PROPOSING A CONSTRUCTIVIST APPROACH TO RESOLVING TRADE CONFLICTS UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT (AfCFTA): A CROSS-JURISDICTIONAL ANALYSIS

by

OLUWASEYI ABAYOMI SANNI

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

at

DALHOUSIE UNIVERSITY

HALIFAX, NOVA SCOTIA.

August 2020.

To my God, my folks, and my love.

TABLE OF CONTENTS

ABSTRACT

Essentially a research of an interdisciplinary nature, this thesis seeks to carefully combine budding thoughts from two different areas of scholarship in order to present a unique underlying perspective. On the one hand, there is the study of conflict and its resolution from such intrinsic standpoint as to appreciate it as constitutive of the Society with the aim of achieving more wholesome outcomes that accentuates the uniqueness of each society. On the other hand, the recent coming to force of AfCFTA has left so much for scholars to grapple with, including how its dispute settlement regime could reflect more on the African character. In merging these two discourses, this thesis aims to give context to the former while proffering theoretical basis to the latter in a seamless symbiotic flow.

LIST OF ABBREVIATIONS USED

1. AB – Appellate Body
2. AfCFTA – African Continental Free Trade Area Agreement
3. ATPC – African Trade Policy Centre
4. AU – African Union
5. CEAO – Communaute Economique De L'Afrique De L'ouest
6. CJEU – Court of Justice of the European Union
7. COMESA – Common Market for Eastern and Southern Africa
8. DSB – Dispute Settlement Body
9. EAC – East African Community
10. ECA – United Nations Economic Commission for Africa
11. ECHR – European Court on Human Right
12. ECJ – European Court of Justice
13. ECOWAS – Economic Community of West African States
14. ECSC – European Coal and Steel Community
15. EEC – European Economic Community
16. EU – European Union
17. EURATOM – European Atomic Energy Community
18. FTA – Free Trade Agreement
19. GATTS – General Agreements on Trade and Tariffs
20. GDP – Gross Domestic Products
21. MAN – Manufacturers Association of Nigeria
22. MFN – Most Favored Nation
23. NAFTA – North American Free Trade Agreement
24. NANTS – National Association of Nigerian Traders
25. NTB – Non-Tariff Barriers
26. OAU – Organization of African Unity
27. PTA – Preferential Trade Agreement
28. SADC – Southern African Development Community
29. TFEU – Treaty on the Functioning of the European Union
30. TFTA – Tripartite Free Trade Area Agreement
31. TWAIL – Third World Approach to International Law
32. USMCA – United States- Mexico – Canada Agreement
33. WTO – World Trade Agreement

ACKNOWLEDGEMENTS

My unreserved appreciation goes to my supervisor, Prof. Diana Ginn, whose mentorship and guidance I find priceless. Also, to Prof. Bisi Akinkugbe for his relentless resourcefulness and his wealth of insight which I find invaluable. To Prof. Saunders and Prof. Richard Devlin who adequately provided the requisite pedagogical foundations for my research adventure, I say thank you! I would also like to express my sincere gratitude to Prof. Lucie Guibault, Associate Dean Graduate Studies, who deserves the accolade for the incredible graduate experience at the Schulich School of Law. Time and space would not deprive me of expressing my gratitude to Dr. Adebayo Majekolagbe for his direct mentorship academically and beyond. It is such a great honour and privilege.

My hearty gratitude goes to my father, in whose shadow I stand, and my mother, by whose counsel I make strides. Thank you for modelling parenthood for me. One does not get luckier than being your child. To my siblings: Tobi, Joshua and Itunu- you are all just rays of sunshine and your thought alone brings me joy.

Last but definitely not the least, I express my esteemed gratitude to the love of my life, Oluwatosin Ogunbiyi. Thank you for making my LLM experience worthwhile. I love you from here to the moon and back. Thank you!

CHAPTER ONE

INTRODUCTION

1.1.Background

Conflict is inevitable. This is so both in the domestic as well as the international Sphere.[1] Hence, the importance of an effective system that caters to resolving potential conflicts that may emanate from the interactions among the actors within any given structure of organization cannot be over emphasized. This does not only speak to the function of law in fostering order, but also bears on the continuous existence of the structure of organization.

The African Continental Free Trade Area Agreement (AfCFTA) exists as one of such structure of organization whose continuity may be guaranteed through an effective dispute resolution system. This thesis is dedicated to exploring how the conflict resolution system under AfCFTA may better guarantee its continuity. In thinking about how States relate with one another and particularly how conflicts are resolved, several theories have been developed by various scholars.

However, the theory that is of particular interest to this thesis is the Constructivist idea, and its workability within the arrangement of resolving trade disputes in Africa would be significantly explored. The approach in this thesis is to have a three-prong discourse. The first discussion would involve an extensive exposition on the notion of constructivism. Subsequently, an analysis on its potential application to the particular context of the conflict resolution paradigm under AfCFTA will be explored. In further establishing the validity and applicability of the constructivist theory, its application within a different context, the European Union context, would also be explored.

[1] John A. Vasquez, *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era* (Ann Arbor: University of Michigan Press, 1995) 1.

The relevance of this thesis is premised on the understanding that the inevitability of conflict informs the need for an effective dispute settlement regime that fits into the structure of organization. This is evidenced by the existence of the court system in the domestic system and further buttressed by the recent proliferation of alternative dispute resolution methods as a less cumbersome, yet more friendly, faster and flexible way of resolving disputes.[2]

The international sphere is not itself excluded from the societal contexts requiring a functioning conflict resolution system. In the light of the peculiar nature of international law and the absence of a unified authority with defined power and oversight over the respective State actors, as it exists under domestic law, the thinking about conflict resolution is more nuanced. Indeed, different concepts have emerged in thinking about how to resolve conflicts among State actors within the international framework, one of such concepts will be the focal point of this thesis.

1.2. Thinking About Resolving Conflict in International Sphere

Given the peculiar nature of international law and relations, several literatures have developed in thinking about dispute resolution within the global sphere. Jacob Bercovitch and Richard Jackson highlight the need to rethink the connection between peace and order in the international society and the approach of international law in resolving international conflicts and contrasts it with what is obtainable under domestic law. In appreciating certain limitations that are peculiar to international law, such as the lack of sanction and the prevalence of power politics, the idea of promoting order through the instrument of international law is better conceived in terms of promoting cooperation and minimizing frictions.[3]

---

[2] Nadje Alexander, "From Common Law to Civil Law Jurisdiction: Court ADR on the move in Germany" (2002)4:8 ADR Bulletin 1

[3] Jacob Bercovitch & Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches* (Michigan, USA: The University of Michigan Press, 2012) 47

At the core of international law, in its regulation of inter-State relationships, is the foundational principle of State sovereignty. The idea of promoting cooperation and minimizing frictions in inter-State relationships can only be best understood, in its nuanced sense, with an appreciation of the notion of Sovereignty. Sovereignty implies the autonomy of the States as against other States or entities within the transnational realm. According to Lauterpatch, the principle of Sovereignty implies that the State is not bound by any rule that it did not previously concede to, expressly or impliedly.

It also implies that the State determines what is acceptable as rule of law.[4] Unless a State voluntarily submits its sovereign right by way of a Treaty or some form of concession, obligations could not be said to accrue to the State.[5] This also extends to the obligation to submit its disputes to any dispute resolution mechanism.[6] No such obligation exists as against States unless the State imposes it upon itself by some form of agreement based on its existing relationship with other States.

States do concede and submit their sovereign rights by way of Treaty-making in order to collaborate with one another to achieve certain socio-political and economic goals. This forms the basis for the establishment of international organizations such as the United Nations as well as the African Union, which is more specific to the African region. The African Union, for example, was

[4] Hersch Lauterpatch, *The Function of Law in the International Community* (Great Britain: UK, Oxford University Press, 1933).

[5] Although State obligations may also arise by way of international customary laws, general principles of law or *jus cogens* as well as *erga omnes* rules but those obligations are more negative than positive. They are more pre-emptory than mandatory.

[6] See *Mavronmmatis Palestine Concessions (Greece v. UK),* (1924) PCIJ (Ser. B) No. 3, where the Permanent Court of International Justice noted that its jurisdiction over the case is dependent on the consent of the State parties, See also *Status of Easter in Corelia* (1923), Advisory Opinion, PCIJ (Ser B) No. 5 at 27; *Factory at Chorzow, Germany v Poland, Jurisdiction* (1927) PCIJ (Ser A) No. 9 at 32*; Rights of Minorities in Upper Silesia (Germany v. Poland)* (1928), PCIJ (Ser A) No 15 at 22.

established in 2001 by the Constitutive Act of the African Union[7] for the enhancement of political cooperation and the promotion of economic integration within the region.[8] The parties that are signed to the agreements are obligated to meet up with one obligation or the other by reason of its signing to the agreement, which may include at the very least, the payment of contributions to the budget of the association, the failure of which such State would be sanctioned according to the provisions of the treaty regardless of its right of sovereignty.[9]

As States collaborate on different fronts, while exercising their respective sovereign rights, there is the tendency for conflict. This is one of the facts that is intended to be brought to fore in this thesis. Invariably, the need for an effective system to cater to the resolution of inter-State conflicts becomes pertinent in order to keep the international sphere animated.

In engaging this topic, the law and society dynamic to the discussion is particularly instrumental. In understanding how States determine what amounts to rule of law in the international sphere, the myopic view that States determine same only by entering into treaties that constrains or otherwise empowers them would be transcended to a wholesome consideration of the social construct that is formed by virtue of States entering into different treaties.[10] In other words, the assessment of the legitimacy of the dispute resolution system may go beyond the fact that it is included in the treaty agreement. It may also require an appreciation of its coherence with the existing regional or international social construct.

As regards how disputes are resolved among States, various methods have been developed for resolving conflicts in the international sphere. Chinkin and Sadurska listed seven categories of

[7] *Constitutive Act of the African Union*, 1 July 2000 (entered into force 26 May 2001)
[8] Konstantinos D. Magliveras & Gino J Naldi, "The African Union - A New Dawn for Africa" (2002) 51:2 ICLQ 415
[9] Article 23. *Supra*
[10] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014)

methods that have emanated over time including: Forcible and Non-Forcible Self Help, Global and Regional Organizations, Negotiation and Third-Party Intermediaries, International Fact Finding, International Arbitration, International Adjudication, Request for an Advisory Opinion.[11] Basheer AlZoughbi highlights only two mechanisms viz; Negotiation Process as well as Arbitration and Adjudication.[12] The Convention for Pacific Settlement of International Disputes sets out a number of dispute resolution mechanisms including Good Offices, Mediation, International Commission of Inquiry, International Arbitration, and Permanent Court of Arbitration.[13] Article 33(1) of the United Nations Charter sets out Negotiation, Enquiry, Conciliation, Judicial Settlement and Regional agencies or arrangements as the methods of conflict resolution.[14] The united nations general assembly also sets out mechanisms for conflict resolution including Negotiation, Inquiry, Mediation, Conciliation, Arbitration, Judicial Settlement, Regional Agencies or Arrangements.[15] The AfCFTA itself recognizes, in addition to its dispute resolution structure, other methods such as Consultation, Good Offices, Conciliation and Mediation, as well as Arbitration.[16] Notably, the methods are reiterated in various international documents, also interesting to note is the potential overlap in the practical expressions of the respective conflict resolution methods.[17]

Although it appears that the larger bulk of the literature on conflict resolution as between and among States have focused more on the methods of resolution, the focus of this thesis shall be on

[11] C. M. Chinkin & Romana Sadurska, "Learning About International Law Through Dispute Resolution" (1991) 40 Int. Comp. Law Q 529.
[12] Basheer AlZoughbi, "The Operation of the Oslo Treaties and the Pacific Mechanisms of Conflict Resolution Under Public International Law", (2013) 45:2 J. Peace Res. 35.
[13] *The Hague Convention for the Pacific Settlement of International Disputes,* 18 October 1907, 2 AJIL Supp. 43 (entered into force 26 January 1910) [Hague I]
[14] *Charter of the United Nations*, 26 June 1945, 1 UNTS 16 (entered into force 24 October 1945)
[15] UN General Assembly, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, 24 October 1970, A/RES/25/2625
[16] Articles 7, 8 and 27 respectively.
[17] For example, regional agreements may involve arbitration or judicial settlements.

the theories undergirding the resolution of conflicts. Restricting the focus of this thesis to the theoretical underpinnings of conflict and conflict resolution is necessary in order to define its scope, as a discussion on the methods would not only be superfluous but stand the risk of taking the discourse off on a different tangent.

It is my opinion that exploring the issue of conflict resolution from a theoretical perspective is a much more significant venture, as it affords the opportunity to engage the subject at a much more profound level. Although, it is not conventional to have the international instruments state the theoretical underpinnings, their impacts in determining the success or otherwise of the dispute resolution regime is far reaching.

According to Cordula Reimann, theory offers a framework that enables scholars and practitioners to more accurately analyse, describe and predict the real world.[18] In tracking the legitimacy of a dispute resolution framework and to measure its coherence within the given social construct, theory is a veritable tool. Thus, in the bid to more accurately analyse, describe and predict the practical implications of the dispute resolution regime under AfCFTA, the dispute resolution regime shall be weighed against constructivist notions and ideas to ascertain whether any cue may be taken to improve its chances of success.

1.3.AfCFTA and Potential Conflict Formation

Before attempting to theoretically analyze how to resolve conflicts, there is the need to first understand how conflicts emanate. We could not talk about conflict resolution without first understanding conflict formation. As an insight into what we will be looking into in engaging the

[18] Cordula Reimann, "Assessing the State-of-the-Art in Conflict Transformation- Reflections from a Theoretical Perspective (2004) Berghoff Handbook on Conflict Transformation.

idea of how conflicts emanate, a brief insight into the occurrences leading up to the signing of AfCFTA is instructive.

The discussion on how States submit their sovereign right in order to collaborate with other States to achieve a common goal is reflective in the story behind AfCFTA. AfCFTA was created to, among other objectives, achieve a common market for goods and services within the region.[19] Prior to signing the treaty, several discussions had gone underway to evaluate its prospect and to better adjust the provisions in order to achieve the desired socio-economic outcome.

One of such discussions was had at the Conference of African Ministers of Finance, Planning and Economic Development which was held at the United Nations Conference Centre in Addis Ababa in May, 2018.[20] The discussion was in respect of how the AfCFTA may impart on job opportunities and economic diversification.

Policy dialogues were also done within the nation States. For example, in Rwanda, the Economic Policy Research Network (EPRN) of Rwanda organized one of such dialogues in July 2018 at Kigali in conjunction with the United Nations Commission for Africa (ECA) and the Rwanda Ministry of Trade and industry.[21] The purpose of the dialogue was generally to reassess the benefit of AfCFTA to the country and the continent as a whole. Different academic literatures have also emanated in this respect.[22]

[19] James Gathii, "Agreement Establishing the African Continental Free Trade Area". (2019) 10:4 AJLS 239-312.
[20] "Addis Ababa to Host Ministerial Conference on the African Continental Free Trade Area." (2018) Targeted News Service (Washington, D.C.).
[21] "THE Whole Continent will Benefit from African Continental Free Trade Area." (2018) US Fed News Service, Including US State News (Washington, D.C.).
[22] See for example, Sene, Seydina. "Impact of the African Continental Free Trade Agreement (ALECA) on Exports." (2019) 9:2 IJEFI 251-64.

Despite the rigor and assiduity that seemed to have been exerted in the development of the Treaty, it did not seem to be devoid of some form of skeptic reactions from certain quarters. A notable incidence is the initial reticence and protracted lingering of Nigeria and South Africa, which are the two biggest economies in the region,[23] in signing the Treaty.

Different issues were raised, including the possibility of dumping and its potential to stir up conflict among States. Despite the ultimate enforcement of the Treaty, skeptics still grapple with the question of whether the Treaty would endure. In fact, different forms of study have been taken up to evaluate the implications of the Treaty in different respects.[24] The postponement of its

[23] Combined, the economies of Nigeria and South Africa account for a third of the Gross Domestic Product (GDP) of the entire region. IMF Data, GDP current prices.

[24] David Luke & Jamie Macleod, *Inclusive Trade in Africa: The Africa Continental Free Trade in Comparative Perspective* (London: Routledge, 2019); Collins C. Ajibo, 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects'(2019)53:5 J.W.T.L p. 871-894; Regis Y. Simo, 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) 23:1 J. Int. Econ. Law P. 65–95, James Gathii, 'Agreement Establishing the African Continental Free Trade Area' (2019) 58 ILM *p.*1028-1083; Olabisi D. Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment', Afr. J. Int. Comp. Law (Forthcoming, 2020); Emilia Onyema, "Reimagining the framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement", (2019) World Trade Rev., pp. 1-23; Kuhlmann Katrin & Akinyi Lisa Agutu, "The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development", (2020) 15:4, Georget. J. Int. Law, (Forthcoming); Franklin Obeng-Odom. "The African Continental Free Trade Area."(2020)79:1 Am. J. Econ. Sociol.p. 167-197; David Luke, "Making the Case for the African Continental Free Trade Area" (January 15, 2019), online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/> [**https://perma.cc/HRJ6-VJ8Q];** James Thuo Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free trade Agreement" (April 10, 2019) online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/> **[https://perma.cc/W3UP-5ZET];** Oyeniyi Abe, "Gender Mainstreaming and Empowerment under Agreement for the Establishment of the African Continental Free Trade Area", (January 30, 2019) online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/01/30/gender-mainstreaming-and-empowerment-under-agreement-for-the-establishment-of-the-african-continental-free-trade-area-afcfta/>**[https://perma.cc/7N9V-CAGN];** Olabisi D. Akinkugbe, "What the African Continental Free trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution", (April 9, 2019) online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/> **[https://perma.cc/JJR7-V37N];** Mihreteab Tsighe, "Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental Free Trade Area?, (April 8, 2019) online (blog) AfronomicsLaw <http://www.afronomicslaw.org/2019/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/ > [**https://perma.cc/LG8C-PXM6**]. There is also the study that was done in the United Kingdom and published in the Mena Report evaluating the impact of the Treaty on Child rights and other human right matters: "Study On The African Continental Free Trade Area Agreement" (2019) MENA Report (London).

implementation which was scheduled for the July 1, 2020,[25] due to the Covid-19 pandemic, also opens up more issues for commentators to deliberate over.[26]

The initial reticence of Nigeria was particularly surprising, considering the fact that the nation has always been at the forefront of the campaign for integration on Africa and had erstwhile strived to have the proposed AfCFTA Secretariat in Nigeria.[27] Moreover, Nigeria's Chief Trade Negotiator and Trade Minister chaired the AfCFTA Negotiating Forum and the negotiations at ministerial level respectively.[28]

The backlash from pressure groups such as the National Association of Nigerian Traders (NANTS) and the Manufacturers Association of Nigeria (MAN) who have overtime raised concerns regarding the protection of interests of local manufacturer and the potential threat of dumping, exemplifies such skeptical reactions. Notwithstanding the validity or otherwise of the concerns raised by the pressure groups,[29] it is interesting that Nigeria finally threw its weight behind AfCFTA in July, 2018.[30]

Skepticism towards AfCFTA may also be further justified considering the historical context of the Agreement. Notably, AfCFTA is not the first attempt by the African Union to achieve economic

---

[25] Elliot Smith, "Africa's Free Trade Area is Delayed by the Corona Virus, but Experts say It's Vital to Recovery" (26 May 2020) online (blog) *CNBC* < https://www.cnbc.com/2020/05/26/afcfta-is-delayed-by-the-coronavirus-experts-say-its-vital-to-recovery.html> [**https://perma.cc/494P-6HRL**]

[26] For example, Susan Isiko Štrba, "Technology, Innovation, Solidarity, Covid-19 and lesson for the AfCFTA: A Brief Online" (16 June 2020) online (blog) *AfronomicsLAW* < https://www.afronomicslaw.org/2020/06/16/technology-innovation-solidarity-covid-19-and-lessons-for-the-afcfta-a-brief-outline/> [**https://perma.cc/X4GY-MKZ9**]

[27] Tijani Mayowa, "Buhari missing yet another opportunity to make history", 22 March 2018

[28] Sean Woolfrey, Apiko Philomena & Kesa Pharatlhatlhe. "Nigeria and South Africa." (2019). ECDPM Online (pdf): <https://ecdpm.org/wp-content/uploads/DP-242-Nigeria-and-South-Africa-Shaping-prospects-for-the-African-Continental-Free-Trade-Area-1.pdf>[**https://perma.cc/79JM-SN9C**]

[29] Some pressure groups such as the Nigerian Labour Congress still express gross dissatisfaction to the decision of the President in subscribing to the Treaty.

