

the entry into force of the AfCFTA and the resultant trade liberalisation expected to occur, there will be a need for countries to set up safeguards. This, of course, contradicts this paper's position for the non-internal imposition of trade remedies. For safeguards, specifically, this is the dilemma that African countries must accept to deal with despite evidence that the safeguards in RTAs encourage greater tariff liberalisation. This dilemma can be resolved based on where the emergent FTA will be notified.

RTAs are legally acceptable or 'qualified' in the multilateral system under Article XXIV of GATT 1994, Article V of General Agreement on Trade in Services (GATS), and the GATT Council Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause).[111] Since Article XXIV of GATT 1994 requires the elimination of tariffs while Article 2(c) requires the mutual reduction or elimination of tariffs, the requirement of the Enabling Clause seems more tariff friendly. It is vital to note that the requirements under the Enabling Clause on the rubric of tariff elimination are generally less stringent than those in Article XXIV.[112] Thus, it is only when the emergent FTAs are notified under the Enabling Clause (they have not yet been notified to the WTO) that this safeguards dilemma easily rears its ugly head.

## 4.0 The case for elimination of trade remedies in African emergent FTAs: The case of the African TFTA & CFTA

Article XXIV of GATT 1994 titled Territorial Application – Frontier Traffic – Customs Unions and free-trade areas, contains the WTO's rules on regional trade exceptions. Essentially, members of the WTO are allowed to form regional trading blocs that conform with requirements of Article XXIV. In order to form such regional arrangements, WTO members are required to eliminate duties and other restrictive regulations of commerce (ORRCs) on

[111] James Mathis and Jennifer Breaton 'Regional trade agreements and the WTO: Implications for Eastern and Southern Africa' in TRALAC, *Cape to Cairo: Making the Tripartite Free Trade Area work,* TRALAC, 2011, 24.

[112] Harrison Mbori, 'Existing in the eternal twilight zone of WTO consistency: The case of the African Continental Free Trade Agreement' *Afronomicslaw Blog,* 25 January 2019.

substantially all the trade amongst the participating members of the arrangement. There has been debate whether the presence and application of trade remedies should be present within these arrangements or whether such provisions and applications should be eliminated as part of 'other restrictive regulations of commerce.' The next section argues that the case for elimination of trade remedies in regional trade arrangements is stronger than that for their retention. Additionally, for purposes of coherence and proper administration of such remedies, African states should act within their broader trading blocs such as the AfCFTA rather than at the sub regional and national levels.

Article XXIV (8)(b) of GATT 1994 provides for the formation of FTAs within the multilateral trading system. According to Article XXIV (8)(b), a free trade area is a group of two or more customs territories in which the duties and other restrictive regulations of commerce (ORRCs) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[113] The essence of FTAs is to facilitate trade between the parties by eliminating duties and other restrictive regulations of commerce amongst the parties. Article XXIV (8)(b) requires that duties and other restrictive regulations of commerce be eliminated for the formation of an FTA. The words 'duties and other restrictive regulations of commerce' have been frequently discussed, but neither the WTO Panels nor the AB has had opportunity to interpret their meaning.[114] Importantly, Article XXIV (8)(b) has a requirement of elimination that applies only to regulations that have a 'restrictive' effect on commerce.[115]

Anti-dumping and countervailing duties, which are adopted as trade remedies, are described under Articles II and VI of GATT 1994 as duties.[116] They are imposed in addition to ordinary customs duties with the intention of

[113] General Agreement on Tariffs and Trade, Article XXIV (8)(b).

[114] Nicolas Lockhart and Andrew Mitchell, 'Regional trade agreements under GATT 1994: An exception and its limits', in Andrew Mitchel, *Challenges and prospects for the WTO*, Cameron, May 2005, 236; *see also* Joel P Trachtman, 'The limits of PTAs' in in Kyle W Bagwell, George A Bermann *et al* (eds), *Law and economics of contingent protection in international trade,* Cambridge University Press, 2010, 138; *see also* Christian Delev, 'Straining the spaghetti bowl: Re-evaluating the regulation of preferential rules of origin' (2022) *Journal of International Economic Law*, 40.

[115] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 236.

[116] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 237.

restricting imports of specific products.[117] Safeguard measures have been described to involve the modification or withdrawal of a market access concession for imported goods, again with the intention of restricting imports. The panel in *Argentina – Footwear* assumed that safeguard measures are 'duties and "other restrictive regulations of commerce".'[118] While the AB reversed the Panel's finding on Article XXIV, it did not look into the question of safeguards as 'duties and other restrictive regulations of commerce'. Neither did it declare it to be an erroneous interpretation of Article XXIV.[119] Accordingly, trade remedies, whose intention is to restrict imports either in the form of duties or quantitative restrictions, should be considered as other restrictive regulations of commerce (ORRCs).[120] Trade remedies have also been found to be inefficient as they disadvantage importers, consumers, and exporters of the products on which they are imposed as well as importers, consumers, and industrial users of products in the countries imposing these remedies.[121] In this vein, parties desiring to enter into an FTA should arguably eliminate trade remedies as this is one of the conditions necessary for the formation of an FTA under Article XXIV(8) of GATT 1994.

