

# AN ANALYSIS OF THE LEGAL IMPLICATIONS OF THE AFRICAN CONTINENTAL FREE TRADE AREA'S RULES OF ORIGIN ON ECONOMIC INTEGRATION AND CONSTITUTIONALISM IN AFRICA

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## **Abstract**

*There has been several efforts to liberalise economic integration in Africa by removing tariffs and non-tariff barriers to enhance the free movement of goods and services such as human capital and intellectual property in Africa. This is evidenced by a plethora of regional economic communities (RECs) that have been established in Africa. Some of the prominent RECs in Africa include the Economic Community for West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community for Central African States (ECCAS), the East African Community (EAC) and the Southern African Development Community (SADC). Almost every African state belongs to at least one REC. Unfortunately, most of these RECs have failed to promote economic integration among their member states. This could be attributed to several factors which include ambiguity on the status of REC decisions and resolutions in member states, complex rules of origin and dysfunctional decision-making, dispute resolution and enforcement mechanisms of the RECs. However, the promulgation of the African Continental Free Trade Area (AfCFTA) agreement has seen the dawn of a new era to liberalise economic integration at continental level in Africa. The technicalities surrounding the rules of origin could raise questions on the applicability of AfCFTA in Africa. It is imperative that drafters of the AfCFTA agreement learnt from the shortcomings of African RECs which are building blocks of the AfCFTA. In this article, the authors examine the legal implications of the AfCFTA's rules of origin on economic integration and constitutionalism in Africa.*

**Keywords:** economic integration; constitutionalism; rules of origin, African Continental Free Trade Area

**JEL Classification:** K22, K33

## **1. Introductory remarks**

The African Continental Free Trade Area (AfCFTA) was signed in 2018 in Kigali the capital city of Rwanda.<sup>3</sup> With a membership of more than 50 countries, the AfCFTA represents the world largest free trade area (FTA) after the World Trade Organisation (WTO).<sup>4</sup> The AfCFTA came into force in 2019 after Ghana became the twenty-second country to ratify it.<sup>5</sup> It is important to note that the signing or ratification of a treaty by its members is not the same as realising the objectives of the treaty or agreement.<sup>6</sup> One of the significant issues that could determine the success or achievement

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<sup>3</sup> S. Wapmuk, and J.M. Ali, 'The African Continental Free Trade Area (AfCFTA) and Regional Economic Integration: Prospects and Challenges' 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 8; M. Leshoele, 'AfCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' *Journal of Contemporary African Studies* (2020), p. 1, 3; A.E. Iyanda, 'The Threat of Trade-Based Money Laundering to the African Continental Free Trade Area' 2(2) *Journal of Anti-Corruption Law* (2018) p. 141, 150; L. Bezuidenhoudt, A. Vaillant, and K. Mathobela, 'A New dawn – The establishment of the African Continental Free Trade Area' 19(5) *Without Prejudice* (2019), p. 12, 12; Disenyana, T., 'The AfCFTA – Lessons from the Free Trade Area of the Americas' (2019) <https://www.businesslive.co.za/bd/opinion/2019-03-27-the-afcta--lessons-from-the-free-trade-area-of-the-americas/>, accessed 27 April 2022.

<sup>4</sup> M. Leshoele, *Journal of Contemporary African Studies* (2020), p. 1, 3; A.E. Iyanda 2(2) *Journal of Anti-Corruption Law* (2018), p. 141, 150; L. Bezuidenhoudt, A. Vaillant, and K. Mathobela, 19(5) *Without Prejudice* (2019), p. 12, 12. Article 1(1) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin provides a technical definition of free trade area and define it to mean "the territories of the State Parties of the African Continental Free Trade Area".

<sup>5</sup> S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 8; L. Bezuidenhoudt, A. Vaillant, and K. Mathobela, 19(5) *Without Prejudice* (2019), p. 12, 12; M. Leshoele, *Journal of Contemporary African Studies* (2020), p. 1, 3; Article 23(1) of the AfCFTA states that "this Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes shall enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification".