[30] Paul Okolo, "Nigeria Finally Throws its Weight Behind African Continental Free Trade Area (2019), Inter Press Service News Agency, Online: <http://www.ipsnews.net/2019/07/nigeria-finally-throws-weight-behind-african-continental-free-trade-area/> [**https://perma.cc/AND2-KTC9**]

integration within the region. The 1979 Monrovia Declaration, the 1980 Lagos Plan of Action and the 1991 Abuja Treaty may well be said to have set a poor precedent in this regard.

Although, upon its entry into force in May, 2019,[31] AfCFTA exists legally and is binding on all 54 member States subscribed to it, nevertheless, its ability to stand the test of time is another question entirely. While I refrain from quibbling on the validity of the issues raised by the different interest groups and how they might consequently impact on the success or otherwise of the arrangement, it is my humble position that an effective conflict resolution regime has the potential to salvage any impending fallout.

However, these issues surrounding the development of AfCFTA are noteworthy as they may be of great utility in understanding how disputes emanate and consequently, how they may be resolved.

1.4.Theories of Conflict Resolution

As noted earlier, the exposition on dispute resolution in this thesis shall be tailored towards the theoretical underpinnings. One of the theories which becomes of particular interest in conceptualizing a constructivist approach to resolving dispute is the theory of conflict transformation. The conception of the theory is traceable to the work of Paul Lederach but has also been explored subsequently in many other quarters. Although the original conception of the theory and the larger portion of the literature that subsequently engaged the theory have done so in respect of peacebuilding, nevertheless, its application to transnational trade is not implausible.

In appreciating what conflict transformation entails, it is convenient to first consider what conflict transformation is not. Conflict transformation is commonly contrasted with related theories such

[31] IISD, "AfCFTA Enters into Force; Phase II on Investment, Competition, IPRs to Last Through 2020 – 2021" (2019), Investment Treaty News, Online: <https://www.iisd.org/itn/2019/06/27/afcfta-enters-into-force-phase-ii-on-investment-competition-iprs-to-last-through-2020-2021/> [**https://perma.cc/87EZ-CWXG]**

as conflict management and conflict resolution. Conflict management engages conflict from a sense of control. The idea is to contain the conflict and not necessarily to end it.[32] Conflict resolution theory engages conflict by identifying the particular issue leading to the conflict and applying plausible solutions that may resolve such issues. Conflict Transformation on the other hand engages conflict by addressing the social structure and system giving rise to the conflict in the first place. In other words, conflict management focuses on the relationship between disputants, conflict resolution focuses on the issue causing the conflict, conflict transformation focuses on the structure or system within which the parties relate.

The concept of conflict transformation quite stands out amongst the other theories because it engages conflict in a much more comprehensive sense. It transcends the rights, interests and powers of the actors within a society to examine the context within which the actors interact.[33] It appreciates the perspective that disputes are not things but are social constructs whose shape is precedent on the definition that the actors within the society give it.[34] The relevance of this theory to inter-State disputes in Africa is what this thesis will be focused on.

Evidently, conflict transformation involves thinking about conflict resolution from a constructivist point of view. Interestingly, the notion of exploring a constructivist approach to the study of international relations is not so novel. Recourse is drawn to the work of Jutta Brunee and Stephen Toope, who have noted that "If international law is only a formal construct that is entirely contingent upon State will, it is at least initially plausible that States' interests and relative powers

---

[32] Hugh Miall, "Conflict Transformation Theory and European Practice" (2007) Online (pdf): <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.408.8131&rep=rep1&type=pdf>

[33] Robert Bush & Sally Pope, "Changing the Quality of Conflict Transformation: The Principles and Practice of Transformative Mediation, (2002) 3:1 Pepp. Disp. Resol. L.J. 72

[34] William F Felstiner *et al*, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…" (1981) 25:3/4 Law Soc. Rev 631

drive their conduct and that law has little or no independent effect".[35] In other words, the rules of international law are essentially constructed by the States, exercising their free will.[36] Thus, the inherent constructiveness that comes with the notion of international law as against the idea of an exogenously imposed normative structure, is one of the major themes to be demonstrated through this study on conflict transformation.

1.5.Research Question

This constructive feature of international law extends to the rules guiding trade arrangements among States. However, the focus of this research project shall be restricted to trade relations in Africa. Thence, the major question to be explored in this thesis is whether AfCFTA may draw value from the constructivist notion in order to achieve a more effective dispute resolution regime. In approaching this research, I will be utilizing a number of methodologies in approaching this question.

1.6. Approaches of Study/ Methodologies

1.6.1. Constructivism

Obviously vital to this research is the constructivist approach to legal study. The idea of constructivism stems from the broader notion of law and society or the sociological school of thought. It is the notion that the function of law is best perceived by how the actors define or "construct" societal reality. According to Onuf, a major proponent of constructivism, "constructivism holds that people make society and society makes people".[37] Constructivism envisages the purpose of law as going beyond constraining behaviours to actually defining the

[35] Jutta Brunee & Stephen Toope, "Interactional International Law: An Introduction" (2011) 3:2 Int. Theory 307
[36] *The Steamship Lotus (France v Turkey)* (1927), PCIJ (SerA) No 10 at 18
[37] N Onuf, "Constructivism: A User's Manual" in V Kubalkova, N Onuf & P Kower (eds), *International Relations in a Constructed World* (London, ME Sharpe, 1998) 58,59

position and interest of the respective actors in the society.[38] In its application to the resolution of conflicts between States, constructivism, contrary to other approaches to the study of how States interact under international law, infers that cues may be taken from the historical, ideological, political, social and cultural factors that qualifies the interests and positions of the States. Although, not popularly utilised, Richard Jackson considers it the "most well-suited of all the main IR approaches to understanding conflict and conflict resolution".[39]

In Jutta Brunee and Stephen Toope's seminal work,[40] they explored the application of constructivist methodology within international law and relations. Bearing on Lon Fullers' propositions,[41] the duo propose an interactional theory of studying international law and relations which brings to fore the normative importance of the manner of interaction between the States within the international societal context.

1.6.2. Theory as an Approach

The constructivist approach to international legal research and the concomitant interactional theory as presented by Brunee and Toope, essentially define the theoretical underpinnings of this research. Hence, this research paper would not be devoid of considerable degree of theoretical exposition and analysis, particularly as it relates to thinking about the resolution of conflicts that may emanate from inter-State trade relations in Africa.

---

[38] Robert Cryer, et al. *Research Methodologies in EU and International Law* (Oxford; Portland, Or.: Hart, 2011) 81.
[39] Richard Jackson, "Constructivism and Conflict Resolution" in Jacob Bercovitch et al, eds, *The SAGE Handbook of Conflict Resolution* (London, California, New Delhi, Singapore: SAGE Publications Ltd, 2009)
[40] Jutta Brunee & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39:1 Colum J Transnat'l L 19
[41] Which includes, amongst others, that the law is a continuous challenge as opposed to a finished project and is a creative utility which is inherited and recreated as the society transits from one generation to the other.

1.6.3. Third World Approach to International Law (TWAIL)

Interestingly, there is a growing theory that is critical of the application of the conventional notion of international rules and norms to the context of third world nations, including the nations in Africa. These ideals are considered essentially Eurocentric as they fail to account for the peculiarities of third world countries as well as their historical context.[42] This growing body of scholarly work is known as the Third World Approach to International Law (TWAIL).

TWAIL Scholars propose a transformative account of legal theories and principles that cater pragmatically to the context of the third world societies. They attempt to bring to fore the need to connect the international laws and rules with the lived experience of the societies against which they are being applied and the need for the rules to be flexible enough to be reconstructed by the prevailing social factors.[43]

It noteworthy that TWAIL is not without its inadequacies and has in fact been critiqued on a number of grounds. This is probably unsurprising considering the fact that it is a fairly novel approach that attempts a lofty and revolutionary alternative to international legal norms. One of such criticisms is that, in highlighting the sour experiences of the third world countries during the imperial rule and wading against the replication of same through the hegemonic structure that is inherent in the prevalent international legal order, TWAIL scholars tend to express some level of paranoia that puts them out as nihilistic. This is also said to affect the lucidity of the expression of what the methodology entails.

[42] James Thuo Gathii, "The Agenda of Third World Approaches to International Law (TWAIL)" Jeffrey Dunoff & Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers,* (UK: Cambridge University Press, 2019)
[43] Michael Hardt & Antonio Negri, *Commonwealth* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009).

Nevertheless, it is glaring that some lessons can be drawn from TWAIL scholars on how to think about the rules that ought to govern the resolution of trade disputes in Africa and the import of a transformational approach. Particularly, the TWAIL scholarship would be instrumental in appreciating the peculiar nature of the African context.

1.6.4. Comparativism

The current dispute resolution regime under AfCFTA was not indigenously constructed but was modelled after the template created by the World Trade Organization.[44] Interestingly, the European Union has a regime other than the WTO regime which seems apparently effective.[45] It is probable that the reason that the economic integration arrangement in Europe has proved effective is that it has an effective dispute resolution regime that caters to its unique circumstance. Thence, a comparative analysis is considered helpful in appreciating the potential benefits of a constructivist approach to thinking about conflict resolution, as evinced in the theory of conflict transformation, and what lessons might be drawn from the European Union in this regard.

Since the discourse in this chapter is largely theoretical, the comparative study as against the EU model is necessary to demonstrate the practical dimensions to the study. In the course of engaging the study of what constructivism entails and its application within the context of Africa, some theories would be brought to fore including Afrocentrism, Laderach's theory of conflict

[44] Ditto to the dispute resolution regime under the various sub-regional economic integration arrangements.
[45] An indication that the EU template is effective is reasonably deducible from the fact that the Union has moved through the various phases of economic integration according to the Vinerian Principle. Jacob Viner, highlighted the stages of development economic integration to include Free Trade Agreement; Custom Union; Common Market and finally Economic Union. The European Union has the rare features of an Economic Union. See Viner, Jacob, *The Customs Union Issue*. (Carnegie Endowment for International Peace 1950). J.E. Meadh, *The Theory of Customs Unions* (Greenwood Press, 1955); R.G. Lipsey, The Theory of Customs Unions: Trade Diversion And Welfare (Económica. New Series 1957). M.O.A. Adejugbe, "Inter-State Economic Cooperation" in G. O. Ogunremi & E.K. Faluyi, eds, *An Economic History of West Africa Since 1750* (Oyo State, Nigeria: Rex Charles Publication, 1996)

transformation, Gathii's theory of flexible regimes, Abangwu's exogenous socio-political input capacity approach, among others. In proving the rationality of engaging all these theories, analysis of a constructivism would be explored within the context of the EU. Nevertheless, care would be taken to appreciate the differences in their respective context so as to avoid a blind transportation of values. Fundamentally, the essence of constructivism is to highlight the value in appreciating each unique context. Quite ironically, Comparativism would be employed in proving this.

Although, the European Union is not the only other form of regional arrangement that could be employed for comparative analysis, yet the EU is chosen for a number of reasons. First, the historical development of the EU up until what we have in practice in recent times, as well as its dispute resolution arm reflects to a very large degree the values of constructivism. Second, the EU is portrayed in recent times as arguably the most successful regional integration regime in the world. This strategically makes it worth evaluating. Third, Africa and Europe share some features in common in respect of their drive towards regional integration. Both continent resorted to economic integration as a response of significant events in history. While for Africa, it is the need for sovereign States to rise from their checkered history of colonialization while maintaining their respective sovereignty, for Europe, it was the need for European States to move beyond years of war and violence towards an integrated system that guarantees peace, prosperity and stability. These would be explored in more details in the body of the of the thesis.

1.7.**Objective & Outline**

This research, just like the various approaches that will be adopted, is crucial as it satisfies the concern of African transnational economic legal scholars on the need to foster normative values that are pan-African centered in fostering inter-State relationship among African States.[46]

[46] Luwam Dirar, "Norms of Solidarity and Regionalism: Theorizing State Behaviour among Southern African States" (2016) 24 Mich St Int'l L Rev 667 at 668-69; Olabisi Akinkugbe, "Dispute Settlement under the African Continental Free Trade Area Agreement: *Supra n*. 24

CHAPTER TWO

CONFLICT, CONFLICT RESOLUTION AND THE CONSTRUCTIVISM NOTION

2.1. Introduction

History is replete with different kinds of conflict at the international sphere. One might even say that the current arrangement that exists under international law is a tacit response to the need to pre-empt conflict in the international scene. For example, the League of Nations, which was a precursor to the extant United Nations was established as an attendant response to World War I in order to resolve impending conflicts between nations before it got blown up into an open warfare. Indeed, the League of Nations played some role in this regard.[47]

Upon its failure, the succeeding evolution of the United Nations in 1945 was not outside the same idea of promoting international peace and order.[48] It is doubtless that preventing conflict is one of the fundamental notions behind the international legal order. The establishment of several international dispute settlement platforms including the International Court of Justice (ICJ) also evidences this.

While the need to promote world peace and prevent conflict lie at the backdrop of the rationale for the existence of the United Nation, this is also true of many of the institutions and practices that exist under international law. A wild inquisition into pre-emption of conflict and promotion of peace and cooperation as the basis for the establishment of the United Nations and other institutions under international law would be too vast. A more prudent exploit would be to examine

[47] One of the popular instances being the Letitia dispute between Peru and Columbia between 1932 and 1934. See Pierre- Etienne Bourneuf, "'We Have Been Making History'; The League of Nations and the Letitia Dispute (1932-1934)" (2012) 39:4 Int. Hist. Rev. 592

[48] Erik Jensen, "The Evolution of the United Nation" (1986) 2:2 ISIA 6

how conflicts emanate as States interact with one another, in the spirit of appreciating this underlying goal of the international legal order.

The study of conflicts, how they emanate, and how they may be resolved particularly as between States only began to become popular in the 1950s. This was largely triggered by the cold war that began in the later 1940s, after the Second world war. Also, the proliferation of nuclear weapons at the time could be attributed as another plausible spur for the development of studies on conflict and peace. Understandably, the odious consequences of previous world wars and the imminence of another, led scholars to begin to inquire into the intricacies of conflicts and how they might be resolved.

According to Christopher Mitchell, the study of conflict has at its corollary, the study of cooperation.[49] Thus, in studying conflict, it is rational not to be only interested in the presence of it, but in the absence also. Inversely, a study on cooperation will also involve a study on conflict. Moreover, at the very centre of the rationale for the institution of international trade, as we know it today is the promotion of peace.[50] According to Simon Lester et al, as States create economic ties between and among themselves, the risk of conflicts are expected to reduce.[51]

Hence, in understanding how African States might sustain their agreement to cooperate with one another on trade grounds, a study on how conflicts emanate and how they might be resolved is important.

---

[49] *Infra, n. 117*

[50] Daniel Griswold, "Trade, Democracy and Peace: The Virtuous Cycle", Presentation delivered at the "Peace Through Trade" Conference at the World Trade Centres Association, Oslo, Norway on 20 April 2007. See Daniel Griswold, "Trade, Democracy and Peace: The Virtuous Cycle" (20 April 2007) online (blog) *CATO INSTITUTE* <https://www.cato.org/publications/speeches/trade-democracy-peace-virtuous-cycle> [**https://perma.cc/H27D-K73V**]; T Graham, "Global Trade: War & Peace" (1983) 50 Foreign Policy 124; U Albrecht, "The Study of International Trade in Arms and Peace Research" (1972) 9:2 J. Peace Res. 165.

[51] *Infra n.* 131

This chapter is dedicated to exploring the applicability of the constructivist approach to the study of conflict and how it may be resolved. The intention is that this will serve as sufficient premise for the discussion of how the approach may be applied in developing a dispute resolution regime that sufficiently caters to preserving trade relationships in Africa.

As a foundation, the idea of conflict, how they emanate and how they may be resolved, particularly through the lens of the various theories that have emanated in explaining these will be explored, particularly in the light of how they validate and justify the consideration of the constructivism idea. Hopefully, this would serve as a sufficient foundation for the subsequent discussion on constructivism. The application of constructivism within the context of Africa will thence serve as a springboard for the discussion in the subsequent chapter.

2.2.Understanding Conflict

Mitchell defines a conflict situations as one in which the disputants perceive that they have goals that are mutually incompatible and he defines a conflict behaviour as the actions taken by a disputant against another in such situation with the aim of making the other abandon or modify their goals. Thus, the root of conflict can be traceable to the point in which States begin to develop interests and positions that may be at variance with the interests and position of another. The existence of such incongruity itself is what must be noted in understanding whether a conflict has arisen or not.

He noted that, quite contrary to the general notion that a conflict must necessarily involve the offensive or defensive use of violence, genuine conflicts do arise without the manifest use of violence. Violence is essentially malevolent and reprehensible. Violence speaks of the chaos that

can result from States being at loggerhead with one another. It is safe to say that while every violence emanates from conflict, not all conflicts morph into violence.

Conflict is not just the presence of war but the absence of peace and cooperation. As noted earlier, the impetus for States co-operating with one another and trade with one another is not just to avoid war but to promote peace. There is no gainsaying that the latter bears on the former. However, in understanding the nature of conflicts and how they emanate within the international trade context, the discussion would necessarily transcend the question of whether armies are likely to be set in array to the question of whether there are interests and goals which are tangible enough to distort cooperation if and when they are at variance with one another. Concomitantly, resolving conflict as such granular level would be rather comprehensive. Yet, this requires engaging the whole idea which a unique set of lenses.

Although, most of the study on conflict that have been engaged overtime are in respect of situations that have conflagrated into blatant strife and war scenarios among States, the study of conflict is not restricted to that. According to Boulding, international conflicts bear significantly on what eventually amounts to history.[52] Not all conflicts that have shaped history are of an aggressive nature, and the Cold war is a glaring example of this. While it was glaring that there were tensions between the United States and the Soviet Union, there was no direct violent opposition between them, hence the term "cold". Nevertheless, the brewing conflict, did have consequent violent

[52] Kenneth Boulding, *Conflict and Defence: A General Theory* (Michigan: Harper & Brothers, 1962). In explaining how the understanding of conflict must transcend the sheer idea of violence, he draws on the fact that litigation is another potential consequence of conflict. Indeed, the International Court of Justice has found itself deciding cases that have had historic significance. An example is *The Legal Consequences for States of the Continued Presence of South Africa in Namibia,* Advisory Opinion, [1971] ICJ Rep 3, which underscores the significance of State Sovereignty and the reprehensibility that is attached to a State illegally occupying another. Understandably, it is not all conflicts that get the benefit of the finality of the decision of a judicial institution, especially considering the unique feature of international law; the absence of a supranational body. Ideas on how to resolve conflict among States would be engaged more comprehensively below. Meanwhile, it suffices to emphasize, as a premise, that the perspective of conflict that is being engaged in this paper is rather granular and pragmatic.

implications.[53] While avoiding the risk of going off on a tangent with an elucidation on the cold war and its ramifications, it suffices to say that a critical lesson to derive from the cold war is that the understanding of conflict beyond the exchange of violent forces helps in understanding conflict at its very root, and to provide insight into how its maturation into violence can be prevented. Also, it reveals the import of State interests, historical factors and international politics in the promotion or stifling of inter-State trade relationships.

In the light of examining conflict at its granular level, the work of Ross Stagner is notable. According to Stagner, the variety of goals that people tend to have is quite expansive and so is the potential for conflict. In his book, which includes a compendium of essays by various scholars who expounded on different sorts of disputes, including inter-State disputes in Africa on ground of boundaries and ideological differences,[54] Ross explores the fundamental values that run through the various kinds of conflict.[55]

To him, these fundamental values, which he regards as the dimension of conflict, reveal how the different sorts of conflicts are similar to one another and this aids the understanding of conflict. Stagner highlights and explains eight of those dimensions of conflict. However, for the purpose of this discourse, I have decided to draw a spotlight on two of them; Intensity and Regulation. He explains Intensity as the "emotional involvement of the participants". This speaks to their personal prejudices in favour of themselves and some other participants in the group as against some other persons in the group. The intensity may be a consequence of peculiar history of the group and the

[53] The United States and the Soviet Union did not war against each other directly but engaged in proxy wars. This was done by providing military support to a State that was apparently at war with another states that is an ally to the other.
[54] James J. Blake, "International Conflicts: The Resolution of African Conflict Situations: Prospects and Problems" in Ross Stagner (ed.) *The Dimensions of Human Conflict* (Detroit, Wayne State University Press, 1967)
[55] Ross Stagner, "The Analysis of Conflict" in Ross Stagner (ed.) *The Dimensions of Human Conflict* (Detroit, Wayne State University Press, 1967)

relationships within them as well as the cultural and religious characteristic of the parties. Conflicts are therefore not foreign imports but an offshoot of the constitutive force of the parties' "intensity". There is therefore no detaching the socio-cultural characteristic of the parties, as organically formed and altered from the very source of conflict.

