

Advancing the African Continental Free Trade Area (AfCFTA): Lessons from the Southern African Development Community Protocol on Trade

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Abstract

The African Continental Free Trade Area (AfCFTA) was founded to integrate Africa's regional economies into a single framework of trade liberalisation. However, some scholarly works suggest that the AfCFTA threatens the existence of Africa's Free Trade Areas (FTAs) and Regional Economic Communities (RECs). Other critics suggest that the AfCFTA overlaps with the FTAs and the objectives of Africa's RECs. In this article, I ask how the AfCFTA can sidestep the challenges experienced by RECs such as the Southern African Development Community (SADC). What legal frameworks has the AfCFTA introduced that further entrench the legal provisions found in Africa's FTAs and RECs? This article advances a legal view that Africa's RECs are the building blocks of the AfCFTA. While the AfCFTA may reproduce some of the trade provisions of FTAs and RECs, overlapping can have positive effects on bilateral trade relations with RECs. In addition, the AfCFTA has leveraged processes of regional economic integration to expand markets for RECs. This article exposes the interface between the SADC Protocol on Trade and the AfCFTA protocols. A qualitative approach based on a literature review of paper and internet sources and legal documents is used to argue that the AfCFTA has drawn lessons—both positive and negative—from the efforts of regional economic blocs in Africa to achieve flexible trade integration.

Keywords: AfCFTA; African FTAs; human rights discourse; protocol; RECs; SADC; trade; trade liberalisation integration



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Introduction: Interface of the SADC Protocol on Trade and AfCFTA

The imperatives for regional integration in Africa arise from the choice made by states to be key drivers in cooperative agreements at a regional level in policy debates, and to pursue certain shared socio-economic and political goals.¹ Article XXIV of the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT) 1994 enables the formation of regional trade agreements. African Regional Economic Communities (RECs) are the Free Trade Areas (FTAs) designed to promote economic integration through trade liberalisation.²

The Lagos Plan of Action for the Economic Development of Africa, 1980–2000³ and the Treaty Establishing the African Economic Community (Abuja Treaty) (1991)⁴ embraced a bottom-up process with the formation of RECs and numerous treaties and protocols governing interstate relations.⁵ In addition, the Treaty of the Southern African Development Community (SADC Treaty) provides that its member states may enter into agreements with other states and regional and international organisations with compatible objectives.⁶ SADC is one of the African Union’s FTAs and thus a foundation or stepping stone for the AfCFTA, which builds on the integration achieved under the RECs. The AfCFTA acts as a common denominator and provides a framework for linkages and synergies between the individual RECs. As anticipated by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ),

[b]y scaling up economic integration from the regional to the continental level, the AfCFTA goes even further and aims at connecting 1. billion people across all of Africa

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- 1 B Byiers and J Vanheukelom, ‘Political Drivers of Africa’s Regional Economic Integration: Lessons from the Maputo and North–South Corridors’ in AD du Pisani, G Erasmus and T Hartzenberg (eds), *Monitoring Regional Integration in Southern Africa* (Tralac 2016) 1–42.
 - 2 A Saurombe, ‘The Southern African Development Community Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV’ (2011) 14(4) PER/PELJ.
 - 3 Lagos Plan of Action for the Economic Development of Africa, 1980–2000 (OAU 1980) <<http://mmeipa.africa-eu-energy-partnership.org/sites/default/files/2020-12/OAU%201980%20Lagos%20Plan%20of%20Action%20for%20the%20Economic%20Development%20of%20Africa.pdf>> accessed 4 November 2024.
 - 4 Treaty Establishing the African Economic Community <https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf> accessed 8 November 2024 (Abuja Treaty).
 - 5 R Nantchouang, ‘Are the Regional Economic Communities’ (RECs) Overlapping Membership an Issue? A Discussion on a “Free Rider” Syndrome as Applied to a Small Economy (Evidence from Burundi)’ (Presentation in Harare, Zimbabwe on 28 February 2014 for The African Capacity Building Foundation) <<https://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH01d2/0ba63f08/678d5aa8/c387.dir/20140228.pdf>> accessed 16 November 2023.
 - 6 Consolidated Text of the Treaty of the Southern African Development Community <<https://www.sadc.int/document/consolidated-text-treaty-southern-african-development-community>> accessed 8 November 2024 (SADC Treaty), Art 22(1).

with a combined domestic product (GDP) of \$3.4 trillion into the world's largest free trade area in terms of participating countries.⁷

Even though the economies—and economic policies—of the member states of the eight African Union (AU) RECs tend to be uneven, each of the RECs introduces unique elements of competitive economic advantages into the AfCFTA. At a micro-level, some countries may ‘exhibit failure or breakdown [in their economies] while other parts continue to function, some even robustly.’⁸

Yet, some of the FTA and REC mandates go beyond the scope of the issues embodied in the AfCFTA.⁹ Notwithstanding this, the ‘AfCFTA is expected to promote the coordination and harmonisation of the integration of REC activities, though this process requires careful and pragmatic policy approaches.’¹⁰ Pursuing this line of thought is fruitful when evaluating complementary positive synergies between Africa's FTAs and RECs and the AfCFTA.¹¹

This article uses SADC as an economic litmus test or yardstick to measure and foresee the lessons the AfCFTA must learn to implement its continental economic integration programme through trade liberalisation. On the one hand, a comparison of SADC and the AfCFTA provides a scholarly platform to debate whether SADC is threatened by the AfCFTA, and to examine potential successes or failures of the AfCFTA, particularly in the context of the RECs.¹² On the other hand, the SADC Protocol on Trade¹³ and its

7 Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), ‘Successes in Regional Economic Integration: Success Stories from GIZ Programmes Across Africa’ (2022) <<https://www.giz.de/de/downloads/giz2022-en-successes-in-regional-economic-integration.pdf>> accessed 16 August 2024.

8 EV Masunungure and JM Shumba (eds), *Zimbabwe's Trajectory: Stepping Forward or Sliding Back* (Weaver Press 2020) 4.

9 W Olayiwola, ‘Governing the Interface Between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges’ (United Nations Economic Commission for Africa (UNCTAD) 2020) <https://archive.uneca.org/sites/default/files/uploaded-documents/RITD/2020/governing_interface_between_afcfta_and_recs_afcfta_issues_opportunities_and_challenges_revised_final_version_as_at_nov_2_2020.pdf> accessed 16 August 2024.