Article XXIV (8)(b) provides for restrictions that may be maintained within the context of an FTA, where necessary, that is, the parenthesis provisions. The restrictive regulations of commerce that may be permitted within an FTA include those under articles XI, XII, XIII, XIV, XV, and XX.[122] Article VI on anti-dumping and countervailing duties, Article XVI on subsidies, and Article XIX on safeguards are not included in this list. Some scholars have argued that this list is merely illustrative, and thus, other restrictions such as trade remedies may be maintained in the context of an FTA.[123] This is because Article XXI, which is on security exceptions, has also been left out of the list. It is inconceivable that the drafters intended to bar contracting parties from

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[117] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[118] *Argentina – Safeguard measures on imports of footwear,* Report of the Panel (25 June 1999) WT/DS121/R [8.96] - [8.97].

[119] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[120] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 238.

[121] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[122] General Agreement on Tariffs and Trade, Article XXIV (8)(b).

[123] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

adopting and maintaining restrictions on trade in the interest of national security. It then follows from this argument that other restrictive regulations of commerce such as those in Article VI could be permitted within the context of an FTA.

The exclusion of Article XXI on security exceptions from the bracketed list points to the view that the list is illustrative. However, pursuing a broad scope of restrictions that may be maintained within an FTA would make the realisation of Article XXIV's objective of facilitating trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories difficult.[124] The interpretation that the bracketed list is an exhaustive list complements the requirement in Article XXIV (5) on eliminating barriers to trade on substantially all the trade. This is further consistent with the AB's statement in *Turkey – Textiles* that the bracketed list allows parties to maintain measures 'otherwise permitted under Article XI through XV and under Article XX of GATT.'[125] This suggests that the AB would have read the bracketed list as providing an exhaustive list of other restrictive regulations of commerce that can be maintained in an FTA.[126] Furthermore, had the drafters of GATT 1994 intended to develop an inexhaustive list, they would have used drafting lingua to show this by employing words such as 'including Article XI…', as used all through the GATT, for example, in Articles V, VI, VIII, XX.

The question that would then arise is, what measures would be adopted to remedy injury to domestic industry in an FTA? Alternatives for trade remedies can be developed and employed within FTAs. The AD Agreement allows states to seek constructive remedies and to apply them prior to the application of anti-dumping duties where developing countries are concerned.[127] This speaks to the possibility of employing less restrictive means to remedy trade injury. Among the alternatives that can be sought include replacing trade remedies with a regional competition law regime, creating a regional investigation authority to implement country-specific safeguards, and creating a traffic-light system for a regional trade remedies regime.

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[124] General Agreement on Tariffs and Trade, Article XXIV (4).

[125] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

[126] Lockhart and Mitchell, 'Regional trade agreements under GATT 1994', 239.

[127] The WTO Agreement on Implementation of Article VI, Article 15.

There are several FTAs that have replaced trade remedies with a regional competition law regime. These FTAs include the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the European Free Trade Association (EFTA) - Chile Agreement, and the EFTA - Singapore Agreement. These FTAs prohibit parties from using anti-dumping laws but instead require the parties to use competition laws to remedy cases of dumping.[128] The creation of a common competition law or policy regime can be problematic in the case of Africa, considering the number of parties involved, who may have different competition law regimes. However, where the parties have a common objective on competition policy[129] or where there are similar business practices, as in the case of ANZCERTA, the creation of a competition policy might be quicker and easier.[130]

The creation of a competition law regime is easier where there are deep regional integration processes among the parties.[131] However, the creation of a competition policy is not a pre-requisite for the elimination of anti-dumping duties.[132] Africa should focus on deep integration, which is characterised by harmonised or common behind-the-border measures, arrangements that allow for the free(r) movement of capital and labour, monetary union or the adoption of a single currency, or political integration.[133] Another alternative available for FTAs in Africa is the creation of a regional investigation authority to implement country-specific safeguards.

Lastly, it is possible to create a traffic-light system for a regional trade remedies regime. Such a regime would determine what measure should be adopted for different cases of injury. In the case of anti-dumping, for example, the traffic-light system would determine, on the basis of an objective, verifiable criterion, which cases would be subject to anti-dumping measures and

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[128] Willemien Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[129] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 20.

[130] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 20.