The second dimension that I will draw upon is Regulation, which speaks of the boundaries, organization, and structure within which the parties must act and which is defined by rules, laws and traditions. This offers some insight to conflict that is rather intrinsic. The Regulation, as Stagner puts it, can be seen as a depiction of what may be regarded as the rule of law that governs the State actors. Notably, such rule of law or regulation are themselves also internally constituted, as they reflect what the parties have come to recognize as their rules of engagement based on a common understanding of their respective socio-cultural, economic and political characteristics. Note the cogency of the respective characteristics of the parties and its bearing on defining polity as this is pivotal to the central idea of this thesis.

Similarly, in understanding Conflict within the context of intragroup relationship, Kristin Behfar et al explore the various categories that exists.[56] Task oriented conflicts were noted as the kinds of conflict that arise when parties are at variance on their understanding of what the task of the group is. Relationship oriented conflicts are more inclined to arise when parties are in animosity with one another. The task-oriented conflicts are otherwise regarded as cognitive conflicts while the relationship-oriented conflicts are also known as affective conflict.

[56] Kristin J. Behfar *et al*, "Conflict in Small Groups: The Meaning and Consequences of Process Conflict" (2011) 42:2 Small Group Res. 127

While the notion of task-oriented conflict and relationship-oriented conflict have been engaged by a number of scholars,[57] Kristin Behfar et al sought to introduce a third category, which they named Process oriented conflicts. Their notion of process-oriented conflict involves the inconsistencies that arise in coordinating the accomplishment of the task and the decision on how to coordinate the members of the group accomplishing the task.

Although each category of conflict is often treated in their respective senses, a holistic approach may not be so far fetched. The agreement between parties to collaborate with one another in order to a achieve a given task is necessarily premised on the assumption that a form of relationship, however precarious exists. More often than not, the task is not an end in itself but a means to further enhance the relationship.[58]

In other words, relationships birth tasks and tasks are sustained by relationships. It is therefore hard to imagine the emanation of conflict that impact the one without the other. In drawing a symmetric parallel, the notion of the task oriented conflict can be related to Stagner's idea of Regulation in the sense that they both speak to the defined scope of operation while the notion of relationship oriented conflicts is synonymous too Stagner's concept of intensity in that they both speak to the prejudices of the parties.

Thus, an understanding of conflict must not only take cognizance of the structure within which the parties interact but must also capture their respective historical and cultural biases as they tend to

[57] A. Amason & H. Sapienza "The Effects of Top Management Team Size and Interaction Norms on Cognitive and Affective Conflict (1997)23 J. Manag. 496; H. Guetzkow & J. Gyr, "An Analysis of Conflict in Decision- Making Groups" (1954) 7 Hum. Relat. 367; K. Jehn, "A Multimethod Examination of the Benefits and Detriments of Intra Group Conflict" (1995) 40 Adm. Sci. Q. 256; K. Jehn, "A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups" (1997) 42 Adm. Sci. Q 530; R. Priem & K. Price, "Process and Outcome Expectations for the Dialectical Inquiry, Devil's Advocacy, and Consensus Techniques of Strategic Decision Making" (1991) 16 Group and Management Studies 206; V. Wall & L. Nolan, "Perceptions of Inequity, Satisfaction, and Conflict in Task-Oriented Groups" (1986) 39 Hum. Relat. 1033.

[58] This is even more so within the context f international trade, as stated earlier.

also define the inconsistencies that ultimately mature into conflict between the parties. According to Boulding, particular conflicts are enshrouded within a broader level of general conflicts which involve ethical, religious, scientific and ideological inconsistencies. To him, where two actors have sharply contrasted ideologies, which they express blatantly, the tendency of conflict is more likely and may be less likely if the platform bringing the institutions together takes into consideration such differences.[59]

2.3.The Inevitability of Conflict

As a foundation to the discourse on conflict resolution, the understanding of what conflict entails is crucial. Also, crucial its appreciation or appropriation within the context of the society. In thinking about conflict and the role it plays in the structure of the society, two major perspectives have been presented.

The first views conflict as essentially dysfunctional, pathological and aberrant. The proponents of this view advocate for the avoidance of conflicts as much as possible. This idea about conflict is largely known as functionalism and at the hub of this notion are scholars like Parson[60] and Smelser.[61] To Smelser, the society is not necessarily always stable and harmonious, nevertheless he posits that conflict[62] can only be construed in the sense of its distortion of the harmonious state of the society. According to him, conflicts are a result of "impairments of the relations among and consequent inadequate function of, the components of social action". Parson engages the idea of conflict more as a form of vice that disturbs the equilibrium of the interactive system which is an integral part of the social system.

---

[59] *Infra. n. 47*
[60] Talcott Parsons, *The Social System* (England: Routeledge, 1951)
[61] Neil Smelser, *Theory of Collective Behaviour* (Glencoe Illinois: The Free Press of Glencoe, 1963)
[62] He uses the term "Collective Behaviour".

On the flipside, there is the view of conflict as "the inevitable by-product of human interaction"[63]. At the forefront of that notion about conflict is Coser.[64] Coser dismisses the functionalism notion as rather utopian and unpragmatic. He stresses the fact that conflict is a ubiquitous and persistent phenomenon which tacitly has its role in promoting interactions within the society. In commenting on the inevitability of conflict, Mack notes that; "Since social organizations are characterised by both contact among members and competition for scarce positions and resources, the potential for conflict is a natural feature of human social life".[65] According to Robert Lee, "Social Conflict is a likely guest wherever human beings set up forms of social organisation. It would be difficult to conceive of an ongoing society where social conflict is absent. The society without conflict is a dead society… Like it or not, conflict is a reality of human existence and therefore a means of understanding social behaviour…".[66]

Without undermining the integrity of their intentions, the arguments presented by the functionalist seemed to be flawed on a number of grounds; The appropriation between the ideal and the reality is obviously misplaced. The assumption that the initial premise is that the society is in a perfect state until the emanation of conflict at best imaginary. The truism presented by Thomas Hobbes, when he notes that Life in its state of nature is solitary, poor, nasty, brutish and short evinces this. Moreover, the idea that conflict impairs the functioning of the society is rather pessimistic and defies the agelong theory of an evolving society as propounded by Darwin. It is my opinion that the transformational view of conflict is more pragmatic, evolutionary and progressive.

---

[63] Kaj Björkqvist, "The Inevitability of Conflict but Not of Violence: Theoretical Considerations of Conflict and Aggression" in Douglas P. Fry & Ors, 3rd ed, *Cultural Variation in Conflict Resolution: Alternatives To Violence* (Mahwah, N.J.: Lawrence Erlbaum Publishers, 1997)
[64] Lewis Coser, *The Function of Social Conflict* (Glencoe Illinois, The Free Press of Glencoe, 1956)
[65] R. W. Mack, "The Component of Social Conflict" (1965) 12:4 Soc. Probl. 388
[66] Robert Lee "Religion and Social Conflict: An Introduction" in Robert Lee & M. E. Marty (eds), *Religion and Social Conflict* (New York: Oxford University Press, 1964)

I consider it pragmatic in the sense that it does not ignore the reality that conflict always occur, evolutionary, because it does not present the society as inherently utopian but presents a more plausible perspective of the gradual maturation of the society, and progressive because rather than adopting a critical posture, it offers insight into real and practical change. Suffice it to say that the dichotomy between the functionalist and transformational approach to conflict is also recurrent in thinking about the resolution of conflict and this will be examined later in this paper.

The preceding discussion basically bears on how intrinsic conflict is to society. One could picture conflict as a thread that is weaved into the fabric of the society. The process of weaving the thread into the fabric may seem perilous to the cloth, but it eventually forms part of the overall layout of the fabric, to such extent that it ultimately beautifies the fabric. So, in designing or amending the weaved portion of the fabric, the tailor has to mind the texture, nature, quality and colour of the fabric itself.

Thus, just like the interrelationship between the thread and the fabric, the connection between conflict and the society is depicted in the discussion that highlights the implications of the disposition or attitudes of parties to issues of conflict and cooperation, their emotive and relational factors, as well as the unique structure within which they operate. No theory better appreciates these nuances than constructivism, hence the proposition for its adoption and appreciation in designing an effective dispute settlement regime under the novel AfCFTA arrangement.

In further buttressing on the intrinsic nature of conflict and its import on the actors and structures within the society, a consideration of how conflicts are formed is also of great utility. Various scholars have engaged the idea of thinking about conflict under international law and how they emanate, as States interact with one another. A consideration of some of these theories can also be

beneficial in understanding some of the values that can be useful in conceiving a constructivist approach to conflict and its resolution.

2.4.Theories of Conflict Formation

2.4.1. Little and Zeitzoff

Little and Zeitzoff, in examining the theoretical foundations for the violence being propagated by the infamous Islamic State in Iraq and Syria (ISIS), came up with two major theories.[67] Although, Little & Zeitzoff engage the idea of violence and not conflict, as explained earlier, value scan still be drawn from their analysis since violence necessarily emanates from conflict.

Little and Zeitzoff present two major ideas. The first is the "Ideological motivation theory" and the other is the "Strategic Logic theory". The strategic, also known as the rationalist theorists suggests that conflicts emanate because a State party deliberately intends to enforce and maintain hegemonic dominance over the others or otherwise in order to derive some form of benefit. Conversely, the ideological or psychological theories suggests that conflicts are motivated by more emotive factors.

Before proceeding to elucidate on the notions of conflict as explained by Little and Zeitzoff, it is noteworthy that the discussion in this thesis is intended to be within the context of trade relations in Africa and particularly within the context of the arrangement among African States under the AfCFTA. While references may be made to other branches of international law, it is with the hope that inferences may be drawn which would be applied to our peculiar context.

[67] Andrew T. Little & Thomas Zeitzoff, "A Bargaining Theory of Conflict with Evolutionary Preferences" (2017) 71 Int. Organ., pp. 523-557

This is done with the understanding that to some degree, the underlying rules that govern the actors under international law are consistent. Whether it is in the context of humanitarian, trade or environmental conservational activities, the general principles of international law as well as customary international law play a role in defining relationships and setting the stage upon which conflicts may be curbed or enhance. Thus, in examining how States, as entities, relate with one another on humanitarian grounds, some inferences may be drawn on how conflicts also emanate on the ground of trade relations.

Each school has not been devoid of some criticisms. The critics of the strategic theory posit that conflicts are not always premised on utility and value, as some may simply be fostered by hate and resentments.[68] An easy example is the xenophobic activities in South Africa or the Rwandan genocide or the more recent Myanmar Rohingya crisis. In South Africa, the recurrent xenophobic activities have mostly been traced, not to any transactional factor, but to the ethnocentric and racial history of the nation.[69] The gruesome phenomenon in Rwanda was traced majorly to radio propaganda by Yanagizawa-Drott in a notable article of his.[70] In similar light, the ongoing Asian crisis was also stirred up by ethnic and religious factors.

Conversely the ideological theories have been criticized as unfounded- lacking logical basis.[71] According to Bruce, "A scientific understanding of international conflict is best gained by explicit theorizing, whether verbal or mathematical, grounded in axiomatic logic, from which hypotheses with empirical referents may be extracted, followed by rigorous empirical analysis (whether

[68] Roger D. Petersen, *Understanding Ethnic Violence: Fear, Hatred and Resentment in Twentieth- Century Eastern Europe* (Cambridge, UK: Cambridge University Press, 2002)
[69] Miriam Moagi et al, "Mozambican Immigrants to South Africa: Their Xenophobia and Discrimination Experiences" (2018) 28:3 J. Psychol. Afr. 196
[70] David Yanagizawa-Drott, "Propaganda and Conflict: Evidence from the Rwanda Genocide" (2014) 129:4 Q. J. Econ. 1947
[71] Bruce Bueno De Mesquita "Toward a Scientific Understanding of International Conflict: A Personal View (1985) 29:2 Int. Stud. Q. 121

quantitative or not) in which assumptions and procedures are explicitly stated".[72] Thus, emotive factors such as religious or tribal preferences as opposed to tangible factors like tariffs and taxes are less feasible to track as they have less cognitive and substantial relevance.[73] It is safe to say that the criticisms of either theories do not entirely render them inapt in all circumstance. The criticism of the one does not in fact render the other more valid. A safer approach would be to engage both theories and draw out relevant values.

In amalgamating the insights from both theories while proffering a rather profound perspective, Little & Zeitzoff suggests an indirect evolutionary approach to viewing conflict. These views conflict as transcending a phenomenon incited by fixed and exogenous factors but rather a choice that is necessitated by intrinsic and evolutionary factors. According to the Little and Zeitzoff, "we adopt an "indirect evolutionary" approach in which actors behave rationally given their preferences, but their preferences are subject to evolutionary forces".

In other words, they present a perspective to examining conflicts that presumes that all conflicts are products of rational and strategic calculations. However, the psychological and emotive factors peculiar to the conflicts are inherently part of the premises in arriving at the calculations as they have overtime evolved to some degree of significance. This goes to say that an attempt at forestalling conflict must forestall both apparent factors, such as power, interests, profit, land etc, as well as psychological factors such as history, religion, ethnicity, etc.

[72] *Ibid*

[73] It is however arguable, in my opinion, that although cognitive perspective to how conflicts emanate cannot be measured through the regular empirical fact-finding approach, this does not in itself disprove its accuracy. Moreover, there have overtime been a number of scholarships exploring the understanding of conflict from a cognitive perspective. For example Ross Stagner, *Supra n. 7*

2.4.2. Daniel Lieberfeld

Similarly, Daniel Lieberfeld,[74] in exploring the theory behind the United States and Iraq War, explores a broader range of theories to explain conflict formation. He highlights the Realism theory which denotes conflict as the natural outcome from the inherent tussle for power and influence in the hegemonic structure of international politics with the mindset that yielding power or influence to another State would make the State vulnerable to the other State. Thus, States decide to engage conflict or otherwise yield to peace based on the implication it will have on their power over and security from other States. The realism theory emphasizes the inevitability of competition, and conflicts can be seen tacitly brewing amidst apparent competitions.

He also explores a liberal theory of conflict which views conflict from an inside-out perspective. The liberalism theory of conflict, which is mostly influenced by the idealism theory of Immanuel Kant considers the fact that the imminence of conflict is largely dependent on the governmental structure of the particular State and its relationship to international law. Hence, States that practice a more ideal form of democracy are less likely to be at conflict with other States than the ones which do not.

According to him, "Democracies fear that non-democracies, which lack both transparency and governmental checks on the use of force, are thereby able to take advantage of slower mobilizing democratic adversaries by attacking first".[75] However, as such democratically governed States engage States that do not practice democracies, the precariousness and lack of transparency in such non-democracies may drive the democratic neighbour State to be more wary and pre-emptive.

[74] Daniel Lieberfeld, "Theories of Conflict and the Iraq War" (2005) 10:2 Int. J. Peace Stud. 1
[75] *Ibid*

Although Lieberfeld's theory is grossly influenced by the Marxist notion of class structure and dominance and offers a narrative of the international sphere as merely a platform where States "gain or lose domestic political advantage",[76] it reveals the influence of the political structure in defining structures within which States cooperate or otherwise.

It also reflects the unavoidable phenomenon of an interplay between the roles of actors and structure in the preservation of peace or the escalation of conflict. In his exposition on the realism theory he brings to bare the influence of actors and in deliberation of liberalism in relation to democracies and non democracies, he alludes to the import of structure. The interrelationship of both categories is what the constructivists make emphatic.

2.4.3. Johan Galtung

The work of Johan Galtung is also crucial in the understanding of how conflicts are formed and he shares an interesting perspective. He begins his theoretical explications from the premise that conflict is what happens when parties are in some form of incompatibilities.[77]

According to Galtung, there are two types of incompatibilities. The first is the incompatibility of values. This incompatibility is more explicit. The other is the incompatibility of Interest, which is more implicit. In his opinion, the incompatibility of interest is so implicit that it is negligible and often disregarded. Yet, a comprehensive analysis of how conflicts are formed ought to cater to both kinds of incompatibilities.

What kinds of incompatibilities would then be regarded as incompatibility of value as opposed to interest and vice versa? What exactly does incompatibility entail? In answering the latter, words

[76] Bruce Bueno De Mesquita, "Domestic Politics and International Relations" (2002) 46:1 Int. Stud. Q. 1
[77] Johan Galtung, "Theories of Conflict Definitions, Dimensions, Negations, Formations" (1973) Foreign Affairs

like variance and irreconcilableness come to mind. We speak of incompatibility where there is the lack of agreement on a given matter. The notion of incompatibility is most popular within the context of marriage and divorce. In a certain study, it was noted that incompatibility is the third most perceived cause of divorce.[78] In another article, it was noted that incompatibility of temperance has been an age-long basis for divorce.[79]

It is understandable that the context of family is different from international relations, which is the central context of this thesis. Nevertheless, since both scenarios involve at its very basis, the coming together of parties to form an agreement and build a relationship, it goes to say that normative values may be transported here and there.

In relation to international relations, the scenario underlying the North Sea Cases is relatable in the discussion of how incompatibilities mature into conflict.[80] The principle of equidistance had been introduced under international law, which granted States certain rights over the seas that extend beyond their coastal regions to a certain extent. However, due to the difference in the coastal configurations of the States, as some States had concave coastal lines while some had convex coastal lines. The implication of this is that the equidistance rule was more favourable to some States than it was to other States, and so the matter was brought before the International Court of Justice for Advice.

Galtung's idea of incompatibility of interest is what the North Sea Cases demonstrates. Inherent features of a given State, such as peculiar history, cultural and religious orientation, geographical formations or even language underlies what form the interest of the State and when such interest

[78] Margaret G. Cleek & T. A. Pearson, "Perceived Causes of Divorce: An Analysis of Interrelationships" (1985) 47:1 J Marriage Fam. 179
[79] Lester B Orfield, "Divorce for Temperamental Incompatibility" (1953-1954) 52:5 Mich L Rev 659
[80] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* Advisory Opinion, [1969] ICJ Rep 3

contrasts with the goals of a potential agreement that fosters the interest of other States, there is deemed to be inconsistency.

Speaking about the impact of history in understanding how conflict is formed among States in the international sphere, Steve Yetiv notes that an insight into history is beneficial to understanding conflicts in international relations both at the regional level and the much wider sphere.[81] He also notes that theoretical notions can be further validated or otherwise disproved by looking into history as history helps to connect the dots and underscores the implication of any given theory.

In engaging the idea of cultural and religious origins as a potential source of incompatibilities in the study of inter-State relationship, Raymond Scupin has explored the role of anthropology and the understanding of culture in understanding conflict in the international sphere.[82] Scupin highlights four subsets of anthropology including physical, archaeological, linguistic and cultural.

Physical anthropology relates to the evolution of human and variation of their genetic compositions. Archaeology relates to the artifacts and material remnants of the human past that illustrates the evolution of societies and civilization, linguistics speak to the differences in pattern of language and its influence on the social interactions, while cultural anthropology relates to inherent social norms, values and behaviours that have been established overtime.

To Scupin, an engagement with anthropology will necessarily have a bearing on history. The relevance of anthropology to the understanding of how conflict emanates is exemplified in Paul and Laura Bohannan's field research on the Tiv Tribe in Nigeria, where they came up with the substantivist economic model to decision making which is varies from the popular neo-classical

[81] Steve Yetiv, "History, International Relations, and Conflict" in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)
[82] Raymond Scupin, "Anthropology, Conflict, and International Relations" in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)

model of rationality and utility maximization. They bring to fore the integral role of cultural norms, values and social institutions to decision making process.[83] Similarly, Henrich *et al* have noted that Kinship institutions and traditional practices impart on decision making processes.[84]

Thus, understanding conflicts involves regarding inherent features of the State as constituting its interest and thus impacting how decisions are made. It may also involve understanding how the demography, geography, economy, culture and polity strains or strengthens international relations.

The notion of demography was extensively engaged by Tadeusz Kulger.[85] According to Kulger, demography shapes the characteristics of the society and has an impact on emanation of conflict as States interact with one another. Hauser & Duncan define demography as "the study of the size, territorial distribution, and composition of population, changes therein, and the components of such changes".[86] Migration is an easy example of how demography can be a useful tool in understanding how conflict emanate among States. According to Kulger, inter-State conflict can be traced to migration particularly considering that migration, even though influences urbanization, also potentially leads to over population which may in turn cause systemic problem.

Galtung notes that as the consciousness of the inconsistencies in interests increases, the structure becomes more organized and confrontations become imminent, the conflict of interest begin to get transformed into conflict of values. Using the example of the North Sea cases, as the dispute progressed, what started out as a sheer inconsistency of interests due to difference in topography

[83] Laura Bohannan & Paul Bohannan, *The Tiv of Central Nigeria. Ethnographic Survey of Africa. Western Africa*; Pt. 8. (London: International African Institute, 1953.)
[84] Joseph Henrich *et al,* ""Economic Man" in Cross-cultural Perspective: Behavioural Experiments in 15 Small-Scale Societies" (2005) 28:6 Behav. Brain Sci. 795
[85] Tadeusz Kulgler, "Demography and International Relations: Economics, Politics, Sociology, and Conflict" in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)
[86] Phillip Hauser & Otis Dudley Duncan, eds. *The Study of Population: An Inventory and Appraisal* (Chicago: University of Chicago Press, 1959)

was subsequently transformed into a contention between the direct application of the equidistance rule and the rules of equity, which are obviously matters of value.