<sup>6</sup> Notably, some of the objectives of the AfCFTA include the progressive elimination of tariff and non-tariff barriers to trade in goods and services and the creation of a single market for goods and services. See articles 3(a) and 4(a) of the Agreement Establishing the

of the AfCFTA's objectives is the nature and scope of the rules of origin.<sup>7</sup> Almost all goods that are subject to international trade are required by law to have a specific origin before declaration to relevant customs authorities at the port of entry of an importing country.<sup>8</sup> Rules of origin help customs authorities to determine the economic rather than the geographical origin of goods.<sup>9</sup> By application of rules of origin, customs authorities are able to establish whether goods qualify for free duty or reduced duty regardless of the fact that the goods in question may contain non free trade agreement components or ingredients.<sup>10</sup>

There has been several efforts to liberalise economic integration in Africa by removing tariffs and non-tariff barriers to enhance the free movement of goods and services such as human capital and intellectual property in Africa.<sup>11</sup> This is evidenced by a plethora of regional economic communities (RECs) that have been established in Africa. Some of the prominent RECs in Africa include the Economic Community for West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community for Central African States (ECCAS), the East African Community (EAC) and the Southern African Development Community (SADC).<sup>12</sup> Almost every African state belongs to at least one REC.<sup>13</sup> Unfortunately, most of these RECs have failed to promote economic integration among their member states.<sup>14</sup> This could be attributed to several factors which include ambiguity on the status of REC decisions and resolutions in member states and complex rules of origin.

However, the promulgation of the AfCFTA agreement could be the dawn of a new era to liberalise economic integration at continental level in Africa.<sup>15</sup> The technicalities surrounding the rules of origin could raise questions on the applicability and success of the AfCFTA in Africa.<sup>16</sup> It is

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African Continental Free Trade Area. See also L. Bezuidenhout, A. Vaillant, and K. Mathobela, 19(5) *Without Prejudice* (2019), p. 12.

<sup>7</sup> M.B. Hailu, 'Regional Economic Integration in Africa: Challenges and Prospects' 8(2) *Mizan Law Review* (2014), p. 299, 320. It has been estimated that full implementation of the AfCFTA could deliver about 100 million people from poverty by 2035. See also L. Signé, and P. Madden, 'Considerations for Rules of Origin under the African Continental Free Trade Area' 8(2) *Journal of African Trade* (2021), p. 77, 77.

<sup>8</sup> International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022. Article 1(c) of the AfCFTA defines customs duty as "duty or charge of any kind imposed on or in connection with the importation or exportation of a good, including any form of surtax or surcharge imposed on or in connection with such importation or exportation". On the other hand, article 1(g) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin defines customs authority as "the administrative authority responsible for administering Customs Laws in a State Party".

<sup>9</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 77; J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 'Closing in on Harmonizing Rules of Origin for AfCFTA: Anatomy of Reconciliations and Remaining Challenges' (2021) *ITC Working Paper Series* p. 1, 8; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022. According to article 1(n) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin, "goods" means both materials and products; article 1(q) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin defines materials as "any ingredient, raw material, component or part used in the Manufacture of a Product" while article 1(t) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin states that product means "the output of a manufacturing process, even if it is intended for later use in another manufacturing operation".

<sup>10</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 77; J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 'Closing in on Harmonizing Rules of Origin for AfCFTA: Anatomy of Reconciliations and Remaining Challenges' (2021) *ITC Working Paper Series* p. 1, 8; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022.

<sup>11</sup> S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 1; Article 1(e) of the AfCFTA defines non-tariff barriers as "barriers that impede trade through mechanisms other than the imposition of tariffs".

<sup>12</sup> See related discussion by M. Leshoele, *Journal of Contemporary African Studies* (2020), p. 1, 8-10; S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* p. 1, 4-5; J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 'Rules of Origin across African Regional Trading Agreements: A Landscape with Measures to Address Challenges at Harmonization' 8(1) *Journal of African Trade* (2021), p. 1, 1; M.B. Hailu, 8(2) *Mizan Law Review* (2014), p. 299, 301-302 and 315.

<sup>13</sup> T. Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' 20(2) *Oregon Review of International Law* (2019), p. 437, 437; S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 4-5.