10 Olayiwola (n 9) 17.

11 Nantchouang (n 5).

12 V Gumede, ‘The African Continental Free Trade Agreement and the Future of Regional Economic Communities’ (Vusi Gumede Research and Publications 2021) <<https://vusigumede.com/content/2021/AUG%202021/Academic%20Paper%204.pdf>> accessed 16 August 2024.

13 Protocol on Trade in the Southern African Community Development (SADC) Region <https://www.sadc.int/sites/default/files/2021-11/Protocol_on_Trade1996.pdf> accessed 8 November 2024 (SADC Protocol on Trade).

interface with the AfCFTA¹⁴ might assist Africa's economic policymakers to leverage the diversification of exports of primary commodities by the RECs.¹⁵

Economic flows between the SADC Protocol on Trade and the AfCFTA must emphasise that existing socio-economic trends should be supported. Similarly, future trends must be anticipated to formulate effective regional policy.¹⁶ At the interface between RECs and the AfCFTA, some of the RECs' achievements that are leveraged to support the implementation of the AfCFTA directly relate to trade facilitation.¹⁷ RECs such as SADC can extend oversight and nudge the implementation of their trade liberalisation policies to meet the objectives of the AfCFTA. They could also use their position to encourage member states to expedite ratification of the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement).¹⁸ Yet, at the same time,

there are many impediments to the capability of RECs to perform these roles. These are weak inter-agency coordination and inappropriate monitoring and evaluation systems. Weak compliance and enforcement mechanisms limit the capacity of private entities or Member States to challenge each other in case of non-compliance.¹⁹

The AfCFTA Agreement is expected to change the trend and trade pattern in Africa by leveraging economies of scale, driving industrialisation, diversifying exports through removing tariffs, non-tariff barriers and regulatory differences, and harmonising standards.²⁰

Methodology of the Study

This study adopted a desktop approach. The main attraction of this approach is that it enables the researcher to consult libraries and use as primary and secondary sources literature in the form of legal instruments found on internet platforms. The primary source for this study is the SADC Protocol on Trade and its interface with the AfCFTA Agreement.²¹ Textual analysis was conducted to study the legal instruments.

14 Agreement Establishing the African Continental Free Trade Area <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 8 November 2024 (AfCFTA Agreement).

15 D Ndonga, E Laryea and M Chaponda, 'Assessing the Potential Impact of the Continental Free Trade Area on Least Developed Countries: A Case Study of Malawi' (2020) 46(4) *Journal of Southern African Studies* 776–92.

16 EJ Drewes and M van Aswegen, *Regional Policy in the Southern African Development Community* (Routledge 2024).

17 Drewes and Van Aswegen (n 16).

18 AfCFTA Agreement (n 14).

19 Drewes and Van Aswegen (n 16) 33.

20 B Moyo, 'Impact of SADC Free Trade Area on Southern Africa's Intra-Trade Performance Implications For the African Continental Free Trade Area' (2022) 59(1) *Foreign Trade Review* 146–180.

21 SADC Protocol on Trade (n 13); AfCFTA Agreement (n 14).

Textual analysis is a qualitative approach, which is suitable for analysing and interpreting legal texts to arrive at multiple meanings that are not predetermined. A comparative perspective was adopted to study the interface between the legal provisions of the SADC Protocol on Trade and the AfCFTA. Comparative international law emphasises

the diversity of national and regional traditions of international law ... and reflect the growing globalisation of legal practise, the increased penetration of international law into the domestic realm, the rising transnational flow of law students, the greater accessibility of diverse national sources through electronic databases, and the movement towards an era of multipolar power.²²

Comparative international law assists in ascertaining the extent of intentional legal connections in the legal and institutional framework of the SADC Protocol on Trade and whether they were the only foundations of the AfCFTA. Comparative approaches also assist the researcher in identifying and determining points of legal departure, novelty and legal innovations that the AfCFTA uses to advance the goal of continental free trade through trade liberalisation.

The SADC Protocol on Trade is discussed briefly in the following section to highlight the trade achievements upon which the AfCFTA could build.

Southern African Development Community (SADC) Protocol on Trade

The SADC Protocol on Trade sets out the basis for regional integration, which is a key objective of trade liberalisation.²³ Through the Protocol on Trade, SADC established an FTA in 2008.²⁴ This is a crucial date by which tariff barriers and non-tariff barriers on substantial all trade in goods in SADC should have been eliminated. The protocol has a dispute settlement mechanism that works through consensus and cooperation among member states.²⁵ Annex VI concerns the settlement of disputes among the SADC member states.²⁶

The AU recognises eight RECs,²⁷ which consist primarily of trade blocs and, in some cases, involve political cooperation. All these communities form the ‘pillars’ of the

22 A Roberts, PB Stephan, V Pierre-Hugues and another, ‘Comparative International Law: Framing the Field’ (2015) 109 (3) *The American Journal of International Law* 467–76.

23 Sauroombe A, ‘Regionalisation Through Economic Integration in the Southern Development Community (SADC)’ (PhD thesis, North-West University 2011) 3.

24 SADC Protocol on Trade (n 13) Art 2(5).

25 *ibid* Art 32.

26 *ibid* Annex VI.