Galtung's explication on the essence of inconsistencies of interests and values in the formation of conflict among States as they relate with one another in the international sphere also buttress the need for an internal analysis of conflict. Galtung's proposition about value inconsistencies coheres with the realist idea that attenuates the tendency for States to grapple for influence and power, as these are undeniable factors that play an immense role in international polity.

Although Galtung's context is the hegemonic culture in the wider international frame and particularly addresses the vice of imperialism which was apparently flagrant at the time, the exportation of his narrative into the African regional context is not far fetched. As will be discovered in the course of this thesis, the evolution of Africa in its intramural sense is not devoid of some of these hegemonic, power-tussle tendencies, which ought to be accounted for in imagining how conflicts emanate within such setting.

Also, his exposition on the idea of inconsistency of interests also validates the inherence of the structure and context within which States interact. Not only does it highlight the existence of such context but further reveals the evolutionary nature of such context.

2.5.Resolution of Conflict

The initial venture into understanding conflict and the various theories that have been developed in understanding how they are formed is necessary to set the stage on the discussion on how the resolution of disputes might be thought about. As we progress in the course of this thesis, what I intend to highlight are the underlying values and notions which inherently run through the thoughts

of scholars in their understanding of what conflict is and how it emanates, even as States interact, which ought to influence how the resolution of conflict might be thought of.

Three major theories have been proposed by scholars in the bid to understand what an attempt at resolving conflicts might look like. They include Conflict Resolution, Conflict Management and Conflict Transformation. It is noteworthy that Conflict Resolution, as a theory is engaged differently from the idea of Conflict Resolution as an overarching theme that presents the various theories and methods of resolving conflict.

For the sake of clarity, the latter shall simply be described as "Resolution" subsequently. The focus of this thesis is theory of conflict transformation, as such the other two theories will be briefly described in order to understand what conflict transformation is not. Further, in exploring the usefulness of the theory of conflict transformation, some underlying notions that run through the previous expositions shall be juxtaposed with the basic propositions of Conflict Transformation theorists, and the connection, if any, would be highlighted.

2.5.1. Resolution

Resolution, as a theory, basically involves identifying the root cause of the conflict and solving same in order to rebuild the relationships that are actually or potentially subject to conflict. Christopher Mitchell describes it as involving "a contention that an acceptable and durable solution to the issues in a particular conflict between adversaries has been discovered- or mutually created- by the parties themselves, possibly with some assistance from other third parties or possibly through their own efforts and sometimes with local assistance from insider parties".[87]

[87] Christopher Mitchell, "Beyond Resolution: What Does Conflict Transformation Actually Transform?" (2002) 9:1 Peace and Conflict Studies 1.

The Resolution theory appears to afford a nimble and probably expedient approach to resolving conflicts. Ronald Fisher and Keashly rather describe it as a "contingency approach to third-party intervention,"[88] which according to them, is all about evaluating the characteristics of each conflict scenarios and matching them with existing intervention models. Although this theory has come to gain traction over the years, and denying its positive outcomes in some instances is easily refutable, nevertheless there is no gainsaying that it lacks an extensive appreciation and appropriation of the features of the conflicts and the disputants and thus may proffer a solution that is at best, momentary.

An understanding of this limitation inspires a more nuanced approach to the understanding of the resolution theory that takes into account inherent sociological factors in some scholarship. For example, Ronald Fisher, in a dissentient manner, presents a narrative about consultation as a method of resolving disputes in such a manner that makes it insistently different from the conventional practice of mediation on the basis of the underlying assumptions, the perceived role, identity, functions and tactics of the third party as well as the overall objective to be achieved.[89]

A more contemporary scholar on conflict resolution, Roger Fisher expresses similar dissention to the conventional thoughts on conflict resolution. In highlighting the evident link between social scientific methods and international law, Fisher particularly critiques the underlying assumption of the game theoretic analysis of international conflict and presents the need for theories that are not only instructive but are beneficial to structuring behaviour.[90]

---

[88] R. J. Fisher & L. Keashly. "The Potential Complementarity of Mediation and Consultation within a Contingency Model of Third Party Intervention." (1991) 28 J. Peace Res 29-42

[89] Ronald J. Fisher "Third Party Consultation as a Method of Intergroup Conflict Resolution: A Review of Studies" (1983) 27:2 J. Confl Resolut pp. 301–334.

[90] Roger Fisher, et al. *Getting to Yes: Negotiating Agreement without Giving In*, (2ed) (Boston: Houghton Mifflin, 1991). See also, Andrew Mamo, "Getting to Peace: Roger Fisher's Scholarship in International Law and the Social Sciences" (2016) 29 LJIL 1061 – 1080.

This motion towards a more pragmatic, sociologically inclined approach to conflict resolution is probably more characteristic of the conflict transformation theorists, which as will be explained in subsequent paragraphs, is a much more novel enterprise. The similarities in the narratives of some resolution theorists and conflict transformation proponents have made scholars like Christopher Mitchell and Ilana Shapiro take a cynical approach to the idea of conflict transformation by describing it as a mere reiteration of the values of the resolution theory while defining the resolution theory only in terms of its apparent failures.[91]

One may posit that the question of whether the conflict transformation theorists merely reinvent the values of the resolution theory, at least its positive sides, or whether they directly address the issues that some resolution theorists seem to have grappled with over the years, is a matter of perspective.

2.5.2. Conflict Management

Proponents of Conflict Management find the idea of removing conflict lofty and unrealistic. Rather, the aim is to manage conflict by developing a system that affords conflicting parties to cooperate with one another despite their differences.[92] This theory was explored by John Powelson, where he identified that conflict between groups that are divided on the lines of ideology had a stifling effect on economic growth in the Latin America.[93] In exploring the conflict management theory, he advocates the instrumentality of institutions in neutralizing values and fostering cooperation amongst people across the different ideological groups.

---

[91] *Supra* n. 88

[92] D. Bloomfield & Ben Reilly "The Changing Nature of Conflict and Conflict Management" in Peter Harris and Ben Reilly (eds.) *Democracy and Deep-Rooted Conflict* (Stockholm: Institute for Democracy and Electoral Assistance (IDEA), 1998).

[93] John P. Powelson, *Institutions of Economic Growth: A Theory of Conflict Management in Developing Countries* (Princeton, N.J: Princeton University Press, 1972)

To Conflict Management theorists, it is all about the parties. It does not matter if the structure within which the parties interact with one another is broken, if one can get the parties to still relate with one another, the conflict is considered manageable, and cooperation can be maintained. This notion of conflict management can be explored in the context of the dichotomy between task-oriented conflicts and relationship-oriented conflicts as exposited by Kristin Behfar et al.[94] Conflict management glaringly flows from the premise that parties can deal with the inconsistencies in the task-oriented conflicts as long as relationship-oriented conflicts are contained. However, one issue that might arise from this theory is that it is rather implausible to think of a situation where the premise upon which the parties relate is totally distinguished from the actual relationship between the parties.

Moreover, at the root of the theory of conflict management is the notion that the idea of resolving conflict is sometimes impossible and so a more pragmatic aim would be to manage the relationship while the root cause of the conflict subsists. This can be seen as a rather pessimistic approach and by advocating for the overlooking of the root cause of the conflicts, it ignores the potential for underlying conflicts to blow up into a situation that may turn out to be more uncontrollable. In thinking about the potential existence of an alternative theory that addresses the lack of pragmatism of the Resolution theorists without falling prey to the pessimism of the conflict management theorists, I move on to discuss Conflict Transformation as a theory.

2.5.3. Conflict Transformation

Conflict Transformation takes a more holistic approach to the idea of resolving conflict. According to Lederach, a renowned proponent of the theory of Conflict Transformation, "Conflict

[94] *Supra n. 8*

Transformation represents a comprehensive set of lenses for describing how conflict emerges from, evolves within and brings about changes in the personal, relational, structural and cultural dimensions, and for developing creative responses that promote peaceful change within those dimensions".[95] As a corollary to the notion that conflicts are an inherent phenomenon in every relationship, Conflict Transformation draws on the fluidity of the actors and interests as not only the source of conflict but also the avenues for its resolution.[96]

In other words, Conflict Transformation appreciates the fact that the society is, in some way dynamic or in worse cases, potentially precarious. As changes occur in the society, the actors and their respective interests tend to get reshaped and potentially conflict may arise in the process. Such reshaping may occur in different ways.

According to Väyrynen, the reshaping can be in the form of emergence of new actors or change in the existing actors or change in the ways in which actors perceive their goals and interest or change in the relationship between the parties. In any case, proponents of Conflict Transformation would opine that to attempt to resolve the inconsistencies that arise from such change can only be effective when the nature of the change is well appreciated.

Therefore, in approaching the resolution of conflict from a conflict transformation perspective, one must primarily consider the nature of the society in question; what changes might, are or have occurred; how such change has affected the position or perception of the actors within the society and how the conflict arising from this change can be addressed by not just seeking to reverse the change but by adapting to the change.

---

[95] John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington: United States Institute of Peace, 1997)

[96] Raimo Väyrynen, (ed.), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage, 1991)

Apart from being premised on the notion that conflict is inevitable, Conflict Transformation is also premised on the idea that conflict is recurrent. As such, in balancing the implausibility of conflict resolution theorists and the pessimism of conflict management theorists, conflict transformation theorists offer a rather pragmatic approach which involves a continuous reconstruction of the society to adapt to the recurrently changing reality of the society. Thus, Conflict Transformation uniquely validates the propositions of scholars like Coser and Robert Lee.[97]

This theory of conflict transformation has been useful in approaching conflicts both in the domestic and international context.[98] As far as international context goes, the bulk of its application has been in relation to promoting peace and preventing war among States.[99] The goal of my thesis is to uniquely bring the conversation within the context of the international trade relationship, particularly in Africa. This is especially considering the fact that promotion of peace and the reduction of conflict is at the core of the rationale for international Trade.

The preceding discourse on conflict and how they emanate bring to bare the significance of certain complexities and intricacies that is evidenced by the inherence of conflict and the fluidity of State actors in respect to how their interests, values and goals are formed, as well as the conditions and circumstanced within which they relate. This sets the stage for the factors that ought to be considered in thinking about resolving disputes. Of the three major theories that have been postulated in thinking about resolving conflicts, Conflict Transformation appears to best capture these complexities.

---

[97] *Supra n. 15 & 17*

[98] Conflict Transformation within the Domestic realm is seen in William L.F. Felstiner & Ors, *Supra* n.34

[99] Kevin Clement, "Towards Conflict Transformation and a Just Peace", Alex Austin & ors. (eds), *Transferring Ethnopolitical Conflict. The Berghof Handbook* (Wiesbaden:VS Verlag, 2004)

Conflict Transformation recognizes the need to appreciate the peculiar nature of the society, as well as the positions and perceptions of the actors within the society in such dynamic sense as to accommodate their fluidity and adapt to same without an insistence on any conventional or rigid method. The discourse about Conflict transformation as an idea that takes a holistic approach to the issue of conflict and pays attention to the internal construct and modalities of interactions within the construct can be seen as an expression under a larger body of literature known as the constructivist approach.

2.6.Constructivism as an Approach to International Relations

The constructivist approach to studying social relations particularly within the international frontiers has at its hub the works of Nikolas Onuf. According to Onuf, "constructivism holds that people make society and society makes people". Constructivism envisages the purpose of law as going beyond constraining behaviours to defining the position and interest of the respective actors in the society.

Constructivists view the society as essentially a product of the construction of the people or actors within it. Thus, in exercising their choices, the agents define the institutional features and their positions thereto as well. According to Reus-Smith, Constructivists have a perspective of actors in the context of social agents within a constitutive framework and whose interests are endogenous to social interactions.[100]

In this wise, the interaction of agents with the institution and its impact on their decisions transcend a mere imposition of rules, but more accurately, is evinced as the outcome of the patterns that emanate from how actors interact with one another. These patterns are therefore what gets to be

[100] *Infra n. 117*

defined as the rules or normative structures. According to Wendt, these normative structures are essentially constitutive as the shape the identities, interests and goals of the actors.[101] Jutta Weldes *et al* describes it as contingent and relational.[102] It is relational because it presumes the existence of some form of peculiar interaction amongst the State actors and it is contingent because the form that the normative structures takes are essentially precedent on such interactions.

This uniquely separates constructivism from other approaches to social relations as other approaches tend to begin from the rules, then proceed to its application to agents and structure.[103] Constructivists, in pre-empting a state of anarchy, which is considered as a situation where the rules are no longer directly responsible for the ways agents conduct their relations, explore the other way around. In this sense, rules are considered more constitutive than regulative. In Gould's words, "Rules link agents and structures in a common process of constitution, but only if rules have an oncological standing appropriate to their dual function.

According to Odumosu, there are various strands of Constructivism and Constructivism does not in itself offer a precise approach to the study of international relations. She premises her position, in part, on the Reus-Smith's classification of constructivism into systemic, unit-level and holistic constructivism.[104]

---

[101] *Infra* n. 119

[102] Jutta Weldes, Mark Laffey, Hugh Gusterson, & Raymond Duvall, "Introduction: Constructing Insecurity" in Jutta Weldes et al., Cultures of Insecurity: States, Communities, and the Production of Danger (Minneapolis: University of Minnesota Press, 1999) 1 at 11.

[103] For example, Gidden's structuration theory which rather than viewing rules as properties on their own, view rules as a property of structure. Anthony Giddens, *The Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Los Angeles: University of California Press, 1979); Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Los Angeles: University of California Press, 1984).

[104] Christian Reus-Smith, "Constructivism" in Scott Burchill *et al, Theories of International Relations* (Hampshire; New York: Palgrave Macmillian, 2005) p. 199

Systemic Constructivism emphasizes on the interactions between inter-State actors to the exclusion of other actors, and the structure idea and norms are strictly defined as created by State practices. She makes reference to Alexander Wendt in this regard.[105] Unit- level constructivism focuses on how other than State practices, domestic, legal and social norms inform the identities and interests of the States. She refers to the work of Peter Katzenstein in this regard.[106] Lastly, Holistic Constructivism is a combination of systemic and unit-level constructivism. In other words, it involves a merging of the idea of an influence of States' international and domestic features in defining its interests and identities. Kratochwil's work seem applicable in this regard.[107]

While it may be noteworthy to highlight the fact that there are some form of variance in the different body of scholarship that explores the constructivism idea, it is also expedient not to ignore the underlying these that runs through the different studies on Constructivism.

In all such studies, it is glaring that there are certain inherent factors that define the interests and identities of States, domestic or international, social, cultural or legal, and these factors determine what would constitute the norm or structure within which States interact with one another.

It may be safe to say that holistic Constructivism is the most ideal kind of constructivism as it seems to provide an overarching template within which other shades of constructivism may apply. This may well be said to be the idea of constructivism that is explored in this thesis.

---

[105] Alexander Wendt, "Anarchy is what States Make of It: The Social Construction of Power Politics" (1992) 46 Int'l Org. 391; Alexander Wendt, "Collective Identity Formation and the International State" (1994) 88 Am. Pol. Sci. Rev. 384; Wendt, "Constructing International Politics", supra note 39; Alexander Wendt, Social Theory of International Politics (New York: Cambridge University Press, 1999)

[106] Peter Katzenstein, Cultural Norms and National Security: Police and Military Power in Postwar Japan (Ithaca, N.Y.: Cornell University Press, 1996); Peter Katzenstein ed., Tamed Power: Germany in Europe (Ithaca, N.Y.: Cornell University Press, 1997).

[107] Friedrich Kratochwil, "The Embarrassment of Changes: Neorealism as the Science of Realpolitik without Politics" (1993) 19 Rev. Int'l Stud. 1.

Constructivism as a wholesome concept has not been without some criticisms. Odumosu notes three of them.[108] The first of which is the fact that the bulk of the work done by constructivists have largely been theoretical and lacks empirical flair. To start with, the essence of theory in research cannot be undermined. In speaking about legal theory, Richard Devlin describes theory as the "wisdom about law".[109] Although, in a manner quite different from empiricism, theory also has its systematic framework for evaluating phenomenon which is equally as valid.[110] Moreover, theorizing affords some form of self-reflectivity on palpable events and occurrences which make it not so far fetched from praxis after all.[111] Meanwhile, it is also not entirely accurate that the bulk of scholarship on constructivism lacks empirical flair as the idea has attracted different forms of scholarships without excluding empirical research.[112]

There is also the averment that constructivism fails to clearly delineate between social and legal norm. Before engaging the question of whether such averment is apt or otherwise, it is worthwhile to consider whether the delineation between legal and social norms is necessary in the first place. The fact that the bulk of scholarship that have engaged social and legal norms have always conceived them as mutually exclusive to one another only makes such approach conventional and not necessarily ideal or apposite. Fundamentally, the point where social norms intersect with legal norms is where constructivists are concerned about.

So, to constructivists, all social norms do not necessarily qualify as legal norms unless they meet certain criteria. Conversely, constructivists aver that legal norms lack legitimacy when they do not

---

[108] *Infra n. 137*
[109] Richard F. Devlin, "The Charter and Anglophone Legal Theory" (2013) 4:1 Rev. Const. Stud. 22
[110] A. Strauss & J. Corbin, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory (London: Sage Publications, 1998)
[111] Terry Eagleton, *The Significance of Theory. Bucknell Lectures in Literary Theory*. (Oxford, UK; Cambridge, MA: Blackwell, 1990).
[112] Martha Finnemore & Kathryn Sikkink, "TAKING STOCK: The Constructivist Research Program in International Relations and Comparative Politics" (2001) Ann. Rev. Polit. Sci. 391 at 406.

cohere with social norms. According to Jutta Brunee and Stephen Toope, "When legal norms are perceived to be legitimate, because of their adherence to an internal morality, and their congruence with a normative inheritance, past and present social practice and contemporary aspirations, they generate adherence and serve to persuade."[113] The seminal work of Lon Fuller is significant in understanding the prerequisite for norms to transition from just social norms to legal norms. Fuller describes social norms as internal morality of law, and highlights eight prerequisites for an internal morality of law to suffice as a legal norm.[114]

Lastly, Odumosu notes that it has also been averred that constructivists pay inadequate attention to the theory of change. While this notion may be easily rebutted by the work done by certain Constructivists IR theorists such as Martha Finnemore and Kathryn Sikkink,[115] it does seem incongruent to imagine a discussion on constructivism that fails to appreciate the concept of change.

In its application to the resolution of conflicts between States, constructivism, contrary to other approaches to the study of how States interact under international law, infers that cues may be taken from the historical, ideological, political, social and cultural factors that qualifies the interests and positions of the States. In Reus- Smit's words, "constructivism have sought to re-read the historical record, to re-think what has long been treated as given in the study of international relations".[116]

[113] Jutta Brunee & Stephen Toope, *Supra* n. 40
[114] They include generality, promulgation, non-retroactivity, clarity, non-contradiction, constancy, plausibility and congruence. See Lon. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1967) at 122
[115] *Supra* n. 127
[116] *Supra* n. 119

Although, not popularly utilised, Richard Jackson considers it the "most well-suited of all the main IR approaches to understanding conflict and conflict resolution".[117] According to Jackson, Constructivism fills in the loopholes that are evident from the Neo-liberal and Neo-realist approaches to international relations.[118] In having a better grasp of what this approach entails, one might find utility in contrasting it with other approaches to international relations.

2.6.1. Neo-Realism, Neo-Liberalism & Constructivism

Neo-realism, which is also known as structural realism was postulated by Kenneth N. Waltz. It is generally premised on the fact that the pragmatic outcome of the autonomy of States and the absence of an independent central authority is that States exercise dominion over other States depending on the nature of their respective powers. As far as conflict resolution is concerned, a Neo-realist approach to conflict resolution would necessarily involve negotiation of the exercise of the power by States in order to achieve peace in the interim.

Neo-liberalism on the other hand, although acknowledging the existence of States as primary actors in international relations, de-emphasizes the autonomy of the States and draws the spotlight on globalization and the interdependence of States through creation of institutional governing regimes at both regional and international level. One way to conceptualize the difference between Neo-realism and Neo-liberalism is that while Neo-realism focuses on agency, Neo-liberalism focuses more on structure.

Constructivism however brings a balance to this dichotomy by emphasizing on a holistic approach that appreciates the dynamic and contingent nature of the society. Constructivists posit that agency and structure are inter-dependent and co-constitutive. According to Jackson, "Agents produce

[117] Richard Jackson, *Supra* n. 39
[118] Ibid

structures through their beliefs, actions and interactions, while structures produce agents by helping to shape their identities and interests". In order words, the structure that defines rights, interests and identities of parties ought not be too sacrosanct but must consistently reflect the historical, social and cultural uniqueness of the agents.