<sup>14</sup> See related discussion by M. Leshoele, *Journal of Contemporary African Studies* (2020), p. 1, 8-10; S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* p. 1, 4-5.

<sup>15</sup> See related discussion by K. Tsowou, and J. Davis, 'Reaping the AfCFTA Potential through Well-Functioning Rules of Origin' 8(2) *Journal of African Trade* (2021), p. 88, 88-89; S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 8.

<sup>16</sup> See related discussion by K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 88.

imperative that drafters of the AfCFTA agreement learnt from the shortcomings of other African RECs which are the building blocks of the AfCFTA.<sup>17</sup> This article examines the legal implications of the AfCFTA's rules of origin on economic integration and constitutionalism in Africa. The article proceeds as follows, the next section discusses the nature of intra-African trade and economic integration before the AfCFTA. Thereafter, the focus will shift to a conceptual analysis of rules of origin. Next, the authors of this article will discuss selected pertinent aspects and the scope of the AfCFTA's rules of origin. Finally, a discussion of the implications of the AfCFTA's rule of origin on economic integration and constitutionalism as well as concluding remarks are provided.

## 2. Intra-African trade and economic integration before the AfCFTA

The AfCFTA could be seen as the first major step towards harmonising and liberalising intra-African trade at continental level.<sup>18</sup> Before the AfCFTA, several RECs and bilateral trade agreements existed and continue to exist in Africa.<sup>19</sup> These fragmented and heterogeneous RECs had different preferential trade concessions.<sup>20</sup> There is inconsistency/flexibility in the application of rules of origin by governments as each country decides the criterion to apply in order to determine the national economic source of a product.<sup>21</sup> Even the General Agreement (GATT) itself does not prescribe how countries should determine its rules of origin.<sup>22</sup> As has been alluded to above, another noteworthy aspect of the pre-AfCFTA era is that almost all African countries belonged to more than one REC.<sup>23</sup> Inadvertently, this could have brought about some complexities regarding determining the appropriate economic origin of good. These various RECs apply different criteria for determining the national origin of materials and products. For example, the COMESA and EAC determine the origin of goods through the change of tariff classification whilst ECOWAS does not.<sup>24</sup>

## 3. A conceptual analysis of the rules of origin

Rules of origin refer to the criteria or the body of laws and regulations that determine the "economic nationality" of a certain goods.<sup>25</sup> Rules of origin are important in international trade since in most instances they determine the duties levied and barriers imposed upon certain imports by the customs authorities of an importing country.<sup>26</sup> For example, when a product is entirely produced in a certain country it can be said that it originates from that country.<sup>27</sup> However, this is not always the case as most processed goods usually consist of several components or ingredients which may be

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<sup>17</sup> H. Fofack, and A. Mold, 'The AfCFTA and African Trade - An Introduction to the Special Issue' 8(2) *Journal of African Trade* (2021), p. 1, 4; M.B. Hailu, 8(2) *Mizan Law Review* (2014), p. 299, 315.

<sup>18</sup> See related discussion by S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 2.

<sup>19</sup> T. Chidede, 20(2) *Oregon Review of International Law* (2019), p. 437, 437.

<sup>20</sup> According to article 1(g) of the AfCFTA, preferential trade arrangements means "any trade arrangement by which a State Party grants preferences to imports from another State Party or a Third Party and includes non-reciprocal preferential scheme granted by way of waiver".

<sup>21</sup> World Trade Organisation., 'Technical Information on Rules of Origin' [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022.

<sup>22</sup> Ibid.

<sup>23</sup> T. Chidede, 20(2) *Oregon Review of International Law* (2019), p. 437, 437.

<sup>24</sup> K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 92; also see J Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 8(1) *Journal of African Trade* (2021), p. 1, 6-8.

<sup>25</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78; K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 89; World Trade Organisation., 'Technical Information on Rules of Origin' [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022.

<sup>26</sup> World Trade Organisation., 'Technical Information on Rules of Origin' [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022.