27 The eight RECs of the AU are: Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Sahara States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic

African Economic Community. SADC stems from the Southern African Development Coordination Conference (SADCC), which was created in 1980. The SADCC transformed into SADC with a focus on cooperation on socio-economic and political security matters.²⁸ SADC is a rule-based intergovernmental organisation with a legal personality. The organisation has the capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and to sue and be sued.²⁹

The SADC Treaty provides the legal framework of the organisation by setting out its status, principles and objectives, the obligations of member states, and membership and institutions. It also sets out procedural matters relating to areas of cooperation among member states, cooperation with international organisations, financial issues, dispute settlement and sanctions, withdrawal and dissolution.³⁰ The objectives of SADC are to promote sustainable and equitable growth and socio-economic development³¹ based on collective self-reliance.³² The SADC Treaty empowers member states to conclude such protocols as may be necessary in each area of cooperation, spelling out the scope of, and mechanism for, cooperation and economic integration.³³

The SADC Regional Indicative Strategic Development Plan 2020–2030 (RISDP) aligns with the United Nations’ Transforming Our World: The 2030 Agenda for Sustainable Development, and the African Union’s Agenda 2063: The Africa We Want.³⁴ It aims to: (a) create a conducive environment to foster regional integration; (b) mobilise resources from within and outside SADC; (c) improve the implementation of existing SADC policies and programmes; (d) strengthen compliance by the member states; and (e) magnify visibility and awareness.³⁵

Originally, the RISDP was a comprehensive development and implementation framework guiding the SADC Regional Integration Agenda over fifteen years (2005–2020). The RISDP for 2005–2020 envisaged the promotion of regional value chains and increased value-addition in priority sectors. These included agro-processing, mineral beneficiation and pharmaceuticals. The RISDP was also designed to provide clear guidance on regional development and growth priorities in SADC to ensure greater

Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); Southern African Development Community (SADC).

28 A Saurombe, ‘An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal’ (2011) 23 SA Merc LJ 393

29 SADC Treaty (n 6) Art 3.

30 Saurombe, Regionalisation (n 23) 3.

31 SADC Treaty (n 6) Art 5(a).

32 *ibid* Art 5(d).

33 *ibid* Art 22(1); ‘protocol’ means an instrument of implementation of the SADC Treaty (Art 1).

34 SADC Regional Indicative Strategic Development Plan 2020–2030 <<https://www.sadc.int/pillars/regional-indicative-strategic-development-plan-2020-2030>> (SADC 2021) accessed 16 August 2024 (RISDP).

35 Drewes and Van Aswegen (n 16).

regional parity between member states.³⁶ The objective was to increase SADC's manufacturing capacity, competitiveness and capacity to trade, and consequently achieve more sustainable economic change.³⁷

The RISDP for 2020–2030 and the SADC Vision 2050³⁸ seek to create a peaceful, inclusive, competitive, middle- to high-income industrialised region where all citizens enjoy sustainable economic well-being, justice and freedom by the year 2050.³⁹ The RISDP adopted three pillars, which are: (a) Industrial development and market integration; (b) infrastructure development in support of regional integration; and (c) social and human capital development⁴⁰ to enhance economic integration in the SADC region. However, 'since the RISDP is still without legal basis, the Council [of Ministers] has to facilitate its implementation and take stock of its progress in its frequent meetings.'⁴¹

SADC's inadequate capacity to effectively solve its own trade problems was magnified by the suspension of the SADC Tribunal in September 2010,⁴² a move widely viewed as a retrogressive step with major consequences for regional governance.

AfCFTA Agreement

Africa's RECs provide the foundation for the AfCFTA. As already argued above, the Abuja Treaty⁴³ encourages its member states to strengthen existing RECs and to establish a new REC where none exists. The Abuja Treaty's five objectives are to: (a) stabilise tariff barriers and non-tariff barriers at RECs level; (b) establish an FTA and a customs union in each REC; (c) establish a customs union at a continental level; (d) establish an African common market and harmonise money, financial and fiscal policies; and (e) allow free movement of persons and rights of residence and establishment.⁴⁴ The idea of a Continental Free Trade Agreement was first

36 *ibid.*

37 *ibid.*

38 RISDP (n 34).

39 *ibid.*

40 *ibid.*

41 A Saurombe, 'The Role of SADC Institutions in Implementing SADC Treaty SADC Provisions Dealing With Regional Integration' (2012) 15(2) PER/PELJ 454–569.

42 According to legal scholar Amos Saurombe (n 42) 469, 'On 28 November 2008, the SADC Tribunal ruled that 76 white Zimbabwean farmers could keep their farms because the Zimbabwean land reform programme had discriminated against them. The Zimbabwean government rejected this ruling and lobbied the Summit to suspend the Tribunal. The Tribunal was duly suspended in August 2010.'

43 Abuja Treaty (n 4).

44 G Erasmus, 'Comparing the Abuja Treaty and the AfCFTA Agreement' (*Tralac*, 29 February 2024) <<https://tralac.org/blog/article/16331-comparing-the-Abuja-Treaty-and-the-AfCFTA-Agreement>> accessed 8 November 2024.

mooted in 2012 by AU members states that wanted to create a single market for goods and services.⁴⁵

The AfCFTA functions through protocols, which are discussed below.

AfCFTA Protocol on Trade in Goods

The main objective of the AfCFTA Protocol on Trade in Goods⁴⁶ is to progressively eliminate tariffs and non-tariff barriers that impede trade liberalisation.⁴⁷ The success of the protocol depends on special and differential treatment to provide flexibilities to other State Parties at different levels of economic development in the implementation phase on a case-to-case basis.⁴⁸ Tariff concessions are negotiated between member states of other RECs⁴⁹ that may request modification of their schedule of tariff concessions⁵⁰ and preferential treatment on rules of origin under conditions set out in Annex 2 on Rules of Origin.⁵¹ Part V of the Protocol on Trade in Goods deals with trade remedies,⁵² while Part X on Institutional Provisions deals with consultation and dispute settlement⁵³ and implementation, monitoring and evaluation.⁵⁴ The protocol can be amended in accordance with Article 29 of the AfCFTA Agreement.⁵⁵

The principles of variable geometry and flexible and special differential treatment enable the AfCFTA to derogate from tariff concessions.⁵⁶ This allows some member states to move ahead with the project of economic integration for the benefit of all members, while enabling poorer member states to reach equal standing to achieve flexible integration. Other AfCFTA principles include achieving transparency and disclosure of information; preserving the laws and decisions of the international community; and observing Most Favoured Nations Treatment and national treatment of reciprocity.⁵⁷ In the AfCFTA Protocol on Trade in Goods, State Parties must accord to products imported from other State Parties ‘treatment no less favourable than that accorded to like domestic products of national origin.’⁵⁸

45 AU website: <<http://www.au.int/en/ti/cfta/about>> accessed 25 June 2019.

46 The Protocol on Trade in Goods is contained in the AfCFTA Agreement (n 14) 17.

47 Protocol on Trade in Goods (n 14) Art 2(a) and (b).

48 *ibid* Art 6.