Thus, an attempt to resolve conflicts by establishing structures for conflict resolution, would be ineffectual without the continuous cooperation of the States, which serve as actors. This is especially so, considering the paramountcy of the autonomy of the States under international law. Conversely, an attempt at conflict resolution that only involves the actors without appreciating the dynamics of structure is at best tentative. A constructivist approach to conflict resolution bridges this gap. According to Harry Gould, constructivists posit that agents and structures constitute one another and as such simultaneously enable and constrain one another.[119]

2.6.2. Constructivism in the Context of Existing Scholarship

The idea of a constructivist approach can be traced as far back as the conversation between Kenneth Waltz and Alexander Wendt. Waltz, in opposing the reductionism theory, insists that structures exist at the very basic level of social interaction and are in fact what define the behaviour of the actors. According to him, structure is observable, irreducible and efficacious.[120] In reacting to Waltz alongside Immanuel Wallerstein, Wendt demonstrates the inadequacy of their position.[121] According to Wendt, since it follows from Waltz's logic that the State predates the structure, as such the State must have a controlling influence over the structure. Wendt subscribes more to Gidden's theory of structuration which is premised on scientific realism which itself is premised

[119] Harry D. Gould, "What Is at Stake in the Agent-Structure Debate?", in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)
[120] Kenneth Waltz, *Theory of International Politics* (Redding, MA: Addison-Wesley, 1979)
[121] Alexander Wendt, "The Agent-Structure Problem in International Relations Theory" (1987) 41 Int. Organ. 335

on the fact that to understand structures, observations must be made to the mechanism that causes it to be established overtime. Wendt also proceeds to establish the fact that the activities of the agents would necessarily be in relation to the structural context. Thus, He highlights how agency works alongside structure in what he refers to as "dialectical synthesis". Wendt also notes that social structures are temporal and spatial. In other words, in understanding social structures, time and space must be taken into consideration.

Also notable is David Dressler, who in agreeing with Wendt, further buttresses the interrelationship between structure and agency. According to Dressler, "All social action presupposes social structure, and vice versa. An actor can only act socially because there exists a social structure to draw on, and it is only through the actions of agents that structures are reproduced".[122]

Paul Kowert explores the constructivist perspective to the formation of National Identity.[123] He does this by exploring the Agent versus Structure discussion. In doing this, he also refers to the work of Wendt and highlights that as opposed to the Neo-liberal and Neo-realist notion, constructivists view State identity as endogenous to the structure that governs the interaction among States. To him, just as much as the interaction between States defines or shapes their behaviour, it also shapes the perspective of how the respective States are viewed. One of the implications of this as discussed by Kuwert is that when political factors within a group are brought to fore, the strength of group identities become glaring and such variance in the group identities becomes exaggerated in the event of conflict.

[122] David Dressler, "What's at Stake in the Agent-Structure Debate?" (1989) 43 Int. Organ. 441
[123] Paul Kowert, "Agent Versus Structure in the Construction of National Identity" in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)

Vendulka Kubálková expresses how constructivism helps to appreciate the defect in the assumption that the norms and rules of International relations as accepted by Americans and Europeans is universally applied.[124] He highlights the need to consider the impact of local circumstances within the State, which contribute to the construction process. To him, international relations is worthwhile only when it reflects the cultural context; the cultural contexts of which is shaped by national, religious, and other identities. He particularly draws on the role of religion in constructing values for the State and therefore instrumental in International relations. This brings us to the discussion around TWAIL as an approach to engaging international relations matter.

2.6.3. Constructivism and TWAIL

Rooted in the Constructivist proposition is the need to appreciate the peculiarities of the society in question, in order to create an effective dispute resolution regime. As noted above, Reus- Smith describes it as re-reading "…historical record to re-think what has long bee treated as given...".[125] Notably, there is a growing approach to research, that is critical of the application of the conventional notion of international rules and norms to the peculiar context of third world nations, such as nations in Africa. These ideals are considered essentially Eurocentric as they fail to account for the peculiarities of third world countries as well as their historical context.[126] This is known as the Third World Approach to International Law (TWAIL).

TWAIL Scholars propose a transformative account of legal theories and principles that cater pragmatically to the context of the third world societies. They attempt to bring to fore the need to connect international laws and rules with the lived experiences of the societies against which they

[124] Vendulka Kubálková, "Reconstructing the Discipline: Scholars as Agents" in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)
[125] *Supra n. 119*
[126] James Thuo Gathii, *Supra* n. 42

are being applied and the need for the rules to be flexible enough to be reconstructed by the prevailing social factors[127]. Evidently, values can be drawn from TWAIL scholars on how to think about the rules that ought to govern the resolution of trade disputes in Africa and the import of a constructivist approach to same. More particularly, the TWAIL ideology is instrumental in appreciating the need for a constructivist approach to settling disputes in Africa.

In the words of Obiora Okafor, "TWAIL is not a monolithic school of thought".[128] It endures a spectrum of arguments and thoughts that may vary in different degrees, from a purely oppositional narrative that only upbraids the polity on the one hand, to a progressive reconstructive approach on the other hand. Certainly, a balance well struck would not just involve a recount of defects in the system but also proffer solutions. According to Chimni, "…we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law… a critique that is not followed by construction amounts to an empty gesture".

Thus, although, at the hub of the TWAIL ideology is the reformist approach to international relations that criticizes a default Eurocentric system,[129] the branch of TWAIL that this thesis shall be focused on is one that suggests an alternative that is carved out from the inherent constitutive forces of the third world, in this case, Africa.

The renowned work of Ibironke Odumosu-Ayanu is helpful in this regard. In proposing a "TWAIL- Constructivist" approach, she suggests an analysis of the Third World as "a contingent (self-identifying) category that insists on history and continuity, while acknowledging the

[127] Michael Hardt & Antonio Negri, *Supra* n. 43
[128] Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43:1 Osgoode Hall Law J. p. 171- 190
[129] Karin Michaelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 Wis. Int'l L. J. 353

diversities inherent within category".[130] In other words, she emphasizes the need to appreciate the unique features of the third world- in this case, Africa- which is formed by historical and socio-economic factors. In her analysis of what TWAIL Constructivism entails, she enumerates four key factors to consider including, the relevant actors, power relations, origin and place of socio-legal norms and ideational factors as well as the methods of engagement in the international order.

In talking about the relevant actors, she means to ask the questions, who are the actors? Since constructivism essentially involves an interplay between actors and structures, there is no gainsaying the importance of understanding who the actors are. For constructivist, definitions are essentially constitutive, and as such an answer to this could not be simplistic. A simplistic approach to defining the actors would be to limit such definition to State actors. The error in such approach is depicted in the reality that beyond the State as a personality, there are other stakeholders who perhaps have more stakes in a particular venture. For example, in thinking about international trade in Africa, the actors cannot be limited to the States, and policy relating to such venture ought to consider the interests, position and power of private citizens, pressure groups as well as sub-regional bodies.

In speaking to power relations, Odumosu means to ask the question, does the actor have the capacity to speak and to be heard? She reasons along the line of the imbalance of power that is evident in the international sphere to which she offers a divergent voice which is in tandem with the TWAIL Scholarship and which engages a narrative that appreciates the reality of the third world.

[130] Ibironke Odumosu, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010) [unpublished]

Since this thesis is based on a context that is intramural to the African region, the argument of power imbalance may not aptly apply. Rather, a useful venture would be to examine the demonstration of power relations as within the African region. As would be seen in subsequent discussions, the politics of power relations is not absent from the historical development of international trade in Africa. This is even more so at the sub-regional level. Hence, one may push the question relating to power relations beyond whether an actor has a voice or can be heard to how the voices of the loudest actors can be utilized in achieving the overarching goal.

In engaging the origin and place of socio-legal norms and ideational factors, she teases out the question, what is the actor saying? Here, she brings to fore the importance of developing socio legal norms and ideas that are characteristic of the African history and experience. This would be explored in subsequent discussions on the idea of Afrocentrism and its relevance to the resolution of trade disputes in Africa.

Lastly the notion of method of engagement is a question of how the actors present what they purport to express. This essentially speaks to specificities of methods, which even though does not form an integral part of this discourse, would be touched on in making recommendations.

2.6.4. Constructivism in a Nutshell

From the exposition above, certain themes can be drawn and depicted as the central themes of the constructivist notion. The first is the idea that constructivism suggests some sense of fluidity in the approach to the study of conflict resolution. Secondly, it suggests the need for flexibility in such manner as to accommodate and appreciate the dynamic nature of the societies and its attendant contingencies. Thirdly, there is the appreciation of the continuous interaction between the actors and the system in defining the regime that governs the relationships between the actors within the

system and consequently the resolution of potential conflicts. Finally, it highlights the need for any conflict resolution regime to reflect the unique socio-economic outlook of the society it is being applied, which itself is shaped by many factors including the historical evolution of the society.

In exploring the applicability of this approach to this study, the following exposition would be a discussion of the various theories that have been engaged in thinking about conflict and how it may be resolved. The goal is to draw parallels from the various propositions with the postulations of Constructivists.

2.7.Presenting the Underlying Connection

The intention of this exposition is to demonstrate that the propositions of constructivist theorists, in conjunction with some of the notions of TWAIL as highlighted earlier, intrinsically run underneath the idea of conflict and some of the theories that have been proposed about resolving it. The consequence of such connection is that it grants the validity as well as insight into how the approach might be applied to the specific case of resolving trade disputes in Africa, which will be explored in the subsequent chapter. In demonstrating this connection, a juxtaposition of the core principles of constructivism and the ideas of conflicts as exposited above is necessary.

In Stagner's postulations about the dimensions of conflict and his explanation on the Intensity and Regulation, the validation of the Constructivist idea of an interplay between actors and structure could not be far fetched. Similarly, in the development of the notion of Process-Oriented Conflict by Kristin Behfar et al, they demonstrate the interrelationship between Task Oriented conflicts and Relationship oriented conflicts.

This can well be paralleled to the interrelationship between Agents and Structure, as posited by constructivists. Task oriented conflicts may be seen as conflicts that emanate from the platform upon which the States relate while relationship-oriented conflict can be seen as conflicts that are premised more on the States as actors. The role of States as actors in the formation of conflict is also depicted in Lieberfeld's realism theory.

Furthermore, when Boulding notes that conflicts are enshrouded within a broader level of general conflicts which involve ethical, religious, cultural and ideological inconsistencies, he could well be said to have engaged a constructivist approach to conflict by highlighting the relevance of socio economic and historical factors. The indirect evolutionary approach theory that was developed by Little and Zeitzoff is also instructive in this area.

Johan Galtung's distillation between conflict emanating from inconsistencies of interests and inconsistencies of value reinforces this. An appreciation of potential inconsistencies on interests propels a consideration of conflict resolution beyond the appreciation of the terms of a treaty to the understanding of the cultural and historical context within which the parties relate.

As regards, the theories of conflict resolution as expounded above, it is almost needless to say that conflict transformation aligns accurately with the constructivist propositions. Apart from the fact that they both draw on the need to appreciate the context of the society, within which the actors relate, was developed, they also both propose a holistic approach towards resolving conflict.

CHAPTER THREE

A CONSTRUCTIVIST APPROACH TO RESOLVING TRADE DISPUTES IN AFRICA: AfCFTA DISPUTE SETTLEMENT MECHANISM AS A CASE IN POINT

3.1. **Background**

Having engaged in a theoretical analysis of conflict, the formation of conflict and its resolution in relation to the constructivist idea, the next step is to apply the values from the discussion to the particular context of AfCFTA and its dispute resolution mechanism. This chapter is dedicated to exploring this.

A discussion about AfCFTA as a Free Trade Area Agreement is best done against the backdrop of an understanding of what Free Trade area Agreements are, how they play out within the broad context of the rules that govern world trade, and what it means for them to have dispute settlement mechanisms.

3.2. PTAs and the MFN Principles

At the core of the rules that govern international trade is the principle of Non-discrimination. The non-discrimination rule is represented in Article I and III of the extant rules on General Agreement on Trade and Tariffs (GATT rules)[131] under two fundamental subprinciples, viz: Most Favoured Nation and National Treatment principles respectively.

[131] The General Agreement on Trade and Tariffs, which is the body of document that incorporates the rules that govern the world's trade in goods. It was originally created in 1947 and popularly referred to as GATT 1947, but was further amended in 1965. However, GATT 1947 as amended, was terminated in 1996 upon the establishment of the GATT 1994. However, in substance the content of GATT 1947 is largely integrated in the extant GATT 1994, except the 1994 version includes other rules including Agreements on Rules of Origin, Anti dumping agreements, among others. GATT 1994 currently exists as ANNEX 1 of the WTO Agreements (also known as the Marrekesh Agreement, 1994).

More relevant to this discussion is the most favoured nation principle, which is spelt out in Article I of the GATT rules. The Most Favoured nation principle is to the effect that each contracting party must treat all other nations equally in terms of imposition of taxes and tariff. Thus, no singular nation ought to be treated specially and given concessions that are not available to other nations. The rules precisely state that "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".[132]

However, one recognized exception is the creation of a Preferential Trade Agreement. Preferential Trade Agreements are arrangements between two or more nations to reduce or eliminate barriers between or among countries while maintaining barriers against imports from other nations.[133] A common example of Preferential Trade Agreements (PTAs) is the Free Trade Agreement.

The implication of establishing PTAs is that although there is a general restriction for States to provide trade concessions to specific States, such States can jointly agree to establish a Free Trade Agreement. Such Agreement can include specific rules of trade that would be effective among the contracting parties and exclusively so. Preferential Trade Agreements are common among regions[134]. As far as North America is concerned, there is the North American Free Trade Area

Meanwhile, the specific contents of the defunct GATT 1947 as incorporated in GATT 1996 is found in the section of Annex 1 tagged Annex 1A.

[132] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 1, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[133] Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary,* 3ed (UK: Oxford, Hart Publishing, 2018)

[134] It may be important to clarify that although PTAs are common among countries within the same continent, it not exclusively applicable to such kinds of relationships. Countries across different regions can conveniently engage in PTAs. An easy example is the PTA between Japan and Mexico which created tariffs for the import of Agricultural products and automobile and other industrial products respectively.

Agreement (NAFTA),[135] which is recently being transformed into the United States- Mexico-Canada Agreement (USMCA). The Europeans have the European Union as a major example of such preferential trade agreement.[136]

Thus, as a recognized exception to the apparent Most Favoured Nation principle a group of States or a couple of States may enter into a Free Trade Agreement which can enable them to offer tariff concessions that would operate within the scope of the agreement as between the State parties. However, technically speaking, the existence of a Free Trade Agreement may be seen in a sense other than an exception as it simply brings the operation of Most Favoured Nations principle within a narrower scope as between or among the States that are subscribed to the FTA.[137] In other words, unless as outrightly agreed by State parties and reflected in the Free Trade Agreement, there is no latitude for States to grant tariff concessions to specific States while ignoring certain others.[138]

PTAs can be beneficial for a number of reasons. According to Lester et al,[139] they make trading easier between natural trading partners. Moreover, they serve as reasonable impetus for developing countries to engage in trade and investment with one another. They also help to achieve trade liberalization beyond the level that is achievable under broader multilateral arrangements such as

[135] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA]
[136] European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957
[137] In his cerebral work, Sørensen highlights the application of the Most Favoured Nation Principle within the European Union. See Karsten Engsig Sørensen, "The Most-Favoured-Nation Principle in the EU" (2007) 34:4 Leg. Issues Econ. Integrat 315-347
[138] For example, the Most Favoured Nation principle is iterated in the Article 4 of Protocol to AfCFTA on Trade on Goods and section 18 of the AfCFTA. Section 18 of AfCFTA provides that "Following the entry into force of this Agreement, State Parties shall, when implementing this Agreement, accord each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties… A State Party shall afford opportunity to other State parties to negotiate preferences granted to Third Parties prior to entry into force of this Agreement and such preferences shall be on a reciprocal basis. In the case where a State Party is interested in the preferences in this paragraph, the State Party shall afford opportunity to other State Parties to negotiate on a reciprocal basis, taking into account levels of development of State Parties." It is interesting to note that Article 4 of the Protocol to AfCFTA in Trade allows States Parties to create PTAs that would operate within the scope of AfCFTA.
[139] *Supra n.* 3

the World Trade Organization (WTO). These reasons and more have inspired the establishment of the long overdue AfCFTA. AfCFTA exists as a PTA established to liberalize trade within Africa and to improve trade transactions among African States, with the broader objective of fostering unity within the continent. Since the bulk of this discourse revolves around AfCFTA, it is beneficial to understand its historical backdrop and the role it plays in the narrative of Africa's experience in respect to international trade. This will be explored subsequently.

3.3. African Continental Free Trade Area Agreement (AfCFTA)

3.3.1 Historical Development of AfCFTA

On March 9 2018, the AU Ministers of Trade approved the Declaration establishing the Agreement establishing AfCFTA; a move that marked the creation of the largest Free Trade Are in the World. This was the culmination of a series of negotiations that had been launched since 2015. The Agreement seeks to create a single market for goods, services and movement of persons and investment among African countries as well as lay the foundation for the establishment of a Continental Custom Union. The creation of a single continental market for goods and services is further aimed at fostering intra-African trade, facilitate structural transformation of African economies and promote sustainable and inclusive socio-economic development across the African continent.

This apparent inclination towards a continental wide economic integration is not recently conceived but can be traced to various resolutions and declarations in the 1970s and 1980s such as the 1979 Monrovia Declaration and the 1980 Lagos Plan of Action. The Lagos Plan of Action set out a framework for using sub-regional economic integration arrangements as preliminary steps toward the establishment of an African Common Market, the framework of which was

subsequently adopted formally by the Heads of States of the respective African countries by virtue of the 1991 Treaty establishing the African Economic Community, which is popularly known as the Abuja Treaty.[140]

However, as a result of the non-implementation or total disregard of States to the attempt at regional integration through the Abuja Treaty, intra region trade in Africa got further stifled. The need for initiatives in this regard led to the 18th Ordinary Session of the Assembly of Heads of State and Government of the AU, held in Addis Ababa, Ethiopia in January 2012. By 2017, a decision was made to fast-track the establishment of a Continental Free Trade Area. AfCFTA was later adopted as one of the flagship projects of the AU's Agenda 2063. It is envisaged by the Economic Commission for Africa (ECA) that AfCFTA will spur an estimated Gross Domestic Product worth 2.5 Million US Dollars across 55 Member States consisting of 1.2 Billion people, and boost intra African trade by 52.3% in as much as import duties and non- tariff barriers are eliminated and reduced respectively. [141]

3.3.2 Africa within the context of World Trade

In reflecting on its experience so far, the African continent may be said to have taken a rather eccentric posture in respect of inter-State trade relationship. For the second largest continent in the world with the largest number of countries within it, intra African trade relationships occur at a way lower rate than one would expect. The figures are even more absurd when placed in comparison to other continents. According to Aljazeera, Intracontinental trade relationships in

[140] Sean Woolfrey, Philomena Apiko & Kesa Pharatlhatlhe, "Nigeria and South Africa: Shaping Prospects for the African Continental Free Trade Area" (2019) The European Centre for Development Policy Management Discussion Paper No. 242**.** Online: ecdpm < https://ecdpm.org/publications/nigeria-and-south-africa-shaping-prospects-for-the-african-continental-free-trade-area/> [**https://perma.cc/WJ3E-ZWED]**

[141] United Nations Commission for Africa, African Continental Free Trade Area: Questions & Answers 1 (2018), https://au.int/sites/default/files/documents/33984-doc-qa_cfta_en_rev15march.pdf

Asia stands at the rate of 59%, the Europeans trade 69% of their products among themselves. Whereas, inter-State trade relationship in Africa is only at the meagre rate of 20%.[142]

The bulk of trading activities that have involved African States have mostly been focused outside the continent. According to Dr. Carlos Lopez of University of Cape Town, Africa serves as the third largest trading partner of the European Union, meaning Africa Trades with the European Union more often than Japan, Australia and Canada do. In recent times, it is recorded that China's export to East Africa has gone up 67%.[143]

The irregularity in this position is further highlighted against the understanding that Africa inhabits some of the fastest growing economies in the world. Nigeria for example has experienced roughly 357% increase in its population since independence in 1960. From a population of over 40 million people to a population of over 206,139,589, one could only imagine what the next twenty years would look like[144]. Consistently growing at the rate of 3.2% per year, there are projections that the population of the country is likely to double by 2050,[145] and may at the time constitute 26% of the world's working age population.[146] Combining this figure to the population of South Africa which is almost 60 million,[147] and the other 50 African Countries, the African Market is evidently

---

[142] Al Jazeera, "Will Africa's historic free trade Agreement succeed? Inside story" (6 April 2019) 00h 13m 35s, online (**video):** *YouTube* <https://www.youtube.com/watch?v=eMXu7KTxmVs> [**https://perma.cc/8ZJ9-UEZZ]**

[143] CGTN Africa, "Benefits of African Continental Free Trade Agreement" (7 July 2019) 00h 00m 13s (**video**): *YouTube* <https://www.youtube.com/watch?v=Ti5xyXA7vCY> [**https://perma.cc/NY4R-L82X]**

[144] "Nigeria Population" (last modified 24 April 2020), online: *worldometer* <https://www.worldometers.info/world-population/nigeria-population/> [**https://perma.cc/6MEJ-3HLN]**

[145] Carol Guensburg, "Nigeria's Population Projected to Double by 2050" (12 April 2019), online: *VOA* <https://www.voanews.com/africa/nigerias-population-projected-double-2050> [**https://perma.cc/CBY7-2RYJ]**

[146] David Luke, "Making the Case for the African Continental Free Trade Area" (January 15, 2019), online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/> [...];

[147] "South Africa Population" (last modified 24 April 2020) online: *worldometer* <https://www.worldometers.info/world-population/south-africa-population/> [**https://perma.cc/76DB-BKKK]**

enormous.[148] As far as trade is concerned, population matters. However, despite the fact that the African Continent wields this incredible leverage, its preference to transact beyond its border is baffling, especially considering the apparent inequities they face in competing with the advanced North.[149]

Although it does appear that in recent times, trade relations between African States with the North is subtly being replaced with transactions with fellow global south nations. As at 2006, China was identified as the biggest player in Angola's post-war reconstruction process and has also strengthened its influence in countries like Liberia, Sierra Leone and Tanzania- Center for Chinese Studies, China's Interest and Activity in Africa's Construction and Infrastructure Sectors. In 2006, Brazil's import from Africa stood at US$8.1 billion, which is a significant increase compared to the 1998 figure – US$2 Billion. Between 2000 and 2010, different forums have emerged including the China-Africa Corporation (2000), Korea- Africa Forum (2006), the Africa-South America Summit (2006), and the India-Africa Forum Summit (2008).[150]

Ofodile notes that there has been an attendant decline in the rate of African trade with the United States and the European Union compared to the 1980s.[151] This shift in focus from developed countries to other developing countries may appear to be a measure to offset the apparent inequities that arise from such transaction, it does not seem unavoidable even in transactions between the

[148] As of Monday, 24th April, 2020, the United Nations officially reports the population in Africa to be 1,334,302,099 Needless to say that the number keeps increasing by the second. "Africa Population" (last modified 24 April 2020) online: *worldometer* <https://www.worldometers.info/world-population/africa-population/> [**https://perma.cc/ZP7T-LMG9]**

[149] Nahanga Verter, "International Trade: The Position of Africa in Global Merchandise Trade" (13 Septermber 2017) online: *intechopen* <*https*://www.intechopen.com/books/emerging-issues-in-economics-and-development/international-trade-the-position-of-africa-in-global-merchandise-trade> [**https://perma.cc/2EPY-3NVL]**

[150] Uche Ewelukwa Ofodile, "South-South Trade and Investment Relations: Harmony and Disharmony – African Perspectives" (2011) 105 Proceedings of the Annual Meeting (American Society of International Law) 521.