<sup>27</sup> K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 89; article 1(f) of the AfCFTA defines originating products as "goods that qualify as originating products under the rules of origin set out in Annex 2 on Rules of Origin". According to article 1(f) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin, country of origin means "the State Party in which the Goods have been produced or manufactured, according to the criteria laid down in this Annex".

imported from other countries which can either be a member of AfCFTA or not.<sup>28</sup> Rules of origin can be divided into two broad categories namely non-preferential trade rules of origin and preferential rules of origin.<sup>29</sup> Non-preferential trade rules of origin apply when goods are traded between countries that are not mutually connected by any preferential trade agreement.<sup>30</sup> For example, if a South African company imports vinegar from Jamaica non-preferential trade rules of origin would apply since there is no formal preferential trade agreement between the two countries.

Non-preferential trade rules of origin would also apply even when there is an existing preferential trade agreement but the goods in question are not covered by any existing FTA.<sup>31</sup> It is worth noting that non-preferential trade rules of origin do not necessarily result in tariff reduction but are employed for other international trade and economic purposes such as the determination of quotas and countervailing duties.<sup>32</sup> There is flexibility when it comes to the determination of non-preferential trade rules of origin as each country determines its own rules of origin.<sup>33</sup> The two main criteria for determining non-preferential trade rules of origin are wholly obtained<sup>34</sup> and substantial transformation.<sup>35</sup>

On the other hand, preferential rules of origin refer to the criteria applied to determine whether goods qualify for duty to be levied on preferential terms offered under a trade agreement before they are imported.<sup>36</sup> If the goods in question comply with an FTA's set criteria for determining the national origin, they will be considered to have originated from a preferential trade partner.<sup>37</sup> Each FTA requires rules of origin to be negotiated separately and the rules are attached either as a protocol or an annex to the main agreement.<sup>38</sup> With respect to the AfCFTA, the rules of origin are attached as Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin. The criteria for preferential rules of trade can be categorised into two main origin criteria namely product-specific rules of origin and regime-wide rules of origin.<sup>39</sup> Product-specific rules of origin can be sub-categorised into wholly obtained goods and the substantial transformation of goods criterion.<sup>40</sup> For example live animals born

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<sup>28</sup> See L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78.

<sup>29</sup> K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 89; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022.

<sup>30</sup> Ibid.

<sup>31</sup> International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid. See related discussion by L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78.

<sup>34</sup> See article 4(a) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin. Wholly obtained goods are those products that are entirely originate from a country and do not contain any non-originating components or ingredients. For more on this see World Trade Organisation., 'Technical Information on Rules of Origin' [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022; see also L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78; J Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 8(1) *Journal of African Trade* (2021), p. 1, 2.

<sup>35</sup> See article 4(b) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin. Substantial transformation criterion is applied in instances where the production of a product took place in more than one country. In such instances, "the country where the last substantial transformation took place determines the origin of the good". See also L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78; J Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 8(1) *Journal of African Trade* (2021), p. 1, 2; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022; World Trade Organisation., 'Technical Information on Rules of Origin' [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022.

<sup>36</sup> K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 89; L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78; International Trade Centre., 'Introduction to rules of origin' (2020) <https://findrulesoforigin.org/en/glossary?id=XkjdBMAACIAxEq&returnto=gloscente>, accessed 28 April 2022.

<sup>37</sup> International Trade Centre, 'Introduction to rules of origin' (2020) <https://findrulesoforigin.org/en/glossary?id=XkjdBMAACIAxEq&returnto=gloscente>, accessed 28 April 2022.

<sup>38</sup> Ibid.

<sup>39</sup> K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 92-93. See also related discussion by L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79; J Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 8(1) *Journal of African Trade* (2021), p. 1, 2-3.

<sup>40</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78; K. Tsowou, and J. Davis, 8(2) *Journal of African Trade* (2021), p. 88, 95; J Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, 8(1) *Journal of African Trade* (2021), p. 1, 3; International Trade Administration., 'Identify and Apply Rules of Origin - Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment' <https://www.trade.gov/identify-and-apply-rules-origin>, accessed 27 April 2022; the International Trade Centre., 'Introduction to rules of origin' (2020) <https://findrulesoforigin.org/en/glossary?id=XkjdBMAACIAxEq&returnto=gloscente>,

and raised in South Africa are regarded as wholly obtained in South Africa when exported to another member state such as Zimbabwe.<sup>41</sup> There are many uses of rules of origin. For example, rules of origin have been used for “the application of labelling and marking requirements, to determine whether imported products shall receive most-favoured-nation (MFN) treatment or preferential treatment and to implement measures and instruments of commercial policy such as anti-dumping duties and safeguard measures”.<sup>42</sup>