49 *ibid* Art 9(1),

50 *ibid* Art 11(1) and (2).

51 *ibid* Art 13.

52 *ibid* Art 17 and 18.

53 *ibid* Art 30.

54 *ibid* Art 31.

55 *ibid* Art 32.

56 O Binha and K Mwakurudza, ‘An Analysis of the Concept of Derogation in Regional and Continental Integration: A Case of Zimbabwe?’ (2020) 10(12) *International Journal of Scientific and Research Publications* 535–45.

57 Protocol on Trade in Goods (n 14) Art 5.

58 *ibid*.

Palomba, Cherif and Zhao estimate that under the AfCFTA, eliminating tariffs and non-tariff barriers by ninety per cent might increase intra-regional trade by about USD16 billion or about sixteen per cent over average levels.⁵⁹ The AfCFTA Agreement promotes value chains that might benefit an expanded continental single market of 1.6 billion people, with a possible cumulative gross domestic product (GDP) of over USD3.4 trillion.⁶⁰

The United Nations Economic Commission for Africa (UNECA) projected that implementing the AfCFTA Agreement could increase intra-Africa trade by fifty-two per cent by 2024 compared with trade levels in 2010.⁶¹ It could also double the share of intra-Africa trade, which is currently around thirteen per cent of exports.⁶² It is for this reason that the AfCFTA has been hailed as a great step forward towards economic integration,⁶³ a game changer for the continent⁶⁴ and a positive step towards continental economic integration through trade liberalisation.⁶⁵

In the AfCFTA, poor member states can use their comparative advantage in agricultural goods to be traded in an expanded trade market beyond the regional one. In addition, some poor member states can apply for derogation from tax concessions on certain services to retain some power to use tariffs to generate revenue. Unfortunately, some AfCFTA members continue to impose non-tariff measures against the letter and spirit of the AfCFTA Agreement.⁶⁶

However, the AfCFTA is widely recognised as a key factor in driving economic growth, industrialisation and sustainable development. Deeper economic integration arising from the continent-wide legal and institutional framework for trade liberalisation might enable Africa's RECs to stimulate highly expected increases in intra-SADC trade. The AfCFTA market encourages diversity and competition in commodities in the production of goods.⁶⁷

59 G Palomba, R Cherif and Y Zhao, 'Is the African Continental Free Trade Area a Game Changer for the Continent?' in IMF *Regional Economic Outlook: Sub-Saharan Africa* (International Monetary Fund 2019) 45.

60 Palomba and others (n 59) 45.

61 The United Nations Economic Commission for Africa provides economic reports that reflect on Africa's economic development; see United Nations Economic Commission for Africa, 'Rules of Origin Have the Potential to "Make-or-Break" the Effectiveness of AfCFTA—UN Report' (n.d.) <<https://repository.uneca.org/handle/10855/45066>> accessed 17 August 2024.

62 United Nations Economic Commission for Africa (n 61).

63 J Cazares, 'The Africa Continental Free Trade Area: Benefits, Costs and Implications' (*Infomineo*, 11 April 2018) <<https://infomineo.com/Africa-continental-free-trade-area>> accessed 7 November 2024.

64 Palomba and others (n 59) 39–54.

65 *ibid.*

66 C Penda, 'Eliminating "Thick" Borders: Analysing the Legal Framework on Non-Tariff Barriers in the Africa Continental Free Trade Area Agreement' (2021) 6(1) *Strathmore LR* 167–94.

67 Saurombe, *Regionalisation* (n 23) 4.

AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes

The AfCFTA Agreement is consistent with most WTO legal instruments and trade agreements that support a rule-based system. The AfCFTA Agreement has its own dispute mechanism, which is explained in the Protocol on Rules and Procedures on the Settlement of Disputes (Disputes Protocol).⁶⁸ The Disputes Protocol was concluded and adopted in March 2018.⁶⁹

Even though the AfCFTA is part of the African Economic Community, the AU does not view the AfCFTA as a supranational institution with independent powers to make binding decisions on behalf of its member states. The AU Assembly of Heads of State and Government is the highest decision-making organ in the AfCFTA Agreement and has exclusive authority to adopt and interpret that agreement. The Assembly's decisions are taken by consensus. This creates fertile ground for future conflict between the member states and in the institutions of the AfCFTA and the Secretariat, which have their own legal personalities.

This absence of a supranational tribunal specifically for the AfCFTA can repeat the problem of non-compliance that caused the suspension of the SADC Tribunal in 2010.⁷⁰ In the AfCFTA Agreement, which entered into force on 30 May 2019, dispute settlement is confined to State Parties.⁷¹ This omission ousts the possibility of approaching courts of choice, which are available to legal or natural persons and member states.⁷² Most formal and informal trade transactions involve private entities whose disputes can be resolved by panels.⁷³ Legal citizens' rights need to be protected to ensure certainty and predictability.⁷⁴ Through the legal provision of duplicity of suits, the Disputes Protocol prohibits forum shopping by precluding a State Party that has invoked jurisdiction of the Dispute Settlement body from litigating in another forum. Under the AfCFTA's principle of *locus standi*, the Disputes Protocol does not allow

68 Agreement Establishing the African Continental Free Trade Area: Protocol on Rules and Procedures on the Settlement of Disputes <<https://africanlii.org/akn/aa-au/act/protocol/2018/rules-and-procedures-on-the-settlement-of-disputes/eng@2018-03-21>> accessed 26 July 2024 (Disputes Protocol).

69 B Wangila, J Andropoulos and T Mwango, 'Harnessing Africa's Free Trade Agenda—AfCFTA Protocol on the Settlement of Disputes', (*Bowmans*, 20 November 2024) <<https://bowmanslaw.com/insights/harnessing-africas-free-trade-agenda-afcfta-protocol-on-the-settlement-of-disputes>> accessed 26 July 2024.

70 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* 2008 (2) SADC T 2 (28).