[151] *Ibid*

independent African State and other developing States, especially when it involves developing States that are actually more developed than the African States.

The inequity that may arise from the cooperation of African States with other Global south is particularly brought to fore with the incidences that followed the recent out-break of the Covid-19 pandemic. The Chinese racial profiling of African immigrants in Guangzhou may be seen as an highlight of the racial dimensions to trade between China and Africans.[152] This can further be seen as one stratum of potentially many vices that must be carefully considered as Africa transacts with its other global south counterparts.

It may be argued that all these considerations ought to be sufficient incentive for the continent to seek alternative arrangements by looking inward. The AfCFTA may just be apt in providing such opportunity.

3.3.3. AfCFTA as a Nudge to Look Inward

The emergence of AfCFTA can be viewed as a possible panacea to address this dysfunctionality. Perhaps it would create an opportunity for African countries to rethink their trading culture by re-evaluating their leverages and taking full advantage of them.

David Luke stands out as intensely optimistic about AfCFTA. He argues that population, market potential and dynamism as well as economies of scale and scope are factors that work in favour of the African continent. To him these are the indices for a successful "trade-led diversification away from Africa's commodity dependence and towards industrial development and structural

[152] David Kirton, "China: Covid-19 Discrimination Against Africans" (5 March 2020), online: *Human Rights Watch* <https://www.hrw.org/news/2020/05/05/china-covid-19-discrimination-against-africans>[**https://perma.cc/S926-56R6**]

economic change".[153] Particularly, he stresses how AfCFTA potentially aids the diversification of African economy, its impact on African women,[154] and its tendency to promote the achievement of the Sustainable Development Goals (SDGs).[155]

The United Nations Economic Commission for Africa (ECA) in conjunction with the ATPC project that by 2040, intra African trade would have increased by between 15 and 25 per cent and that such increase would account for between USD$50 Billion and USD$70 Billion worth of trade.[156] Specifically, they project that intra-African Trade in industrial products such as textiles, apparels, leather, wood and paper, vehicles and transport equipment, electronics, and metals would increase by between 25 and 30 percent which is estimated at the value of between USD$36 Billion and USD$44 Billion, while intra African trade in Agricultural products such as Sugar, vegetables, fruits, nuts, beverages, tobacco, meat and diary products are projected to increase by between 20 and 30 percent, and this is estimated to be valued at between USD$9.5 Billion and USD$17 Billion.[157] Exchange in energy and mining products among African States is expected to increase by between 5 and 11 per cent and this is estimated at between USD$4.5 Billion and USD$9 Billion.[158]

---

[153] David Luke, "Making the Case for the African Continental Free Trade Area" (January 15, 2019), online (blog) *AfronomicsLaw* <http://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/> [**https://perma.cc/U8B5-2TNW**];

[154] Also buttressing on the impact of AfCFTA on women is the remarkable article of Oyeniyi Abe, see Oyeniyi Abe, "Gender Mainstreaming and Empowerment under Agreement for the Establishment of the African Continental Free Trade Area", (January 30, 2019) online (blog)*AfronomicsLaw* <http://www.afronomicslaw.org/2019/01/30/gender-mainstreaming-and-empowerment-under-agreement-for-the-establishment-of-the-african-continental-free-trade-area-afcfta/> [**https://perma.cc/385G-6UQD**];

[155] *Ibid*

[156]ECA et al, "An Empirical Assessment of the African Continental Free Trade Area Modalities on Goods" (2018) at 3, online (pdf): *United Nations Economic Commission for Africa*<https://www.uneca.org/sites/default/files/PublicationFiles/brief_assessment_of_afcfta_modalities_eng_nov18.pdf> [**https://perma.cc/W8U3-ZKX4**]

[157] *Ibid*

[158] *Id*

The transition into an AfCFTA driven African economy is obviously not without its cost. In this instance, this appears to be a cost that is not necessarily indispensable, but perhaps one that has found itself sentimentally attached over the years. It is estimated that although AfCFTA would boost the overall rate of Africa's Export and Gross Domestic Products (GDP), it will inevitably decrease its rate of export to the outside world, which is currently at a high rate.

For example it was projected that by 2020, with the effect of AfCFTA alone, independent of other sub-regional arrangements such as the Pan Arab` Free Trade Agreement, North Africa is likely to experience an increase by 2.7 per cent increase in its exports which is valued at roughly USD$8.9 Billion, but is expected to experience a gross decrease in its export outside Africa thereby losing USD$1.7 Billion.[159]

However, the above projection may not be factually realistic within the stipulated time frame in the light of certain intervening factors such as the Covid-19 Pandemic and the fact that the African States are behind timeline in executing of the goals birthing AfCFTA. Nevertheless, the prospects are glaring, and the calculations reveal that African States have more to gain engaging its compatriots than maintaining the status quo.

Moreover, in nudging Africa's economic sphere to life, another factor to consider is its trade dimensions. Almost half of the value-added products from North Africa are produced by resource-based activities and 60 per cent of its exports to the global markets are primary activities.[160] Medium and high technology industries only represent 23 per cent of the its industrial production.

---

[159] ECA, "Industrialization Through Trade in North Africa in the Context of the Continental Free Trade Area and Mega Trade Agreement" (2017) at 1, online (pdf): *United Nations Economic Commission for Africa*<https://www.uneca.org/sites/default/files/PublicationFiles/industrialization_through_trade_in_north_africa_eng_mm_ok.pdf> [**https://perma.cc/4DVL-EMKA**]

[160] Ibid

As the global stage gets focused more Mechanized and the gear shifting with the introduction of the 5G network,[161] Africa could not afford to be left out in these defining moments. The potentials that Africa's population advantage poses to E-commerce business and the Digitization of Africa is enormous. In one of its relatively recent reports, the ECA has emphasized the need for AU member States to fully leverage on the fourth Industrial revolution.[162]

This could be achieved through the implementation of AfCFTA, as collaboration of efforts are made by government and private corporations across the various African States. Sadly, It appears that the larger portion of regional integration that has been engaged by African States so far has been in terms of free movement of people[163], while production and trade integration aimed at meeting promoting science and technology remains largely uncharted.

If there is any phenomenon that has highlighted, more than any other, the dire need for African States to tend their allegoric garden rather than running to the forest for safety, it would be the recent Covid-19 Pandemic. With nations closing their borders, inter-continental trade stifled and African leaders who would ordinarily have flown abroad for treatments grounded and stranded,[164] there is no gainsaying the urgency required to heeding to the successive nudges to look inward.

---

[161] Don Rosenberg "How 5G will change the World" (18 January 2018), online: <https://www.weforum.org/agenda/2018/01/the-world-is-about-to-become-even-more-interconnected-here-s-how/> [**https://perma.cc/EVX6-GZZY**]

[162] ECA, et al, "Next Steps for the African Continental Free Trade Area- Visual Summary" (2019) at 18 < https://www.uneca.org/sites/default/files/uploaded-documents/RITD/ARIA9/aria9_visual_summary_v-final-web.pdf> [**https://perma.cc/BH2X-U3GY**]

[163] ECA et al, "Africa Regional Integration Index Report 2019" (2019) at 32, online (pdf)<https://www.uneca.org/sites/default/files/PublicationFiles/arii-report2019-fin-r39-21may20.pdf> [**https://perma.cc/5T3F-SKD7**]

[164] Tope Ayeni, "Nigeria's Chief of Staff Sheds Light on Conflicting Rules" (22 April 2020), online: *theafricareport* <https://www.theafricareport.com/26588/coronavirus-death-of-nigerias-chief-of-staff-sheds-light-on-conflicting-rules/> [**https://perma.cc/8WHR-A293**]

The hope is that sometime in the near future, a solidarity call to action like the one made by the WHO in order to tackle the global pandemic may be plausible within Africa.[165]

The latest Arii's report reveal that Africa still scores very low in terms of regional integration,[166] and a country like Nigeria which is a strong contributor to Africa's GDP, still has only a marginal proportion of its import from African States. In hoping that African region responds to the successive nudges to look inward, Arii report could not put it better; "Now that we are moving forwards with the implementation of AfCFTA, it is time for quantum leaps. Regional integration is the glue that will make that happen".

3.3.4 Prospects or Otherwise of AfCFTA

However, some levels of skepticism have been raised regarding the viability of AfCFTA, the most popular of which is its implementation. Popular among the skeptics is the richest man in Africa, Aliko Dangote who iterates that unless African Countries demonstrate a political will to allow the promises of the CFTA play out, it may well be an exercise in futility. He speaks drawing from his experience in being restrained from accessing the market due to government restrictions despite the existence of a subsisting sub-regional economic community.[167]

Although Dangote's concern in respect to potential non-cooperation of some African states, may be valid, it may also be argued that the AfCFTA has a larger scope than the sub-regional economic communities. Hence, where any State appears non-cooperative, there are vast alternatives to

---

[165] Susan Isiko Štrba, "Technology, innovation, Solidarity, COVID-19 and Lessons for the AfCFTA: A Brief Outline" (16 June 2020), online: <https://www.afronomicslaw.org/2020/06/16/technology-innovation-solidarity-covid-19-and-lessons-for-the-afcfta-a-brief-outline/> [**https://perma.cc/U2NG-QL4M**]

[166] *Supra* n. 178

[167] Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993.

explore. Moreover, it is understandable that competition may be stiffer amongst neighbouring countries, hence the potential hostilities from neighbouring governments. Thus, trade activities begin to multiply beyond the subregions, the ease of penetrating markets would become more glaring. In other words, if Republic of Benin refuses to open its borders up for Nigerian Traders pursuant to the AfCFTA Agreement, Nigerian Traders have an array of alternatives and may even go as far at the eastern part of Africa to countries such as Uganda or Kenya.

Generally, as African States begin to build substantial trade relations with their African counterpart, its reliance on the outside world reduces and this might bring the respective States to a healthier position to negotiate. This is without mentioning the potential to build a united trading bloc as against other States, which benefits are rather innumerable.

Despite the rigor and assiduity that seemed to have been exerted into the development of the Treaty, skeptical reactions to the viability of AfCFTA were apparent. These skeptical reactions were not just at the level of individual businessmen but also perceived from the disposition of some significant States in Africa. A notable incidence is the initial reticence and protracted lingering of Nigeria and South Africa, which are the two biggest economies in the Continent,[168] in signing the Treaty.[169]

Different issues were raised, including the possibility of dumping and its potential to stir up conflict among States. Despite the ultimate enforcement of the Treaty, skeptics still grapple with the

[168] Combined, the economies of Nigeria and South Africa account for a third of the Gross Domestic Product (GDP) of the entire region. IMF Data, GDP current prices.
[169] Chinelo Meg Egbunonu, "Nigeria's hesitation in joining the AfCFTA train: the real problem beneath" (10 June 2019), online: *AfronomicsLAW*<https://www.afronomicslaw.org/2019/06/10/nigerias-hesitation-in-joining-the-afcfta-train-the-real-problems-beneath/> [**https://perma.cc/UU72-MRCP**]

question of whether the Treaty would endure. In fact, different forms of study have been taken up to evaluate the implications of the Treaty in different respects.[170]

The potential failure of AfCFTA may best be imagined in terms of an impending fallout of the various African States as a result of conflicts arising from the implementation of the provisions of AfCFTA. It is one thing to have a treaty come into force and it is an entirely different quest to have State parties comply and implement its provisions. Africa's experience with the Abuja Treaty and some of its sub regional arrangements evidences this. This thesis explores a possible obviation of such fall out through an effective dispute resolution mechanism, but firstly an examination of the current dispute settlement regime under AfCFTA is pertinent.

3.4. AfCFTA Dispute Settlement Mechanism

3.4.1 Dispute Settlement as the Key to an Enduring AfCFTA

There are numerous areas that could be explored in order to evaluate the viability and durability of AfCFTA. However, for the purpose of this discussion, the Dispute settlement mechanism would be the area of concentration. The reason is because, as noted earlier, conflict is inevitable, and conflict resolution vital.

Moreover, there is the tendency that the reservations expressed by States before signing the AfCFTA Agreement may develop into tangible conflicts subsequently. Hence, the need for an effective dispute resolution regime is critical to the sustainability of the trade relation of African

[170] For example, there is the study that was recently done in the United Kingdom and published in the Mena Report evaluating the impact of the Treaty on Child rights and other human right matters: "Study On The African Continental Free Trade Area Agreement" (2019) MENA Report (London).

States under AfCFTA, as an effective dispute resolution regime has the potential to salvage any impending fallout.

Interestingly, Article 4 of the Protocol to AfCFTA on Dispute Settlement Mechanism acknowledges that "the dispute settlement mechanism of the AfCFTA is a central element in providing security and predictability to the regional trading system. In other words, improving the dispute settlement mechanism under AfCFTA can be a bona fide way of bolstering inter-State trade in Africa.

Quite unavoidable in these times is the recent outburst of the Covid-19 virus pandemic across the continents, and whose effects on international trade cannot be undermined.[171] As such, suggestions have been made for the need to rethink the institutional frameworks that govern economic corporation in the global south. This argument can be well extended to the dispute resolution regime under AfCFTA.

3.4.2 Dispute Settlement under AfCFTA

It is expedient at this juncture to understand the nature of the dispute resolution mechanism established pursuant to AfCFTA. Article 4 of AfCFTA spells out that the members States have the specific objective to, among others, establish a mechanism for the settlement of disputes concerning their rights and obligation. In further establishing the pertinence of dispute settlement to the goals of the goals of the member States, Article 4 of the Protocol to AfCFTA on rules and procedure on the settlement of Disputes establishes that the dispute settlement mechanism of the

[171] It is projected that the pandemic will result in a fall of 13% to 32% of world trade in 2020. Clair Gammage & Olabisi D. Akinkugbe, "Covid-19 and South-South Trade & Investment Cooperation: Three Emerging Narratives" (11 March 2020), online: *AfronomicsLaw* <https://www.afronomicslaw.org/2020/05/11/covid-19-and-south-south-trade-investment-cooperation-three-emerging-narratives/> [**https://perma.cc/2RGH-FG52**]

AFCFTA is a central element in providing security and predictability to the regional trading system. The goal is to create a mechanism that preserves the rights and obligations of the State Parties under the Agreement and clarify the existing provision of AfCFTA in accordance with customary rules of interpretation of international law.[172]

Article 20 of AfCFTA establishes a Dispute Settlement Mechanism and further provides for the basis for the establishment of the Protocol on Rules and Procedures on the Settlement of Disputes.[173] The Dispute Settlement Mechanism under AfCFTA is largely tailored after the WTO model. This may largely be premised on the intention to achieve similar success as seen in the global trading system.[174]

To oversee the dispute settlement system Article 5 of the Protocol establishes the Dispute Settlement Body (DSB) which is comprised of representatives of the State Parties and headed by a Chairperson who shall be elected by the State Parties. The DSB makes decisions by consensus and reports to the AfCFTA Secretariat on disputes related to AfCFTA.[175] The DSB has the prerogative to establish Dispute Settlement Panels as well as Appellate Body, the report of which the DSB gets to adopt as occasion arises. The DSB also has the oversight over keeping track of

[172] Article 54 of the Protocol on Rules and Procedures on the Settlement of Disputes

[173] It provides for the establishment of a Dispute Settlement Mechanism which shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes

[174] The notion that the dispute settlement mechanism obtainable in the global trading front is a success, seems a popular one. An erstwhile Director General of the GATT, Peter Sutherland, regards the WTO dispute settlement mechanism as the greatest achievement of the international community since Bretton Woods. Mike Moore, a more recent former Director General of the WTO describes it as the "crown jewel" of the entire multilateral trading system. J Bacchus, "Inside the World Trade Organization" (2002) APEC Study Centre Discussion Paper No. 18. <https://www8.gsb.columbia.edu/apec/sites/apec/files/files/discussion/bacchusdp.pdf>[**https://perma.cc/FUD9-5WN9**]. However, one may argue otherwise, especially considering the recent hitch the WTO DSM is currently facing, that has led to the redundancy of its Appellate Body. Keith Johnson, "How Trump may Finally kill the WTO" (9 December 2019), online *FP* <https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/> [**https://perma.cc/3ZZY-QSR5**]

[175] The Secretariat is established pursuant to Article 13 of the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA), Mar. 21, 2018 (entered into force May 30, 2019) [AfCFTA]

implementation of rulings and recommendations of the Panel and Appellate Body and may authorize the suspension of concessions and other obligations under AfCFTA when it so deems it fit.

At inception, any disputes brought under this mechanism is mandated to explore potential amicable settlement. This is technically known as the Consultation Stage. The complaining party gets to send a written request for consultation to the defaulting party, while notifying the DSB. The defaulting party is required to respond within 10 days of receiving the request, after which consultation is required to begin. This must be no later than 30 days after receipt of request.

The consultation process is typically confidential and without prejudice to the rights of any of the disputants. The essence is to explore the potential for amicable settlement between parties, and if this is not achieved within 60 days from the commencement of the consultation process, the complaining party gets to refer the matter back to the DSB and consultation would be deemed to be over.