#### 4. The scope of the AfCFTA’s rules of origin and related aspects

The AfCFTA will require exporting countries and companies to prove the origin of their goods before they can enjoy preferential treatment.<sup>43</sup> One way of proving the origin of goods is by producing a certificate of origin.<sup>44</sup> A certificate of origin is issued by “the Designated Competent Authority of the exporting State Party on application having been made in writing by the Exporter or, under the Exporter's responsibility, by the authorised representative”.<sup>45</sup> A designated competent authority means a body or organisation designated by a member state to issue certificates of origin.<sup>46</sup> In order to reap the full economic benefits of trade liberalization and economic integration under the AfCFTA, there should not be excessive bureaucracy and unnecessary delays in acquiring a certificate of origin. As it stands, by conferring a designated competent authority to issue certificates of origin, unforeseen delays and bureaucracy could frustrate the achievement of AfCFTA’s objectives. Consequently, the nature of rules of origin and the procedure of securing certificates of origin could ultimately determine exporting companies’ choice of raw materials.<sup>47</sup> An exporter will request preferential status when the benefits of market access exceed the compliance costs.<sup>48</sup> Although it is not easy to predetermine compliance costs, an exporter might be discouraged from applying for a certificate of origin under the AfCFTA if there is a reason to believe that the process will be affected by delays.<sup>49</sup>

One of the pertinent issues that could prove problematic to the success of AfCFTA is the variation of interests between developing and least developed countries.<sup>50</sup> Developing countries and big African economies such as Nigeria and South Africa may require the criteria for rules of origin to be drafted in a way that may not be favourable to least developing countries.<sup>51</sup> For example developing countries may favour strict rules of origin “to protect regional producers of intermediate products in supply chains”.<sup>52</sup> Developing countries in Africa could also be concerned that relaxed rules of origin could lead to trade deflection.<sup>53</sup> On the other hand, least developed countries may

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accessed 28 April 2022 explain that substantial transformation can be determined in three ways namely; change in tariff classification, value added calculations and specific processing. However, an in-depth discussion of these criteria is beyond the scope of this article.

<sup>41</sup> Article 5(1)(c) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin.

<sup>42</sup> World Trade Organisation., ‘Technical Information on Rules of Origin’ [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm), accessed 08 June 2022; see also International Trade Centre., ‘Introduction to rules of origin’ (2020) <https://findrulesoforigin.org/en/glossary?id=XkjdBMAACIAxEq&returnto=gloscente>, accessed 28 April 2022.

<sup>43</sup> Article 17 of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin.

<sup>44</sup> See Article 17(1)(a) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin. Article 1(a) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin defines a certificate of origin as “the documentary proof of origin issued by a designated competent authority, confirming that a particular product complies with the origin criteria applying to preferential trade under the Annex Protocol on Trade in Goods and in accordance with paragraph 1(a) of Article 17 of this Annex”. Article 21(1) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin states that “a certificate of origin shall be issued by the designated competent authority of the exporting state party on application having been made in writing by the exporter or, under the exporter's responsibility, by the authorised representative”.

<sup>45</sup> Article 21(1) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin.

<sup>46</sup> Article 1(i) of Annex 2 of the Protocol on Trade in Goods concerning Rules of Origin.

<sup>47</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>48</sup> See related discussion by J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, ‘Closing in on Harmonizing Rules of Origin for AfCFTA: Anatomy of Reconciliations and Remaining Challenges’ (2021) *ITC Working Paper Series* p. 1, 8.

<sup>49</sup> See related discussion by J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, (2021) *ITC Working Paper Series* p. 1, 9.

<sup>50</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>51</sup> S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 2.