71 Disputes Protocol (n 68) 1–22.

72 JT Gathii, *Designing the Continental Free Trade Area (CFTA): An African Human Rights Perspective* (Friedrich Ebert Stiftung 2016) 1–25.

73 AfCFTA Agreement (n 14) Art 9.

74 G Erasmus, 'Dispute Settlement in the African Continental Free Trade Area' (*Tralac*, 11 July 2019) <<https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html>> accessed 7 November 2024 3.

private parties to bring suits before the Dispute Settlement body.⁷⁵ This is called ‘forum shopping’, which is permitted under the SADC Protocol on Trade.⁷⁶

Article 2 on the scope of application states that the protocol will apply by resolving by consensus disputes arising between State Parties concerning their rights and obligations under the AfCFTA Agreement.⁷⁷ The AfCFTA ‘framework agreement model’⁷⁸ can be difficult to implement as a dispute resolution mechanism that can provide binding remedial measures for ensuring compliance.⁷⁹ Heads of State exercise power over important issues that require decisions at the highest level. At the same time, other responsibilities are delegated to panels.

AfCFTA Protocol on Women and Youth in Trade

The main objective of the protocol on Women and Youth in Trade⁸⁰ is to eliminate non-tariff barriers,⁸¹ encourage inclusive socio-economic development,⁸² open access to finance for women and youth in trade⁸³ and encourage the participation of women and youth in formal trade.⁸⁴ However, this protocol is not self-executing⁸⁵ and, therefore, digital trade requires State Parties to ensure digital frameworks to support women and youth in trade by facilitating access to digital trade platforms and solutions.⁸⁶ The Protocol on Women and Youth in Trade could contribute to mainstreaming gender in the AfCFTA, considering that the SADC Protocol on Trade says little about mainstreaming gender in trade.⁸⁷

75 Wangila and others (n 69).

76 Sauroombe, Forum Shopping (n 28).

77 Disputes Protocol (n 68) 2.

78 K Kuhlmann and AL Agutu, ‘The African Continental Free Trade Area: Towards a New Legal Model for Trade and Development’ (2020) 51 *George Town Journal of International Law* 756.

79 B Fagbayibo ‘Exploring Legal Imperatives of Regional Integration in Africa’ (2012) 45(1) *CILSA* 64–76.

80 Protocol to the Agreement Establishing the African Continental Free Trade Area on Women and Youth in Trade <https://africanlii.org/akn/aa-au/act/protocol/2024/free_trade_area_on_women_and_youth_in_trade/eng@2024-02-18> accessed 8 November 2024 (Protocol on Women and Youth in Trade).

81 Protocol on Women and Youth in Trade (n 80) Art 7.

82 *ibid* Art 8.

83 *ibid* Art 11.

84 *ibid* Art 16.

85 J Stuart, ‘The AfCFTA Protocol on Women and Youth in Trade and Trade-driven Development in Africa’ (*Tralac*, 24 February 2024) <<https://www.tralac.org/blog/article/16324-the-afcfta-protocol-on-women-and-youth-in-trade-and-trade-driven-development-in-africa.html>> accessed 8 November 2024.

86 Protocol on Women and Youth in Trade (n 80) Art 18.

87 SADC Protocol on Gender and Development <https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Gender_and_Development_2008.pdf> accessed 8 November 2024.

AfCFTA Protocol on Digital Trade⁸⁸

Digital trade refers to digitally enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve natural or juridical persons.⁸⁹ The objectives of the AfCFTA Protocol on Digital Trade are to promote intra-Africa trade by eliminating barriers to digital trade among State Parties⁹⁰ and to establish predictable and transparent harmonised rules and common principles and standards for digital trade⁹¹ under a common legal framework.⁹² In Part II of the protocol, market access and treatment of digital products depends on State Parties' adopting an Annex that sets out the rules of origin to determine the origin of Africa-owned enterprises and digital platforms.⁹³ Article 20 describes facilitation of cross-border data transfers.⁹⁴ Part V of the protocol deals with cybersecurity⁹⁵ and online consumer protection, while Part VI focuses on including micro-, small and medium-sized enterprises in digital trade⁹⁶ and emerging technologies and innovation⁹⁷ in a rapidly globalising international market. Disputes arising from digital trade must be resolved under the Protocol on Rules and Procedures on the Settlements of Disputes.⁹⁸

The AfCFTA's Protocol on Digital Trade is detailed and is likely to benefit informal traders and ordinary people who are not thought of as traders under the SADC Protocol on Trade, which caters for large corporations.⁹⁹

AfCFTA Protocol on Trade in Services

The AfCFTA Agreement contains a Protocol on Trade in Services.¹⁰⁰ Part I of the protocol defines the nature of services to be traded. Part II explains the scope of the protocol and how its measures apply among member states. Part III sets out the objectives of the protocol for trade with member states and for multilateral trade with international Most Favoured Nations.¹⁰¹ Article 7 recognises education or experience

88 Protocol to the Agreement Establishing The African Continental Free Trade Area on Digital Trade <https://www.bilaterals.org/IMG/pdf/afcfta_digital_trade_protocol_-_9_february_2024_draft.pdf> accessed 8 November 2024 (Protocol on Digital Trade). Entry into force in accordance with the provisions of Arts 23(2) and 23(4) of the AfCFTA Agreement (Protocol on Digital Trade).

89 Protocol on Digital Trade (n 88) Art 1(g).

90 *ibid* Art 2(a).

91 *ibid* Art 2(b).

92 *ibid* Art 2(h).

93 *ibid* Art 5.

94 *ibid* Art 20.

95 *ibid* Art 25.

96 *ibid* Art 31.

97 *ibid* Art 34.

98 *ibid* Art 45.

99 UNCTAD, 'Reaping the potential Benefits of the African Continental Free Trade Area For Inclusive Growth' (2021) Economic Development in Africa Report 46–84 <https://unctad.org/system/files/official-document/aldcafrica2021_intro_en.pdf> accessed 8 November 2024.