Consultation is essentially a prerequisite before a Dispute Settlement Panel can be set up. Thus, without going through consultation, a complaining party cannot request for the setting up of a panel. Except in the case of urgency such as perishable goods, the complaining party may request for the setting up of a panel after 20 days from commencement of consultation and no agreement has been reached.[176]

The Panel conducts a formal resolution of dispute and parties are expected to comply with the rulings and stipulations of the Panel in good faith and in a timely manner.[177] However, the panel

[176] Article 7(9) of the Protocol
[177] Article 6 of the Protocol

is expected to make an objective assessment of the facts of the case in accordance with the provisions of AfCFTA. Although the Panel may still consult with the Parties to determine whether a mutually satisfactory solution can be reached.[178]

The Panel is expected to conduct its business within 5 months from the time the Panel is established. However, in the case of urgency, particularly those involving perishable goods, the Panel is expected to conduct its business within one and a half months.[179] After considering the submissions and arguments of parties, the Panel will issue a draft report which it shall present to parties, and to which parties may submit their comments.[180] By way of comment, a party may request for an interim review of the report.[181]

The Panel will then submit its final report. The report will contain the findings of fact, the application of the relevant provisions of AfCFTA, rationale behind decision, and its recommendation.[182] Where a party makes a request for an interim review of the report, the final report will reveal the arguments and discussions made during the interim review stage.[183]

The Panel waits for 20 days after sharing the initial report to the parties before transmitting the final report to the DSB in order to afford the State Parties ample time to consider the report and make any comment or otherwise request for a review.[184] Upon submission of the final report to the DSB, the DSB waits for a period of 60 days before convening a meeting with the disputing State Parties in order to obtain a consensus to adopt the report.[185] Once a consensus is reached, the

[178] Article 12 of the Protocol
[179] Article 15(4) of the protocol
[180] Article 18(1)
[181] Article 18(2), (4), (5)
[182] Article 15(5)
[183] Article 18(7)
[184] Article 19(1)
[185] Article 19(4)

report is deemed to be the final decision of the DSB, which shall be final.[186] However, the report will not be considered for adoption if any of the State parties raises an intention to appeal, except and until the appeal has been heard.[187]

Any State party that intends to appeal against the decision of the Panel is expected to lodge same with the DSB within 30 days of communicating such decision to the DSB.[188] The Appeal proceedings shall be concluded within a period of 60 days, and it shall only involve deliberations on issues of law.[189]

Article 22(9) is noteworthy. It provides that "An AB report shall be adopted by the DSB and unconditionally accepted by the Parties to the dispute unless the DSB decides by consensus not to adopt the AB report within thirty (30) days following its circulation to the State Parties. This Adoption procedure is without prejudice to the right of States to express their views on an AB report." In other words, when the Appellate Body gives it report, the report subsequently gets adopted as the decision of the DSB and unconditionally binding on State parties, until there is a contrary consensus by the DSM.

This may be contrasted with the procedure at the level of the Panels. While the consensus of the DSB is needed to validate the repot of the Panels, the consensus of the DSB is only needed to invalidate the decision of the Appellate Body. This is known as the revered or negative consensus and it is also a derivative of the WTO Dispute Settlement Mechanism.[190] While it serves as

---

[186] *Ibid*
[187] *Id*
[188] Article 19(6)
[189] Article 21
[190] Gerhard Erasmus, "Dispute Settlement in the African Continental Free Trade Area" (11 July 2019), online: *tralac* <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> [**https://perma.cc/JGP9-KQLJ**]

arguably the most coercive part of the procedure, it serves the purpose of forestalling a situation where a defaulting party frustrates the formal proceedings and pre-empts the adoption of binding decisions and judgments.

States are generally expected to comply with the ruling and recommendations of the DSB, however, in the event of non-compliance, the Aggrieved State party may temporarily suspend concessions or other obligations towards the defaulting State Party. The Aggrieved party may also receive compensation, which is only available when the defaulting party voluntarily agree to same.[191]

3.4.3 AfCFTA DSM- An Imported System

As noted earlier, the Protocol to the AfCFTA on the settlement of dispute is largely derivative of the Dispute Settlement Mechanism under the WTO.[192] The historical trends of Africa's experience with regional trade reveals the importation of foreign regimes as almost a norm; one that has not exactly produced positive results.[193] The AfCFTA dispute settlement protocol is not the first move to import a dispute resolution regime from WTO or any foreign body for that matter into the African Community The Tripartite Free Trade Area Agreement (TFTA), which is an agreement among the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), and Southern African Development Community (SADC) have their dispute resolution mechanisms modeled after the WTO.

[191] Article 25
[192] DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU]
[193] This may be attributed to Africa's non-litigious culture in respect of regional trade disputes, which according to Akinkugbe, is pervasive among African States

Similarly, a gaze into the dispute settlement mechanism within the various sub-regional communities particularly the EAC and the Economic Community of West African States (ECOWAS) shows a transplantation of the European Union system. Although this system is more formal and juridical.

Meanwhile, the experience of the Communities at the regional level is a testament to the fact that the development of a homegrown Afrocentric dispute resolution regime, as opposed to importing from the global sphere, is long overdue. The experience at the subregions is that the Institutions set up for the purpose of settling trade disputes are rather redundant, caught in the loop of what Mihreteab Tsighe regards as the "virtual idleness of inter-State dispute settlement mechanisms".[194] In a bid to stay relevant there have been successful clamours to expand the bandwidth of their respective jurisdictions to accommodate human right disputes,[195] which move has also been met with some backlash.[196] The experience with the SADC is particularly notable because it led to the suspension of the SADC Tribunal altogether.[197]

Speaking to the replication of the WTO styled DSM in the SADC Protocol, Clement Ng'ong'ola notes that this can be "criticized as a quixotic experiment, attempted without a profound appreciation of the special needs of a fledgling institution and of the different environment obtaining in the WTO"[198]. In other words, if there ought to be a transplantation of any dispute

[194] *Supra* n. 23
[195] Olabisi D Akinkugbe, "What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution" (9 April 2019), online (blog): AfronomicsLaw <http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/ > [https://perma.cc/NPZ6-SRTS]
[196] Karen J. Alter, James Gathii & Laurence R. Helfer, "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences" (2016) 27:2 EJIL 293
[197] Frederick Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction", (2013) 13:1 HRLRev, pp. 153 – 165.
[198] C. Ng'ong'ola "Replication of WTO dispute settlement process" (2011) 1 SADC LJ, p.62.

settlement system at all, it ought to reflect the socio-political realities of the Africa. Thus, even though the WTO Dispute Settlement Mechanism may appear to be a global success, "wholesale transplantation without regard to the socio-economic, historical, political, and heterogeneity of the African" is inapt.[199]

An effective dispute settlement system under AfCFTA would invariably be informed by the lessons learnt from the lived experience of the sub-regional communities in Africa. If there is any thing that is brought to fore by the redundancy of the community courts within the sub-regional communities in Africa, it is the fact that Africans do not have the proclivity to settle their trade disputes in a formal or juridical system, in whatever spectrum it might appear. African States are more inclined to resolve their trade disputes through non litigious methods.[200]

One gets to wonder why there is the insistence on dispute settlement systems that ultimately end up redundant. It is my submission that the ostensible need for a rule-based system, such as the one that underpins the AfCFTA Protocol on dispute settlement is merely assumed, as African States have a tacit culture of non-litigation of economic disputes.[201]

Evidencing the reticence of trade actors within Africa to rule-based formal approaches to resolving trade disputes, the disposition of the East African Business Council to the East African Court of Justice gives a valuable hint. There is an obvious preference to engage the administrative structure

[199] Olabisi D. Akinkugbe, *Supra* n. 24
[200] James Thuo Gathii "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement" (10 April 2019) online: *AfronomicsLaw* <https://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/>[**https://perma.cc/5K5Z-TZTW**]
[201] *Supra* n. 48

set up pursuant to the Mechanism for Reporting, Monitoring & Eliminating Non-Tariff Barriers (NTBs).[202]

3.4.4 Alternative Dispute Settlement Arrangements

In thinking about alternatives to the rule based formal system, one of the practices within the COMESA community provides insight. An aggrieved COMESA member may write to the defaulting party in respect to a perceived treaty violation and put the COMESA secretarial in copy of the memo. The memo will include the details of the allegation and a request for clarifying information. Where parties hit an impasse, the COMESA Committee on Trade steps in and submits a report to the Council of Ministers or to the COMESA Secretary General requesting for investigation into the matter.

The Mechanism for Reporting, Monitoring & Eliminating Non – Tariff Barriers (NTBs) also gives an insight into what an alternative model might look like. Interestingly, the Mechanism for Reporting, Monitoring & Eliminating Non – Tariff Barriers (NTBs) have been established pursuance to AfCFTA. Annex 5 to the Protocol on Trade in Goods establishes the mechanism thereby affording members of the private sector to file complaints in specific trade obstacles.[203] The complaint is then sent to the government of the State involved for them to react and resolve the complaint within concrete timeline. This is advantageous on several bases. Apart from the fact that it affords a fast and expedient method to addressing such complaints, it is also available to all stakeholders including the private traders, academicians, as well as AfCFTA personnel.

---

[202] *Supra* n. 49

[203] "The African Continental Free Trade Area (AfCFTA) – Creating One African Market" online: *African Continental Free Trade Area Non – Tariff Barriers Reporting, Monitoring and Eliminating Mechanism* <https://tradebarriers.africa/about>[**https://perma.cc/QA2F-F2Q5**]

The fact that AfCFTA incorporates systems for resolving trade related disputes other than the central mechanism established under the Protocol on dispute settlement, is noteworthy. In fact, Article 3(2) of the Protocol on dispute settlement is to the effect that any special additional rule and procedure for resolving disputes established in AfCFTA takes primacy over the protocol on dispute settlement. This has been noted to infer that there is a tacit understanding that effective trade dispute settlement could transcend the formal system.[204]

The provision of alternative mechanisms for dispute settlement is also replete even within the Protocol for dispute settlement. Article 27 provides that disputants may by mutual agreement resolve their disputes through arbitration proceedings, however where parties resort to arbitration, they are not permitted to simultaneously refer the matter to the DSB. This is understandable since such act would only amount to forum shopping. The protocol also allows for Good Offices, Conciliation and Mediation.[205]Although the use of Good Offices, Conciliation and Mediation, quite unlike Arbitration, can be used simultaneously alongside the DSB. These buttress the idea that the draftsmen understand that the formal system could not be totally relied on.

3.5. Theory: A Tool for Constructing and Deconstructing

The goal of this paper is not to totally undermine the efforts of the African leaders in instituting AfCFTA, neither is the priority to expose the flaws of the Protocol on dispute settlement. Rather what this thesis intends to achieve is to demonstrate the cogency of deconstructing phenomena in order to appreciate and appropriate their values.

[204] *Supra* n. 49. It is noteworthy that the WTO DSM has no such provision and the WTO DSU serves as the ultimate forum to validly resolve international trade disputes.
[205] Article 8 of the Protocol

One veritable way to achieve a critical examination of any phenomenon is by theorizing. Bacharach defines theory as "a statement of relations among concepts within a set of boundary assumptions and constraints".[206] Strauss & Corbin defines it as "a set of well-developed categories (e.g. Themes, concepts) that are systematically inter-related through statements of relationships to form a theoretical framework that explains some phenomenon".[207] Eagleton notes that "Theory is just a practice forced into a new form of self-reflectiveness on account of certain grievous problems it has encountered".[208] He further notes that "Theory is just human activity bending back upon itself, constrained into a new kind of self reflectivity"

In other words, theory is about teasing out the underlying patterns that shape the scope within which a concept or phenomenon can be defined or evaluated. Strauss & Corbin define these patters as "well developed categories" or "themes" or "concepts". Although Strauss & Corbin stress the import of such concepts, themes and categories as explaining phenomena, but they also may be beneficial in analyzing phenomena. Eagleton's idea of theory is noteworthy in this regard. Eagleton emphasizes the value of theory in exploring some form of self reflectiveness.

This informs the need to reflect on trends and experiences in order to tease out consistent patterns that can be appreciates in forging better experiences in the future. Thinking about theory in this manner reveals the reformative potential of theorizing as opposed to the facile idea that theory is at best abstract and elusive.

[206] S. B. Bacharach, "Extraordinarily ordinary: Working in the Social Economy" (1989) 14:4 Soc. Enterp. J. 496
[207] A. Strauss & J. Corbin, *Supra* n. 125
[208] Terry Eagleton *Supra n. 126*

In reflecting on trends and developments, and highlighting underlying pattern, explanations of such patterns are fixed in concepts, categories or themes for ease of description and reference. One of such concepts that this thesis intends to bring to fore is the notion constructivism.

3.5.1 The Constructivist Theory and its Relevance to AfCFTA DSM

Some degree of exposition has been made in the preceding chapter on what constructivism entails, but as a form of recap, one may posit that Constructivism brings to fore the crucial interplay between agency and structure in properly defining systems within the society and forging reasonable progress. To constructivists, the actors influence the system and the system is a product of the posture and actions of the actors. This narrative is evident in how States interact with one another on the basis of trade and how they resolve impending conflicts.

As far as Africa is concerned, just like other third world countries, there is the narrative that one of the relics of the colonial experience is that there is a deprivation of the continent of the freedom to self reflect. Consequently, there is the deprivation of the opportunity to appreciate its peculiar interplay of agency and structure, and how they play out in order to understand the practical workings of its systems. Rather, there seems to be a direct importation of norms that, although may be efficient in other climes, would encounter some hiccups when applied to Africa.

This discussion can be transported to how African States resolve trade disputes among themselves, as a phenomenon. While discussions are ongoing about AfCFTA as the recent most significant development in Africa, it may be worthwhile to reflect on and examine whether the Constructivist narrative is being leveraged on in exploring a unique African experience. With the telescope drawn on dispute resolution, the subsequent paragraphs would involve some form of juxtaposition between the values derived from constructivism as a theory in terms of its application to the

African experience and how well the dispute settlement mechanism under AfCFTA appreciates such values.

Basically, these values shall be explored under two broad topics. Firstly, in discussing Conflict Transformation, the need to define the structure in such manner as to reflect the peculiarities of the actors within them is brought to fore. Subsequently, the notion of Pan Africanism would be explored in understanding the Actors and how they define the structure.

A. Conflict Transformation

Conflict Transformation could not be more emphatic in discussing a constructivist approach to resolving dispute. Conflict Transformation transcends the rights, interests and powers of the actors within a society to examine the context within which the actors interact thereby addressing the social structure and system giving rise to the conflict in the first place.[209] It appreciates the perspective that disputes are beyond just existing phenomena, but are social constructs whose shape is precedent on the definition that the actors within the society give it.[210]

Hugh Miall describes Conflict Transformation as the process of "engaging with and transforming the relationships, interests, discourses and if necessary, the constitution of society…", as they are more effective in explaining "the pattern of conflictual relationships that extend beyond the particular site of conflict."[211]

In describing the structure of the system that gives rise to conflict, Thania Paffenholz uses the term "root causes". For her, Conflict Transformation is about analysing not just the apparent causes of

[209] Robert Bush & Sally Pope, *Supra* n. 33
[210] William F. Felstiner et al, *Supra* n. 34
[211] Hugh Miall "Conflict Transformation: A Multi-Dimensional Task" in Alex Austin, Martina Fischer & Norbert Ropers, (eds.), *Transforming Ethnopolitical Conflict. The Berghoff Handbook* (Wiesbaden: VS Verlag, 2004)

conflict but the root causes. For her, this would involve addressing the perception and attitudes of the actors, that is the presumed behaviour, the actual behaviour of the actors and the context within which they interact.[212] This is particularly important considering that these perceptions, behaviours and even the interests of the parties may change as the society evolves. Change in governance is particularly relevant in this regard.

The import of the dynamics of the society is one of the vital points Vayrynen brings to fore in this discourse. According to him, "The bulk of conflict theory regards the issues, actors and interests as given and on that basis makes efforts to find a solution to mitigate or eliminate contradictions between them. Yet the issues, actors and interests change over time as a consequence of the social, economic and political dynamics of societies".[213]

The relevance of this narrative in rethinking how to resolve trade disputes within Africa cannot be undermined. One obvious feature of the African continent is its diversity across cultural, political, language, religious and even historical front, and this ought to count for something in fashioning an effecting dispute settlement regime that is afrocentric.[214] The tendency for frictions on this

---

[212] Thania Paffenholz, "Understanding Peacebuilding Theory: Management, Resolution and Transformation" in Kristina Lundqvist, ed, **"**Conflict transformation: Three lenses in one frame" (2009) 14:2 Journal of Peace Research and Action

[213] R. Vayrynen, "To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts", (ed.), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation (*London: Sage, 1991) 1-25.

[214] In speaking to the ethnic and cultural differences in Africa, a glaring example is recurrent strife between nomadic-oriented tribes who tend to seek grazing land and water supply for their livestock even in places beyond their territories. The case of the scuffle between the Ethiopian empire and the ethnic Somalis was particularly interesting. The ethnic Somalis, who were ordinarily nomads, who tended to seek water and food for their livestock, were also impoverished of water supply, even for themselves. They could not resist the need to explore the riverine area of Ogaden region, which happens to fall within territory of Ethiopia. The Ethiopians on the other hand did not take kindly to unauthorized intrusion. See Taslim Olawale Elias, *Africa and the Development of International Law* (Leiden; A. W. Sijthoff, 1972). The religious, language and cultural factor is particularly important to highlight. For example, it accounts for the obvious disconnect between the Northern part of Africa and the rest of Africa. The Northern countries are more united as against other countries in Africa, essentially because they share similar language and culture that is embedded in their religious and political outlook. See May Barth, "Regionalism in North Africa: The Arab Maghreb Union in 2019" (2019) Brussels International Centre Policy Report, Democratic Development Series. The Political difference can be understood by considering a country like Rwanda, where the President assumed office since April 2000, and

account is not unprecedented in the African trade relations story. An account of the historical development of ECOWAS reveals an initial backlash by the francophone countries in West Africa,[215] which came together to form the Communaute economique de l'Afrique de l'ouest (C.E.A.O.).[216] The unfavourable treatment of a Nigerian businessman in Benin Republic as seen in the case of Ukor v Lalaye,[217] and Dangote's protest against his inaccessibility to the Benin Market due to the hostile economic measure employed by the Benin government,[218] further buttresses the need for a transformative approach to resolving trade disputes in Africa.

A constructivist approach to resolving trade dispute through the lens of conflict transformation would also inform a practical appreciation of who the actors are in order to further understand the role they play and how such interactions play out in the formation of conflict and can be instructive in diffusing them.

It is interesting that the dispute settlement mechanism under the AfCFTA envisages a State- State dispute settlement, whereas as far as the African environment is concerned, the private sector plays a huge role, and potentially a bigger role in inter-State trade relations.[219] The fact of the Ukor v Lalaye case that was brought before the ECOWAS Court of Justice revealed how Nigeria was distanced from the process, thereby leaving the Plaintiff without leverage, since the mechanism

---

juxtaposing it with a country like Nigeria whose president can only remain in office for a maximum of 8 years. Situations where one regime becomes less committed to the AfCFTA cause ought to be factored in developing a dispute settlement system.

[215] Daniel C. Bach "The Politics of West African Economic Co-operation: C.E.A.O. and E.C.O. S.W.A.S" (1983) 21:4 J. Mod. Afr. Stud. 605 - 623

[216] The Communaute economique de l'Afrique de l'ouest comprised of six francophone countries including; including Ivory Coast, Senegal, Niger, Upper Volta, Mali and Mauritania

[217] *Ukor v Lalaye*, 2005 ECW/CCJ/APP/04/05

[218] Mo Ibrahim Foundation "Mo in Conversation with Aliko Dangote" (6 April 2019) 00h 14m 35s, online (**video**): *YouTube* <https://www.youtube.com/watch?v=OBnQ21NSpMw>[**https://perma.cc/FWL5-D5KF**]

[219] Landry Signe & Collette Van Der Ven, "Keys to Success for the AfCFTA Negotiations" (2019) Africa Growth Initiative Policy brief. Pg. 9

that the ECCJ afforded mostly State- State dispute settlement structure, except in cases involving the breach of human right.[220]

Another integral feature of Conflict Transformation is that it affords a long-term approach to resolving disputes. In Lederach's words, "Conflict transformation must actively envision, include, respect, and promote the human and cultural resources from within a given setting. This involves a new set of lenses through which we do not primarily see the setting and the people in it as the problem and the outsider as the answer. Rather, we understand the long-term goal of transformation as validating and building on people and resources within the setting".[221] He proposes the building of long-term infrastructure for peacebuilding by supporting the reconciliation potential of society. As noted earlier, AfCFTA is on of the flagships for the AU's agenda 2063. It goes to say that building a much more integral and fundamental dispute resolution system that is sustainable on a long run fits more within the goals of the AU than a facile system that purportedly resolve immediate needs.

Interestingly, Hugh Miall advocates a more frequent application of the Conflict Transformation within a prescribed contextual framework in order to achieve a more comprehensive evaluation of the theory.[222] Through this thesis, I present the dispute settlement regime under AfCFTA as a veritable platform to explore such application in order to achieve not just a more effective trade dispute resolution system for the African continent but also provide a basis for more thorough examination of the conflict transformation theory.

[220] Article 4 of the Supplementary Protocol to the ECOWAS Treaty. SUPPLEMENTARY PROTOCOL A/SP.1/01/05
[221] John P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (New York: Syracuse University Press. 1995)
[222] *Supra* n. 66

B. Towards an Afrocentric Approach

As iterated repeatedly in this thesis, at the hub of constructivism is the focus on the substantial interplay between Agency and Structure. According to Jackson, "Agents produce structures through their beliefs, actions and interactions, while structures produce agents by helping to shape their identities and interests".[223] In the preceding segment, the bulk of the discussion related to how the beliefs, actions and interactions affect the structure. This segment is more focused on the shaping of identities and interests of Agents within the structure. The discussion on identity as it relates to Africa cannot be discussed without the mention of TWAIL, which has earlier been exposited on.