<sup>52</sup> J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, (2021) *ITC Working Paper Series* p. 1, 8; see also L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>53</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

favour relaxed rules of origin in order to promote foreign investment.<sup>54</sup>

Negotiators of the AfCFTA have reached an agreement on Product Specific Rules (PSRs) that will be applied to certain goods.<sup>55</sup> However, not all goods have been covered by the discussions on the said PSRs.<sup>56</sup> Some goods have been covered while some have not. This could present a huge stumbling block to the success of the AfCFTA. As Gourdon *et al* put it, the absence of PSRs for certain goods could affect the preferential treatment of other processed goods that are used as inputs for other final products.<sup>57</sup> For example if a PSR for cooking oil has been agreed on but there is no PSR for sunflowers.<sup>58</sup> It is required that the sunflower for making cooking oil is “originating”. Nevertheless, a PSR explaining originating sunflower is not defined.<sup>59</sup> Consequently, it could be difficult to determine “originating bread.”<sup>60</sup>

## 5. Implications of AfCFTA’s rules of origin on economic integration and constitutionalism

Economic integration in Africa has not been easy at continental level due to Africa’s fragmented markets which have been described by Fofack as inefficient and “constrain economic growth”.<sup>61</sup> The AfCFTA could harmonise Africa’s fragmented markets and significantly increase production by reducing business operational costs.<sup>62</sup> The AfCFTA could promote economic integration in Africa by increasing market efficiency and enhancing economies of scale.<sup>63</sup> All these opportunities could depend on the criteria adopted for the determination of the economic nationality of goods. Too flexible rules of origin could enhance investment but at the same time may cause trade deflection.<sup>64</sup> On the other hand, a strict approach to the determination of the origin of goods could promote domestic production of intermediate inputs.<sup>65</sup> Consequently, developing countries like Nigeria, South and Egypt could consider stricter rules of origin while least developed countries may be in favour of liberal rules of origin.

Despite being elusive, the term constitutionalism incorporates tenets such as democracy, the protection of human rights and judicial independence.<sup>66</sup> Van Riet defines constitutionalism to refer to the state of a country that observes the supremacy of the Constitution whether or not it is written.<sup>67</sup> To this end, a Constitution should therefore determine how a state is governed.<sup>68</sup> In a constitutional state, the distribution of power between government’s main organs namely the legislature, executive and judiciary is clearly set out in a constitution.<sup>69</sup> This could provide certainty of law which can enhance investor confidence.<sup>70</sup> A country’s constitution plays a significant role in advancing constitutionalism by “defining the nature of the state, including a broad equality provision, by

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<sup>54</sup> Ibid.

<sup>55</sup> J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, (2021) *ITC Working Paper Series* p. 1, 8.

<sup>56</sup> J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, (2021) *ITC Working Paper Series* p. 1, 7-8.

<sup>57</sup> See related discussion by J. Gourdon, D. Kniahin, J. De Melo, and M. Mimouni, (2021) *ITC Working Paper Series* p. 1, 8.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> H. Fofack, ‘A Competitive Africa - Economic Integration could make the Continent a Global Power’ *Finance and Development* (2018), p. 48, 49.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>65</sup> Ibid. See also related discussion by M. Kang, M, ‘Will the AfCFTA Accelerate Inter-African Economic Integration?’ *KIEP Research Paper, KIEP Opinions no. 202* (December 21, 2020), p. 1, 2.

<sup>66</sup> V. Sripathi, ‘Constitutionalism in India and South Africa: Comparative Study from Human Rights Perspective’ 16(1) *Tulane Journal of International and Comparative Law* (2007), p. 49, 49-53; see also G. Van Riet, ‘The Limits of Political Development and Constitutionalism in South Africa’ 75 *New Contree* (2016), p. 98, 100.

<sup>67</sup> G. Van Riet, 75 *New Contree* (2016), p. 98, 100. Also see P.M. Maduro, ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’ 3(2) *International Journal of Constitutional Law* (2005), p. 332-332-333; M.A. Wilkinson, ‘Political Constitutionalism and the European Union’ 76(2) *The Modern Law Review* (2013), p. 191, 194.