100 The Protocol on Trade in Services is contained in the AfCFTA Agreement (n 14) 31.

101 Protocol on Trade in Services (n 14) Part IV, Art 4.

obtained, requirements met, or licences or certifications granted in another state, and the expected implementation of special and differential treatment in trade in services. This provision is in line with the principles of variable geometry and derogation necessary to implement trade liberalisation at a different pace for various State Parties. However, certain business practices of service suppliers may restrain competition and restrict trade in services.¹⁰²

Article 8 of the protocol focuses on the right to regulate. Article 9 explains domestic regulation and Article 10 insists on mutual recognition of the principle of reciprocity. These articles in the protocol can be applied to put checks and balances on monopolies and suppliers of exclusive services.¹⁰³ The architects of the AfCFTA must have realised that without robust trade in services, trade liberalisation in goods would, at best, be slowed down and, at worst, stagnate.¹⁰⁴

Implementation Phases of the AfCFTA

The AfCFTA Agreement will be implemented in two phases. Phase 1 would cover the areas of trade in goods and trade in services. Phase 2 would cover the areas of investment, intellectual property rights and competition policies.

The AU Free Movement of Persons Protocol

The AU's Free Movement of Persons Protocol¹⁰⁵ was adopted on 29 January 2018 in Addis Ababa, Ethiopia. This protocol encourages member states to grant their citizens visa waivers, the right of residence and the right to establish themselves in member states for professional or work reasons. The AU's Free Movement of Persons Protocol can be of critical importance for Africa's informal trading, which is practised by ordinary men, women and youth. This is recognised in the AfCFTA Protocol on Women and Youth in Trade.¹⁰⁶

However, in the SADC Protocol on Trade,

[t]he Draft Protocol on the Facilitation on the Movement of Persons of 2005, remains inoperative, leaving national immigration laws to regulate the movement of people in the region. This lack of progress may indicate a lack of political will towards creating an effective large-scale integrated community.¹⁰⁷

102 *ibid* Part IV, Art 12(1).

103 *ibid* Part IV, Art 11.

104 C van der Ven and L Signé, 'Keys to Success for the AfCFTA Negotiations' (2019) 3 Brookings Institution <https://www.brookings.edu/wp-content/uploads/2019/05/Keys_to_success_for_AfCFTA.pdf> accessed 12 November 2023.

105 Van der Ven and Signé (n 104) 32–3.

106 Protocol on Women and Youth in Trade (n 80).

107 V Amadi and P Lenaghan, 'Advancing Regional Integration Through the Free Movement of Persons in the Southern African Development Community (SADC) (2022) 34(1) *Speculum Juris* 52–67.

Most AfCFTA member states tend to be reluctant to open their borders liberally to facilitate the movement of people. In some AfCFTA member states, free movement of people is made cumbersome and more difficult to prevent free movement of people at a continental level.¹⁰⁸

The AfCFTA Agreement was negotiated in line with the AU's Agenda 2063. Most national governments have policies that restrict the movement of people. However, it is important to remember that freedom of movement of people is both a fundamental human right and an economic right.¹⁰⁹

Human Rights Under the AfCFTA

The AfCFTA is not adequately underwritten by human rights discourses in continental economic integration. Within the AfCFTA,

[a] rights-based approach to trade must take into consideration the contributions and specific needs of all people, including women and girls. AfCFTA must ensure policy coherence and policy space so that its implementation and trade liberalization in the African continent would advance a people-centred Africa Agenda 2063.¹¹⁰

Efforts to integrate economies at a continental level are likely to face challenges that require member states to consider a human rights-based approach. The suspension of the SADC Tribunal in 2010 after a failure to resolve the land issue in the *Campbell* (2008)¹¹¹ land case highlighted the importance of human rights discourses in the legal instruments of economic agreements of organisations focusing on integration.

If human rights obligations are respected and protected in trade policy measures, people will equitably benefit from trade. In the AfCFTA, human rights have the potential to ensure that the ambition to 'promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties'¹¹² will be achieved for all.

108 Kuhlmann and Agutu (n 78) 753–808.

109 K Magliveras and G Naldi, 'The Free Movement of People in Africa as a Human Right and as an Economic Right: From the African Charter to the African Economic Community Protocol of 2018' (2022) 22(1) African Human Rights LJ 1–23.

110 Macleod J, *Human Rights and the African Continental Free Trade Area: Taking Stock and Navigating the Way Forward* (Friedrich Ebert Stiftung 2022) Foreword <<https://library.fes.de/pdf-files/bueros/genf/19225.pdf>> accessed 24 November 2024. See also J MacLeod, L David and G Guepie, 'The AfCFTA and Regional Trade' in L David (ed), *How Africa Trades* (LSE Press 2023) 23–50.

111 *Campbell* (n 70).

112 AfCFTA Agreement (n 14) Art 3.

The necessity to embed human rights discourses in the AfCFTA Agreement should be emphasised to protect legal persons who are currently prohibited from using alternative courts.¹¹³ In addition, human rights impact assessments that

[place] too much reliance on conventional economic measurements of economy-wide potential gains arising from liberalisation can overshadow the adverse distributional impacts for those at the bottom of the economic ladder, who are often women, informal traders or small-scale agricultural producers.¹¹⁴

An AfCFTA informed by human rights discourses will enable African businesses, citizens, and all stakeholders in the processes of continental integration to

influence negotiations as well as ... provide a platform to civil society groups to advocate for equitable, poverty-reducing, and human rights-consistent outcomes. Its utility includes avoiding unintended adverse effects of CFTA provisions, identifying necessary compensatory measures, strengthening inclusive governance processes, reducing opposition to trade agreements, and preventing litigation around human rights issues. It is also a tool to encourage compliance with human rights obligations.¹¹⁵

Human rights impact assessments must be considered as a structural and institutional mechanism to facilitate and monitor the implementation of the AfCFTA, resolve conflicts and encourage stakeholders to implement the agreement.

Lessons Learnt, Challenges and Future Opportunities For the AfCFTA

Lessons Learnt

This section discusses the negative and positive lessons that the AfCFTA inherited from RECs such as the SADC Protocol on Trade. The argument reiterated in this article is that Africa's RECs, such as SADC, are the foundation of the AfCFTA. The SADC FTA is guided by the RISDP, which is the legal instrument to accelerate implementation of the SADC Protocol on Trade. The principle of asymmetrical economic development is embedded in the legal instruments of the AfCFTA Agreement to take the different levels of economic development in African countries into consideration. The SADC Protocol on Trade's substantial all trade pegs zero-rated commodities at eighty-five per cent. This protocol is critical in influencing the AfCFTA to expand its list of goods falling under substantial all trade to ninety per cent. If effectively implemented in the AfCFTA, this process will deepen economic integration in the RECs and in the AfCFTA.