[131] Ryan Farha, 'A right unexercised is a right lost; Abolishing anti-dumping in regional trade agreements', (2012) 44(1) *Georgetown Journal of International Law* 211.

[132] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[133] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa'; Thomas J Prusa, 'Antidumping provisions in preferential trade agreements' in Jagdish Bhagwati, Pravin Krishna and Arvind Panagariya, *The World Trade System,* MIT Press, 2017.

which ones would not. This would be similar to the approach in the Canada - Chile FTA, where the use of anti-dumping measures is prohibited save for exceptional circumstances.[134]

### 3.1.0 The case studies of PTAs where trade remedies are eliminated: Lessons for Africa

FTAs have traditionally dealt with the question of trade remedies in one of three ways. The first is through confirming and making reference to rights and obligations under WTO Agreements. The second is by eliminating the use of trade remedies against FTA parties. The third is through restricting the use of trade remedies against FTA parties.[135] Through confirming and making reference to rights and obligations under WTO Agreements, parties to these FTAs are allowed to use trade remedies against other parties in the FTA as they would in the absence of the FTA. Southern Common Market (MERCOSUR for its Spanish initials), EFTA - Korea FTA, and Association of South East Asian Nations (ASEAN) - India FTA, are examples of FTAs that adopt this approach.[136]

The Treaty Establishing the European Community eliminates all forms of trade remedies among its members.[137] The ANZCERTA, which entered into force in 1983, also eliminates trade remedies among its members. The 1983 Agreement allowed parties to use anti-dumping measures to remedy cases of dumping as against non-contracting parties.[138] In 1988, the Agreement was amended by the Protocol to the Australia New Zealand Closer Economic Relations - Trade Agreement on Acceleration of Free Trade in Goods (ANZCER-

[134] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements.'

[135] Yanlin Sun and John Whalley, 'China's anti-dumping problems and mitigation through regional trade agreements', CIGI Papers No 70, 2015, 6.

[136] Jean-Daniel Rey, 'Antidumping regional regimes and the multilateral trading system: Do regional antidumping regimes make a difference?' (2021) WTO Staff Working Paper, No ERSD-2012-22, 20.

[137] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[138] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

TA Protocol).[139] The Protocol eliminated the possibility of using anti-dumping measures on goods covered by the Agreement.[140] This evolution in anti-dumping measures has been attributed to deep integration among the parties to the Agreement.[141] On countervailing duties, the Agreement allows parties to employ countervailing duties but only 'when no mutually acceptable alternative course of action has been determined by the member states.'[142]

The FTA between the EFTA states and the Republic of Chile (EFTA - Chile Agreement), which entered into force on 1 December 2004, eliminates anti-dumping measures between the parties. In place of anti-dumping measures, the FTA requires the parties to use competition laws to remedy cases of dumping.[143] The Agreement recognises that the effective implementation of competition rules can address the economic causes that lead to dumping.[144] Similarly, the EFTA - Singapore Agreement, which entered into force on 1 January 2003, prohibits the use of anti-dumping measures among the parties through article 16.[145] Article 16 states that 'in order to prevent dumping, the parties shall undertake the necessary measures as provided for under Chapter V.'[146] Chapter V of the Agreement is on competition rules.

It has been argued that the degree of integration is an important factor in allowing for the abolition of anti-dumping measures in FTAs.[147] The level of integration can easily lead to the abolition of anti-dumping measures without necessarily necessitating the creation of common competition law or policy.[148] The China - Hong Kong, China FTA is another example of yet another FTA that eliminates the use of anti-dumping measures among the parties. This is also the case for the China - China Macau, China FTA. These FTAs do not

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[139] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[140] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[141] Rey, 'Antidumping regional regimes and the multilateral trading system' 30.

[142] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[143] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa' 16.

[144] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[145] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[146] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[147] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements' 211.

[148] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

prohibit the use of anti-dumping measures against third parties.[149] The Canada - Chile FTA, which entered into force on 5 July 1997, while prohibiting parties from using anti-dumping laws on the goods originating from the territory of the other party, allows parties, subject to consultation, to employ anti-dumping measures in exceptional circumstances.[150] In addition, the Agreement requires notification to an intra-FTA Committee on anti-dumping and countervailing measures and the application of the FTA-specific dispute settlement mechanism.[151]

While the FTA between New Zealand and China[152] does not eliminate anti-dumping measures, it restricts the use of these measures by requiring the parties not to use anti-dumping measures in an arbitrary or protectionist manner.[153] The North Atlantic Free Trade Agreement (NAFTA) between the USA, Mexico, and Canada provided for bilateral safeguards for a transitional period and independent bi-national panels to assess final determinations on anti-dumping and countervailing duties against domestic laws.[154] This is a measure that was suggested after an FTA between USA and Canada failed to successfully eliminate anti-dumping measures.[155]

The Singapore - New Zealand FTA does not completely eliminate anti-dumping measures.[156] Within this FTA, parties can employ anti-dumping measures against each other. However, there is a greater exercise of restraint to be followed when employing anti-dumping measures as against the other party.[157] The *de minimis* margin is raised, the definition of negligible is raised, and the duration for implementation of the measure is reduced for parties to

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[149] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[150] Farha, 'A right unexercised is a right lost: Abolishing anti-dumping in regional trade agreements' 211.