<sup>68</sup> G. Van Riet, 75 *New Contree* (2016), p. 98, 100.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

addressing social and societal oppression and past injustices, by defining property and land rights and by defining social and economic rights”.<sup>71</sup> Constitutionalism infers a state of constitutional supremacy.<sup>72</sup> In a constitutional state, any law that is inconsistent with the constitution would be invalid to extent of its inconsistency.<sup>73</sup>

The success of AfCFTA could be challenged by contemporary national security and political issues in Africa two biggest economies.<sup>74</sup> For example, rampant terrorist attacks in Nigeria which have been largely blamed on foreign terrorists who take advantage of Nigeria’s porous borders could frustrate the free movement of goods and people in and out of Nigeria.<sup>75</sup> On the other hand, persistent xenophobic attacks on foreigners and foreign-owned businesses and properties could threaten foreign direct investment in South Africa. Economic activities in Nigeria and South Africa could affect the ultimate success of AfCFTA as these two economies are not only the biggest but that they are also major links to Europe and other countries outside Africa. South Africa and Nigeria’s ports of entry are some of the busiest ports on the continent.

Whilst there are significant economic incentives that are to be reaped out of trade liberalisation through AfCFTA, some countries especially Nigeria and South Africa could be caught between a wall and a hard rock. This could so as these two countries could be forced to choose between economic integration through AfCFTA or prioritising national security issues that could have deep constitutional implications. It is hoped that Nigeria, South Africa and the rest of the signatories to the AfCFTA that have ratified the agreement will be able to strike a balance between their domestic affairs and possible economic gains.<sup>76</sup>

Additionally, as has been indicated above, one of the key tenets of constitutionalism is democracy.<sup>77</sup> By definition democracy entails the election of political representatives through free and fair democratic processes.<sup>78</sup> Ideally, it is expected that the policies adopted by these freely elected representatives should improve the welfare of the people that elected them.<sup>79</sup> Seemingly, this idea stems from the utilitarian economic theory of law which states that in a democratic or free society, the proper functioning of the economy and social welfare are best achieved through “individual liberties and actionable property rights”.<sup>80</sup> By facilitating actionable property rights to its citizens, a government ensures that the constitution becomes “self-enforcing”.<sup>81</sup> However, history shows that governments/elected political representatives/actors do not always serve the interests of the electorate.<sup>82</sup> In the context of this article, the possibility of democratically elected political representatives such as presidents and ministers to waive public interest through ratifying the AfCFTA with rules of origin limit citizens’ choice of/access to certain goods or property is not far-fetched.<sup>83</sup> Commenting, on the European Union (the EU), Wilkinson argues that public power

<sup>71</sup> V. Sripathi, 16(1) *Tulane Journal of International and Comparative Law* (2007), p. 49, 54.

<sup>72</sup> See related discussion by R. Southall, ‘Threats to Constitutionalism by Liberation Movements in Southern Africa’ 49(1) *Africa Spectrum* (2014), p. 79, 80.

<sup>73</sup> For example, see sections 2(1) and 3(1)(a) of the Constitution of Zimbabwe 2013; sections 1(c) and 2 of the Constitution of the Republic of South Africa, 1996. See related discussion by R. Southall, 49(1) *Africa Spectrum* (2014), p. 79, 80.

<sup>74</sup> See related discussion by S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 9. See also L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>75</sup> S. Wapmuk, and J.M. Ali, 3(1) *Zamfara Journal of Politics and Development* (2022), p. 1, 9. See related discussion by M. Kang, M. KIEP Research Paper, KIEP Opinions no. 202 (December 21, 2020), p. 1, 2.

<sup>76</sup> G.P.E. Walzenach, ‘Comparative Constitutionalism and Democratisation: Has Africa Anything to Learn From Europe?’ *Politology* (2010), p. 67, 69 warns that African states should not sacrifice constitutionalism over economic returns but that Africa should adopt “participatory and communicative practices”.

<sup>77</sup> V. Sripathi, 16(1) *Tulane Journal of International and Comparative Law* (2007), p. 49, 49-53; see also G. Van Riet, 75 *New Contree* (2016), p. 98, 100.