113 *ibid* Art 3(1).

114 Gathii (n 72).

115 *ibid*.

Challenges in Implementing AfCFTA Trade Policies

A deeper integration arrangement compared to the AfCFTA provisions is the Regional Customs Transit Guarantee Scheme¹¹⁶ (RCTG) agreement, which was signed and ratified by thirteen Common Market for Eastern and Southern Africa (COMESA) member and non-member states. Rules of origin for the AfCFTA are at the negotiation and design stage. This should be a bonus to the AfCFTA's goal of industrialisation through beneficiation. The AfCFTA's rules of origin should be aligned with the existing REC rules of origin.¹¹⁷ However, some critics aver that the uneven levels of economic development among AfCFTA member states mean that more prosperous countries peg their rules of origin at a higher level. This makes it difficult for poorer nations to trade in highly developed African markets.¹¹⁸

The AfCFTA will have to carefully and thoughtfully discourage member states from reimposing new non-tariff barriers. In the East African Community and SADC, goods that nearly had zero-rated intermediate tariffs saw a remarkable increase in the non-tariff component. Most member states continue to impose non-tariff barriers on goods and services.¹¹⁹

The AfCFTA needs to improve road infrastructure so that motor vehicles and aeroplanes are not delayed at borders. In 2015, delays at the border between South Africa and Zimbabwe were estimated by transporters to cost truck operators at least USD400 a day in additional drive time, petty cash, parking fees and opportunities lost because they serviced fewer clients due to longer roundtrips.

Opportunities For Advancing the AfCFTA

Every treaty or economic agreement can be amended when a new need arises. The SADC Protocol on Trade is one of the stepping stones of the establishment of the AfCFTA. As a continental free trade area, the AfCFTA can deepen the commitment initiated and implemented in RECs to eradicate tariff and non-tariff barriers.

A true test for the commitment of the RECs to the AfCFTA would be effective compliance monitoring and the domestication of the AfCFTA Agreement. The process of domestication is divided into four steps: (a) ratification; (b) transformation; (c) incorporation; and (d) legislation of provisions. This means implementation of

116 The Regional Customs Transit Guarantee Scheme was developed to facilitate the movement of goods under customs seals in the COMESA region.

117 T Komi and J Davis, 'Reaping the AfCFTA Potential Through Well-functioning Rules of Origin' (2021) *Journal of African Trade* 88–102.

118 United Nations Economic Commission for Africa (n 61); see also L Signé and P Madden, 'Considerations for Rules of Origin Under the African Continental Free Trade Area' (2020) *J of African Trade* 1–17.

119 This is prohibited by both the SADC Protocol on Trade (n 13) and by the AfCFTA Agreement (n 14).

the AfCFTA Agreement is directly related to trade facilitation between AfCFTA member states.

The technical architects of the AfCFTA Agreement are best positioned to critically examine trade protocols of RECs and encourage member states to realign themselves with a continental vision of the AfCFTA. This means assessing trade patterns and conscientising RECs to accept the new reality. Their legal and institutional frameworks need to reflect and rethink the concept of sovereignty to support integration efforts and promote intra-regional trade to increase the volume of intra-Africa trade. The AfCFTA is expected to change the trend and trade pattern by leveraging economies of scale, drive industrialisation and diversify exports through removing tariffs, non-tariff barriers and regulatory differences and harmonising standards.

Some AfCFTA member states, such as Zimbabwe, have already subverted this provision. This is known as derogation.¹²⁰ There is slow progress among other AfCFTA member states to sign and then ratify the AfCFTA Agreement. Each African member state has a different level of infrastructural development. This fact is significant because flexibility in treaty provisions must enable member states to implement legal obligations at their own pace and in their own time. Within a single country, different sectors react differently to the imperatives of economic integration.

The SADC Treaty has an existing 2012 Protocol on Trade in Services.¹²¹ However, it appears that AfCFTA's Protocol on Trade in Services is more detailed. This can positively influence the SADC Protocol on Trade to expand the kinds of service that can be traded to deepen economic integration in the SADC region. The AfCFTA should avoid the mistakes SADC made, which led to the suspension of the SADC Tribunal.

Can the AfCFTA Become a Supranational Organisation?

As mentioned above, some scholars¹²² have expressed fear that the AfCFTA might threaten African FTAs and RECs. The AfCFTA is an organisation aligned with the AU and the African Economic Community. It is a fact that AU Heads of State have misused their extraordinary powers to undermine regional economic integration. Most member states of the AfCFTA seem not ready to cede their sovereignty. This will impede the speedy implementation of the AfCFTA.

Compliance with the rule of law and treaty obligations is essential to successfully advance the goals of the AfCFTA. The AfCFTA Secretariat is a functionally autonomous institutional body within the African system and has an independent legal

120 Binha and Mwakurudza (n 56).

121 SADC Protocol on Trade in Services <https://www.sadc.int/sites/default/files/2022-01/SADC_Protocol_on_trade_in_services_-English.pdf> accessed 26 July 2024.

122 N Charalambides and C Capon, 'Is the AfCFTA the "Game Changer" for Africa?' (*SAIIA*, 24 October 2022) <<https://saiia.org.za/research/is-the-afcfta-the-game-changer-for-africa>> accessed 8 November 2024.

personality. The Secretariat is autonomous from the AU Commission.¹²³ Yet, the AfCFTA is member driven and decisions are taken by consensus. This undermines the need to have an independent supranational body with oversight powers.¹²⁴ The danger is that Heads of State can take decisions under the legal institutions that they have created.¹²⁵

Actions by member states that might lead to the suspension of supranational tribunals can create the wrong precedent¹²⁶ and could make the AfCFTA a casualty of the unchecked or unregulated authority of its members states. This authority could be encouraged by an uncritical use of development integration theory. The suspension of the SADC Tribunal in 2010 at the instigation of an errant Zimbabwean government shows that the AfCFTA should ensure the harmonisation of an effective continental regulatory framework that cannot be undermined if member states refuse to align their regional and national regulatory instruments in an expanded AfCFTA market.