[151] Rey, 'Antidumping regional regimes and the multilateral trading system' 20.

[152] Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China (1 October 2008) <https://www.wipo.int/edocs/lexdocs/treaties/en/cn-nz/trt_cn_nz.pdf> accessed 14 March 2021.

[153] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[154] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[155] Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

[156] Agreement between New Zealand and Singapore on a Closer Economic Partnership (1 January, 2001), art 2.

[157] Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

the FTA.[158] Consequently, parties are restricted but not prohibited from taking anti-dumping measures against parties in the FTA.[159] The same approach is adopted for the Jordan - Singapore FTA.[160] In a similar approach, the Chinese Taipei - Nicaragua FTA, as well as the Chinese Taipei - Panama FTA, reduces the duration of the anti-dumping measure.[161]

The autonomy and independence of FTAs warrant the parties to the FTA to determine which provisions will guide their trade relations, including provisions on trade remedies. Economists have argued that trade remedies are almost invariably inefficient.[162] FTAs are entered into by parties with a common goal to liberalise trade between them.[163] This carrot rather than stick approach can give parties incentive to adopt alternatives that would be effective for the specific FTAs.

## 5.0 Conclusion

This article has made two broad arguments. Firstly, international economic law generally and international trade law specifically have worked more towards the immiseration rather than the emancipation of African peoples. Secondly, the paper has shown that with the current global fatalistic acceptance of poorly checked trade liberalisation and globalisation, trade remedies cannot in themselves remedy the immiseration that currently faces many of the peoples in Africa. Specifically, the article has argued that at the multilateral level, trade remedies (especially the anti-dumping regime) should be eliminated as they are not economically justifiable, have been used for protectionist purposes, and are one of the causes of the demise of the WTO AB in 2019. Due to the fact that at the multilateral level, there will be no serious reform or push in this direction, the article has argued that more energies for remedying this regime

158 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

159 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

160 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

161 Rey, 'Antidumping regional regimes and the multilateral trading system' 22.

162 Denner, 'Trade remedies and safeguards in Southern and Eastern Africa.'

163 Kampel Kim, Options for disciplining the use of trade remedies in clean energy technologies, International Centre for Trade and Sustainable Development, 2017, 39.

should be done at the regional level. For Africa specifically, trade remedies should be eliminated at the national and sub-regional RECs, and a single trade remedies authority should be set up at the AfCFTA level.

This argument is embedded in the view that under Article XXIV of GATT 1994, trade remedies are 'other restrictive regulations of commerce' that ought to be eliminated in a WTO consistent FTA. This means that African states will not impose anti-dumping or countervailing duties against each other but will investigate and impose such duties on third parties who are not members of the AfCFTA. This is a compromise position for the imposition of trade remedies that balances the fact that even though they are undesirable at multilateral levels, they are permissible, and other countries will continue using them. Their elimination in AfCfTA (which has not been done) would have been more in tandem with the AfCFTA's goal of promoting intra-African trade. Their maintenance at the national and sub-regional levels shows the level of mistrust among African states, and the achievement of the Pan-African emancipatory economic goals will, in my view, remain a pipe dream. Unfortunately, for purposes of this article, without further rethinking and reforming of the African trade remedies regime, the AfCFTA, like the multilateral trading system, will perpetuate and not alleviate the immiseration of African peoples.

# JURISDICTIONAL OVERLAPS IN TRADE AND INVESTMENT DISPUTES SETTLEMENT IN THE EAC: REFLECTIONS ON THE EAST AFRICAN COURT OF JUSTICE'S ' CONSTRAINED JURISDICTION'

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## Abstract

This study seeks to examine the jurisdiction of the East African Court of Justice (EACJ) to hear and determine trade and investment disputes within the East African Community (EAC) in line with its principle of having a people-centred and market-based community. The research is anchored on the hypothesis that the jurisdiction of the EACJ to determine commercial disputes arising out of trade and investment activities within the region is constrained. The study establishes that there exist parallel dispute resolution mechanisms whose effect is to constrain the jurisdiction of the EACJ to hear commercial disputes within the EAC. This in turn affects both the consistency and predictability of trade and investment jurisprudence in the EAC. These mechanisms include the East African Committee on Trade Remedies, the EAC Competition Authority, arbitral tribunals within national

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