<sup>78</sup> E. Petersmann., ‘Constitutionalism and International Organizations. Northwestern’ 17 *Journal of International Law & Business* (1996), p. 398, 406. For more on this, also see M.A., Wilkinson, 76(2) *The Modern Law Review* (2013), p. 191, 200-201; G.P.E. Walzenach, *Politology* (2010), p. 67, 68-69.

<sup>79</sup> See related discussion by E. Petersmann., 17 *Journal of International Law & Business* (1996), p. 398, 406; M.A., Wilkinson, 76(2) *The Modern Law Review* (2013), p. 191, 192-193.

<sup>80</sup> E. Petersmann., 17 *Journal of International Law & Business* (1996), p. 398, 406.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Also see G.P.E. Walzenach, *Politology* (2010), p. 67, 69. For example, according to article 9 of the Agreement Establishing the AfCFTA, the institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA

exercised by the EU is not derived from the electorate, but from the member states.<sup>84</sup> Rules of origin affect the electorate's access to certain materials and products as they inevitably determine what goods/raw materials can be exported out of or imported into an FTA's state party.<sup>85</sup> To this end, it can be argued that AfCFTA's rules of origin have the potential to undermine domestic democracies and political accountability by usurping the law-making function away from legislatures.<sup>86</sup> Consequently, AfCFTA through the rules of origin could threaten the existence of constitutionalism in member states.<sup>87</sup> Wilkinson observed the emergence of "supranational claims of power" that does not emanate from the public and this could render the constitution "obsolete".<sup>88</sup> Pernice views this as a "challenge to statehood" and the "transfer of sovereignty" to a supranational organisation which in the context of this article would be done through the AfCFTA especially through the rules of origin.<sup>89</sup>

## 6. Concluding remarks

The AfCFTA has the potential to deliver millions of impoverished Africans from poverty through trade liberalisation and economic integration.<sup>90</sup> As discussed above, rules of origin play a crucial role in achieving the objectives of AfCFTA. In light of the challenges that AfCFTA rules of origin might pose to the achievement of the set objectives, a few recommendations are provided. In consent with Signé and Madden, it is recommended that AfCFTA adopts self-certification with regards to the acquisition of certificates of origin by exporters.<sup>91</sup> This could combat the possible bureaucracy that could result from the current procedure. Self-certification could also minimise delays that could discourage exporters.<sup>92</sup> Secondly, it is suggested that a cautious approach be adopted by all signatories to the AfCFTA so that the gains to be reaped from the agreement are not overwhelmed by the risk of a borderless Africa, such as terrorist and xenophobic attacks in Nigeria and South Africa respectively.<sup>93</sup>

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consists of the Council of Ministers and the Committee of Senior Trade Officials. Article 11(1) of the Agreement Establishing the AfCFTA provides that "the council of ministers is hereby established and shall consist of the ministers responsible for trade or such other ministers, authorities, or officials duly designated by the state parties". Article 12(1) of the Agreement Establishing the AfCFTA provides that "the committee of senior trade officials shall consist of permanent or principal secretaries or other officials designated by each state party".

<sup>84</sup> M.A., Wilkinson, 76(2) *The Modern Law Review* (2013), p. 191, 197.

<sup>85</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 79.

<sup>86</sup> See related discussion by E. Petersmann., 17 *Journal of International Law & Business* (1996), p. 398, 407-408.

<sup>87</sup> M.A., Wilkinson, 76(2) *The Modern Law Review* (2013), p. 191, 197.

<sup>88</sup> Ibid; G.P.E. Walzenach, *Politology* (2010), p. 67, 69 argues that Africa might end up with "nominal constitutions" whereby "the dominant political practices do not actually reflect constitutional prescriptions".

<sup>89</sup> See related discussion by Pernice, I., 'Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and "Multilevel Constitutionalism"' in Eibe Riedel (ed) *German Reports on Public Law. Presented to the XV. International Congress on Comparative Law*, Bristol 26 July to 1 August 1998 (1998), p. 40, 40-41.

<sup>90</sup> See related discussion by H. Fofack, and A. Mold, 8(2) *Journal of African Trade* (2021), p. 1, 3.

<sup>91</sup> L. Signé, and P. Madden, 8(2) *Journal of African Trade* (2021), p. 77, 78.

<sup>92</sup> Ibid.

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