Decisions in the AfCFTA must be made by the AfCFTA Council of Ministers. Issues with certain implications are handled by the Heads of State, while some disputes are dealt with by chosen and established panels. Chayes and Chayes remind us that compliance is ‘the normal Organisational presumption’.¹²⁷ An emerging multilateral organisation such as the AfCFTA needs to enter a ‘collaborative jurisdiction ... which ensures partnership between transitional and national institutions to align the interpretation of treaties and protocols [by tribunals] and enforcements of judgments by national governments.’¹²⁸

Future Improvement of the AfCFTA

The AfCFTA needs to mainstream transparent energy policies to support the continent to industrialise by using the energy resources it has. Considering the faltering energy provision in nearly all AfCFTA member states, it is imperative that member states deliberately take a keen interest in bringing ‘to the fore a new economic development pathway that is driven by renewable and non-renewable energy to create new sectors for economic growth, to create decent work, to reduce persisting energy inequalities and to address the ongoing energy crisis.’¹²⁹ Most Western nations underwent their third industrial revolution, which led to a dramatic increase in coal use: coal accounts for

123 Erasmus, Comparing the Abuja Treaty (n 44).

124 *ibid.*

125 A Chivamba, ‘The Demise of a Legitimate Southern African Regional Court’ (2019) 6 SALC Policy Brief, Southern African Litigation Centre <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/11/The-Demise-of-a-Legitimate-Southern-African-Regional-Court.pdf>> accessed 8 November 2024, 1–5.

126 Saurombe, SADC Institutions (n 41).

127 A Chayes and AH Chayes, ‘On Compliance’ (1993) 47(2) *International Organisation* 179.

128 Fagbayibo (n 79).

129 NN Xaba, ‘Whose just energy transitions? A South African perspective.’ (2023) *WIREs Energy and Environment*, 12(5) e478.

seventy-four per cent of all commercial energy use and eighty-seven per cent of its electricity generation.¹³⁰ AfCFTA member states need to raise local and international funds to modernise and adopt new energy sources.¹³¹

Recommendations

The AfCFTA will continue to be strengthened by Africa's RECs because the FTAs initially provided the building blocks for the AfCFTA. Member states in Africa's RECs can promote or frustrate the advancement of the AfCFTA because the success of regional FTAs is a precondition for the success of the AfCFTA. African national governments have the power to distribute resources to what they consider national priority areas. If these priorities do not align with those of the AfCFTA, the AfCFTA might not achieve its goals by 2030 and might not progress towards fulfilling Agenda 2063.

This article, therefore, recommends that:

- The AfCFTA sidestep the challenges that have slowed the processes of regional integration in Africa's FTAs.
- The SADC Protocol on Trade should welcome the AfCFTA as providing a bigger and more competitive FTA.
- The AfCFTA Secretariat be made a functionally autonomous institutional body with legal personality within the AU system.
- The AfCFTA clearly embed human rights because trade matters occur in a context where respect for fundamental human rights must be guaranteed.¹³²

Conclusion

This article sought to explore ways in which SADC and its Protocol on Trade must leverage the economic integration objectives of the AfCFTA. A qualitative approach was followed to conduct a literature review of paper and internet sources and legal documents to argue that the AfCFTA has drawn lessons—both positive and negative—from the efforts of African regional economic blocs to achieve flexible trade integration.

130 *ibid.*

131 J Mbatia, J Burton and F Ochieng Ouma, 'Financing the Just Energy Transition in Africa' (*Just Energy Transition*, 2023) <<https://southsouthnorth.org/wp-content/uploads/2023/06/Technical-Thinkpiece-Financing-the-Just-Energy-Transition-in-Africa-2023-FINAL-copy.pdf>> accessed 7 November 2024.

132 The *Campbell* case (2008) (n 70) began as a trade conflict when white land was confiscated. But this case became a human rights issue when the Tribunal argued that the Zimbabwe government had discriminated against whites in Zimbabwe.

The article argues that the RECs of the AU are the building blocks of the AfCFTA. The establishment of the AfCFTA is a step in the right direction to achieve continental economic integration. The AfCFTA has widened the list of trade in services.

The article dispelled some fears by legal critics that overlapping membership between RECs and the AfCFTA threatens the AfCFTA. Overlapping membership can be a strategic legal resource for members of the AfCFTA because the successes of the AfCFTA hinges on the economic performance of regional FTAs such as SADC. It is in the RECs that implementations of the AfCFTA's processes for regional integration take place. Experience is teaching the architects of the AfCFTA that member states' negative regional responses or narrow ideologies of nationalism undermine the speed at which Agenda 2063 is implemented.

Reimposing protectionist policies undermines the 'free' flow of goods and services among AfCFTA member states. SADC member states, such as Zimbabwe, continue to violate the principle of derogation by reimposing non-tariff barriers.¹³³ This goes against the spirit of the AfCFTA Agreement, where the principle of derogation inculcates flexible integration that can enable member states to develop their economies at their own pace while they remain member states of both their RECs and of the AfCFTA.

Conversely, the SADC Protocol on Trade will benefit when SADC members domesticate the legal provisions of the AfCFTA, such as the Protocol on Digital Trade, which has been given less prominence in the region and in individual countries. Most SADC member states resist the notion that sovereignty can be shared. If this attitude continues within SADC, the REC will have missed an opportunity to learn from the AfCFTA. The AfCFTA has leveraged processes of regional economic integration through an expanded market in goods and services for RECs. There is no contradiction in suggesting that, while the AfCFTA must learn from SADC, SADC will also benefit from the AfCFTA's legal provisions. Careful and thoughtful implementation of the AfCFTA must be considered to ensure that there is no negative competition between SADC and the AfCFTA.

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¹³³ T Khumalo and J Pfumorodze, 'Lawful Coups and Other Legal Developments in Zimbabwe in 2017 and 2018' (2018) *University of Botswana LJ* 106–122.

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