Rooted in the Constructivist proposition is the need to appreciate the peculiarities of the society in question in order to create an effective system. Concomitantly the TWAIL idea criticizes the application of the conventional notion of international rules and norms to the peculiar context of third world nations, including Africa. TWAIL Scholars propose a transformative account of legal theories and principles that cater pragmatically to the African context.

They attempt to bring to fore the need to connect the rules of international laws with the lived experience of the societies against which they are being applied and the need for the rules to be flexible enough to be reconstructed by the prevailing social factors. Invariably they propose a transformative account of legal theories and principles that cater pragmatically to the context of the third world societies.[224]

[223] Richard Jackson, *Supra* n. 39

[224] Although the idea that flow from TWAIL are quite expansive, however, in the analysis in this thesis is restricted to the branch of TWAIL that, in the words of Ibironke Odumosu- Ayanu, serves as "a contingent (self-identifying) category that insists on history and continuity, while acknowledging the diversities inherent within category"

In attempting any constructivist analysis that aims to exposit on the unique identity of the African Continent, the notion of Pan-Africanism or Afrocentrism cannot be overlooked. At the epicentre of what may be described as a Pan Africanist notion is the need to unite the African continent. What exactly it means to unite Africa and the technical definition of Africa is a more nuanced discussion that will be explored shortly. It does suffice to mention that the idea of uniting Africa, however laudable it may sound, is not itself met without some level of skepticism and cynicism. These are probably understandable when seen in the light of the complexities that beclouds the African continents and its inherent disparities on many quarters.

Nonetheless, the daunting confidence of persons like Kwame Nkurumah, the then Prime Minister of Ghana, may be credited for existence of the notion till date. According to him, "I have often been accused of pursuing a 'policy of the impossible'. But I cannot believe in the impossibility of achieving African union any more than I could ever have thought of the impossibility of attaining African freedom … Africa must unite. We have before us not only an opportunity but a historic duty".[225] Mammo Muchie describes him as the "most extraordinary Afro-optimist of the Twentieth century". The notion can be said to have achieved a considerable level of success when one considers the establishment of the Organization of African Unity (OAU) and its subsequent transformation into the African Union.[226]

What exactly is Pan Africanism? A peculiar feature of the various literature that attempt to exposit on the theory of Pan Africanism is that different scholars offer different shades of meaning to the idea of Pan Africanism. More glaring is the disparity between what can be regarded as the

[225] Kwame Nkrumah, *Africa Must Unite* (London: Panaf, 1963), p. 231.
[226] The OAU was created in 1963. In 1999, member states of the OAU called for its transition to the African Union. The first assembly of the African Union was held in 2002

traditional notion of Pan Africanism and another which stems more from a liberalized perspective or narrative of the world order. A certain scholar wittily distills both ideas by describing the former as "Pan Africanism" and the latter as "pan-Africanism".[227]

The traditional idea of Pan Africanism as iterated by persons like Kwame Nkurmah, is essentially in a bid to achieve a form of unity and solidarity and build a sense of community among States that are situated within the African continent.[228] According to Mammo Muchie, the Pan Africanist theory essentially grapples with the establishing principles that are beneficial in evolving a shared goal to pursue African union and solidarity.[229] Charles Adrian buttress on the idea of Pan Africanism as building a union or community within Africa, by noting that the political and economic viability of the continent is precedent on it.[230]

On the flipside, in a bid to accommodate the lived experiences of persons of black descent that live in diaspora, there has been an attempt to expand the definition of Pan Africanism. Essentially, the traditional idea of Pan Africanism cannot be divorced from the colonial experience of the African experience. So, the idea of Pan Africanism is contingent on the discussion on how the African continent can find its footing and thrive both politically and economically having experienced protracted years of oppression and subjugation in the yesteryears. Meanwhile some Africans were at the time of the colonial era were forced to migrate on unpleasant terms. As such the liberalist

[227] George Shepperson, "Pan-Africanism and 'Pan-Africanism': Some Historical Notes," (1962) 23 Phylon 346.
[228] Deliberations were made in various conferences in developing this idea including the Pan – African Conference which held London in 1900; All- Africa People's Conference of 1958 which was held in Accra, as well as a series of 5 conferences held in Paris, London, Lisbon, New York, and Manchester between 1919 and 1945. See George Shepperson. *Ibid*
[229] Mammo Muchie, "Pan-Africanism: An Idea Whose Time Has Come" (2000) 27:2 Politikon 297.
[230] Charles F. Andrain, "The Pan-African Movement: The Search for Organization and Community," (1962) 23:5.Phylon

idea of Pan Africanism seeks to incorporate in its definition, the identity of such persons and their descendants, who are generally regarded as being in diaspora.

The major proponent of this broad definition of Pan Africanism is W.E.B DuBois, who connects the American struggle for civil liberties with the African post colonial struggle.[231] To Du Bois, Pan-Africanism meant simply the liberation of Africa from colonialism, achieving African unity, and triggering the revival of the continent.[232] Charles Ashante, drawing on Dubois' notion describes Pan Africanism as the idea of protecting Africa's self determination, and promoting a sense of consciousness and group solidarity amongst people of African origin.[233]

It is inferable that while the traditional notion of Pan Africanism places an emphasis on the expediency for the African Continent to progress by collaborating and uniting with one another, the liberalist idea focuses more on the identity that is formed by the eerie past.[234]

However, there are quite a few issues that can be raised against the liberalist viewpoint of Pan Africanism, especially in the light of the rules of international law. To start with, the assumption that people of "African descent" qualify as a people deserving of the right to self determination, as subtly inferred by the liberalist, is presumptive. This is especially because the definition of "people" under international law remains elusive till date. Assuming without conceding, that people of African descent constitute a people under international law, this does not itself grant

[231] However, a number of scholars have also developed this thought. See Babacar M'baye, "Pan Africanism", in Richard M. Juang & Noelle Morrissette, eds, *Africa and the Americas: Culture, Politics and History: A Multidisciplinary Encyclopedia,* volume 1 (California: Greenwood Publishing Group, 2008) 862

[232] A. "Nkrumah and African unionism. African Perspective" (2000) 1:3 Pan-Africanism 10–13.

[233] Charles Asante et al. *Ghana's Foreign Policy Post-Independence: A Study of Kwame Nkrumah's Pan-Africanism* (PhD Dissertation, Griffith University, 2018).

[234] However, Scholars like Dr John Henrick Clarke attempt to integrate both notions of Pan Africanism in what he regards as a holistic approach that sees Pan Africanism as "a collective effort to preserve and reconstruct Africans' nationhood, culture and humanity". See John Henrik Clarke, "The Development of Pan-Africanist Ideas in the Americas and in the Caribbean Island." Presentation at Colloquim, FESTAC '77 (Lagos: FESTAC International Secretariat, 1977), quoted in Nascimento and Nascimento, Africans in Brazil, 123

them status for recognition under international law, the extent of its recognition under international law is limited. For example, the discussion on Treaty making within the context of Regional integration could not be had in respect of a group of "people". It must necessarily involve States.

This probably accounts for the idea of Pan Africanism as an idea and as a movement. Young notes that the idea of Pan-Africanism as a sense of Affinity towards Africa mostly exists as an idea while emergence of institutionalized activities focused on varying degrees of unity can better be described as a Movement.[235]

Also notable from the differences in the two ideas of Pan Africanism is the importance Africa as a defined territory. The narrative for the traditional notion of Perspective is the development of the body of space defined as the African continent, whereas the liberalist idea simply lacks this feature. Territory is pertinent and this cannot be overemphasized. It has in fact ben suggested that the original idea behind the liberalist Pan Africanism is to enable the Africans in diaspora go back "home".[236] As long as the Africans in diasporas remain scattered abroad, one can valid question the moral validity to lay claim to the idea of Pan Africanism.

Moreover, the liberalist idea of Pan Africanism is largely based on the assumption that Afrocentrism equates Negritude. It creates the assumption that all the black colour of skin is essentially what defines Africans. This couldn't be more incorrect, and this idea was largely

[235] Kurt B. Young, "Towards a Holistic Review of Pan-Africanism: Linking the Idea and the Movement" (2010) 16:2 Nationalism and Ethnic Politics, 141–163.

[236] It is said that the idea was conceived by one Dr. Smeathman but was put in put into action by Granville Shape and the members of the Claphan sect who organized for the transportation of liberated negro slave and their dependents to Africa. The first attempt was made in 1787, which was met with a disastrous end, but subsequent attempts were made and by 1792, a good number of them had arrived in Sierra Leone. See Paul M. Henry, Pan–Africanism: New Aspirations of an old Movement (1959) 49:196 The Round Table 345 - 350

explored by Shaden Tangeldin.[237] She explains how Africa is a combination of the Arab North and the Black south. In other words, there is more to being an African than just the colour of the skin, and if any idea would suffice as Pan-African, it ought to appreciate this.

In clearly distilling the traditional idea of Pan Africanism from the liberalist idea, Chris Landsberg introduces the concept of "Afro Continentalism" in describing the former.[238] However, Landsberg specially stresses on the fact that the goal is not to create a supranational entity in Africa but to achieve mutual cooperation where States build common approaches to addressing issues. He also notes the viability of establishing functional structures that address impending issues as States relate with one another, while maintaining harmony and peace.

For the purpose of this thesis, in applying the notion of Pan Africanism to the discussion of a constructivist perspective to resolving trade disputes in Africa, preferences shall be given to the traditional narrative of Pan Africanism. Apart from the fact that it best fits into the inherent discussion, it does appear to be the more authentic idea of Pan Africanism.

In this regard, the words of David Blake are salient. According to Blake, the Organization of African Unity (OAU), which in recent times is now regarded as African Union (AU), lies at the hub of defining Pan Africanism. The region is obviously divided across cultural, religious, historical, language and geographical grounds, and this potentially stifles political and economic cooperation.[239] Yet, the OAU (as it then was) strategically emanated as a platform to promote what

[237] Shaden M. Tageldin, "The Place of Africa, in Theory: Pan-Africanism, Postcolonialism, Beyond." (2014) 27:3 Journal of Hist. Sociol. 302–323

[238] Chris Landsberg, "Afro-Continentalism: Pan-Africanism in Post-Settlement South Africa's Foreign Policy." (2012) 47:4 JAAS 436–448.

[239] A glaring example is recurrent strife between nomadic-oriented tribes who tend to seek grazing land and water supply for their livestock even in places beyond their territories. The case of the scuffle between the Ethiopian empire and the ethnic Somalis was particularly interesting. The ethnic Somalis, who were ordinarily nomads, who tended to seek water and food for their livestock, were also impoverished of water supply, even for themselves. They could not

may be regarded as an afrocentric approach to promoting cooperation. At the core of the value of the organization is the importance of unity among African States and it is represented in a concept Blake refers to as "Transcendent African Solidarity". Having this sense of a transcendent African Solidarity, the idea of use of force or the threat thereof is treated as outcast, rather they utilize the forum of the organization of African Unity in discussing their problems and reaching terms, and this had proved effective in resolving the disputes including the dispute between Algeria and Morocco. [240]

This position is also confirmed by Gathii's thesis that "Regional Trade Agreements (RTA) are generally not overseen by powerful supranational bureaucracies, but rather by relatively weak institutions that leave ample sovereignty to their member states". To Gathii, RTAs in Africa are best envisaged as flexible regimes that aim to foster cooperation as opposed to rules requiring scrupulous and rigorous adherence.[241]

Hence, one could say that the strength of the African continent is in its bond. It is glaring that the region has been able to resolve complex disputes by coming together to forge alliances. If such arrangement can be workable in a complex case as the Algeria's case, one could expect similar outcomes in its application to disputes that may emanate as African States transact with one

---

resist the need to explore the riverine area of Ogaden region, which happens to fall within territory of Ethiopia. The Ethiopians on the other hand did not take kindly to unauthorized intrusion.

[240] In the vehement territorial dispute having a colour of colonial and religious factors, between Algeria and Morocco, the OAU was responsive in bringing peace and promoting cooperation even at its budding stage. A meeting was arranged by the Emperor Selassie of Ethiopia and resulting from the Bamako meeting was the need to create a committee composed of Algerian, Moroccan, Ethiopians and Malian Military officers to define a militarized zone. At a subsequent occasion, a special committee comprising of Ivory Coast, Ethiopia, Mali, Nigeria, Senegal, Sudan and Tanganyika (Tanzania), the special committee which met four times: once in Abidjan in December 1963 and three times in Lagos in February 1964, was able to successfully resolve such complex dispute. See H. A. Amankwah "International Law, Dispute Settlement and Regional Organizations in the African Setting" in Frederick E. Snyder & Surakiart Sathirathai (eds) *Third World Attitudes Toward International Law: An Introduction* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1987)

[241] James Thuo. Gathii, "African Regional Trade Agreements as Flexible Legal Regimes." (2010) 35:3 N. C. J. Int'l L. & Com. Reg. 667.

another on trade grounds. This collaborative approach is not only rewarding for intra region trade relations but also in the role the region plays at the global stage.[242] According to Alavi, the lack of cooperation of African States is one of the factors that undermines its participation in the WTO DSMs.[243]

The importance of paying attention to the transcendent African solidarity notion is accounted for in an evaluation of the dealing of African States with the outside world. According to Guzman, the Bilateral Treaties relating to investments sometimes include standards that are even less favourable to the African States than the defunct Hull rule. He particularly attributes this to the inequalities in leverage and suggests that developing countries ought to act collectively instead of individually.[244]

The implication of this discussion in respect to developing a dispute settlement mechanism in Africa is that such mechanism must be maintain and further foster unity and cooperation. As far as African States are concerned the purport of boosting trade relations as well as resolving the disputes arising from them, is not just to establish a system that affords for such activity. Its central idea is to foster and encourage unity and cooperation. Such mechanism ought to be functional in achieving this goal. In order words, the mechanism ought not to simply respond to conflicts as task oriented but also appreciate it as relationship oriented.

---

[242] Interestingly, Article 33 of the Charter establishing the United Nations emphasizes the role that regionalism plays in the international Legal order. It has also been said that the idea behind Article 51 of the Charter is not just to provide individual and collective self defence for States but also to serve as an affirmation to the legitimacy of regionalism. Thus, the rise of AU further strengthened was key in strengthening the regional identity of African States and thus would invariably play a huge role in the understanding of what works for the region. H. A. Amankwah *Ibid*

[243] Amin Alavi, "African Countries and the WTO's Dispute Settlement Mechanism" (2007) 25:1 Development Policy Review Journal 25-42 Oxford UK.

[244] *Supra* n.11. This seems to be the evolving approach of African States, except with the recent move of Kenya to go solo as with its trade relations to the United States. Jack Caporal, John Hoffner & Sanvid Tuljapurkar, "Going Solo: What is the Significance of a US-Kenya Free Trade Agreement?" (18 March 2020), online: *Centre for Strategic & International Studies* < https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement> **[https://perma.cc/GZ6V-5HYY]**

Also, the preceding arguments bring to fore the importance of understanding Africa as a Continent existing within a geographical sphere. Understanding the demographics reveals how Africa is dispersed across racial, ethnic and religious lines. There seems to be a gulf between the Arab largely- Islamic north and the Black potentially- non-Islamic south. In developing a functional dispute settlement system, these differences ought to be considered. Perhaps, one plausible option may be to incorporate the sub regional communities as arbiters.

Moreover, the dispute mechanism ought to be structured in such a way that it looks beyond interest of the State Parties to their respective values. The identities of many of the States in Africa are defined across ethnic and religious lines. In other words, values matter. When appreciated, they can be explored in constructing an effective dispute mechanism.

Moreover, some of the States are intrinsically conservative, and they may be very reticent in accommodating to the changes that are consequent to the operation of AfCFTA. The dispute settlement mechanism may also be thought through to accommodate such scenarios and effectively address them.

In highlighting the importance of merging the solidarity goal with the divergent reality of the continent, Abangwu proposes what he describes as the exogenous socio-political input capacity approach. He posits that in considering the potentials for economic integration, considerations ought to be had to the creation of factors that would facilitate such integration within the member states. He notes that "A country will be said to be committing itself to an integration move if it is willing to mobilize its political, social, cultural, economic, technocratic, and bureaucratic resources

towards that goal."[245] In other words, institutional frameworks within and among member states are incumbent for the success of economic integration among African States.

[245] George C. Abangwu, "Systems Approach to Regional Integration in West Africa" (1974)0 13:1 JCMS 116–135.

CHAPTER FOUR

A CROSS JURISDICTIONAL ANALYSIS

4.1. Background

Every society is carved from its unique history. Events and experiences that take place overtime are influential in defining its goals as well as the relationships of its members. This is no less true of the societies created through economic integration. Thus, in order to appreciate how States relate within such arrangements, and how disputes may best be settled between them, it is important to consider the unique nature of such arrangement as defined by history. This lies at the core of the constructivist argument.

In strengthening the argument that highlights the importance of a constructivist approach to viewing the resolution of trade disputes in Africa, particularly in the context of the AfCFTA, it may be worthwhile to consider whether this can be seen to find any relevance in any related society. This chapter sets out to achieve this by taking an in-depth look at the European Union, considering the fact that the European Union is reputed as the most viable and dynamic economic integration model.[246]

4.2. Constructivism, Eurocentrism and the European Union

The events leading to the establishment of the European Union are particularly noteworthy. Exiting a series of Franco German Wars, the exigency of peace in a permanent form led to talks to integrate the European Continent. Against this backdrop, Stefanova sees the European integration itself as

[246] Abiodun Odusote, "Integration of Regional Economic Communities as Panacea for Africa's Economic Growth: Lessons from Comparative Models." (2015) 8:2 Acta Universitatis Danubius. Relationes Internationales 138–156

a conflict resolution strategy. According to her, "The history of regional integration in Europe provides important insights into the role of regionalism as a nonconventional conflict resolution strategy".[247]

Indeed, the EU has served to transform the continent and provide some reasonable guarantee for sustainability and continuity after the World Wars by providing a platform for conflict resolution. The reputation of EU as one of the best national strategies in achieving peace and cooperation in Europe after the Second World war may be attributable to the fact that it is an off shoot of an essentially Pan-European campaign, and notably so.[248]

Although there is no collective adoption of the approach by the EU or any of its institutions, Constructivism does seem inevitable in the analysis of the European practice. Generally, it may be hard to find a clear-cut match between academic theories of conflict and conflict resolution and the practice of such theories, particularly within the context of the EU practice. Nevertheless, the influence of the European idea is reflective in the context, structure and actors, goals and events of conflicts within the EU.[249] Thus, the nexus is not far-fetched, and it is this nexus that will be highlighted in this chapter.

4.3. Historical Development of the European Union

In order to understand what a Eurocentric idea might look like, it is worthwhile to first take a cursory look at the evolution of the European Union. The origin of the idea of a European continent

[247] Boyka Stefanova. "Regional Integration as a System of Conflict Resolution: The European Experience" (2006) 169:2 World Aff. 81–93.
[248] Ibid
[249] Hugh Miall, "Conflict Transformation Theory and European Practice" (2007) Paper Prepared for the Sixth Pan-European Conference on International Relations, ECPR Standing Group on International Relations

as we know it today can be traced to the cold war that spanned for the major part of the mid twentieth century.

While the Soviet Union controlled the portion that would be considered as eastern Europe, the United States had its influence across the western region of Europe. It was the Western Europeans that pioneer the move towards an integrated Europe, and this was initiated by the move by France and Germany to reconcile their age-long differences by establishing an alliance to manufacture products using Coal and Steel.[250]

The initiative expanded to include four other countries and formally established a European Coal and Steel Community (ECSC)[251] through the Treaty of Paris, which was signed on 18 April 1951 and came into force on 25 July 1952.[252]

The ECSC marked the first step towards European integration. In the subsequent years, there would be other treaties which fostered the integration objective. In 1957, members consecutively signed two treaties in Rome on 25 March 1957, one of which created the European Economic Community (EEC), which was aimed at eliminating tariffs, creating a free market and allowing the free movement of workers across board. The other treaty created the European Atomic Energy Community (EURATOM).[253]

---

[250] These were erstwhile used for creating weapons to fight against one another; weapons which were of great utility during the World Wars, particularly the second world war which had just been concluded at the time.
[251] The countries that formed the ECSC are France, Germany, Italy, Luxemburg, Netherland, and Belgium. Although it was only the West Germany that was involved at this point. This was because pursuant to the Cold war, the Iron Curtain separated Western Germany from Eastern Germany, with the east being controlled by the Soviet Union at the time.
[252] European Parliament, *The Historical Development of European Integration – Fact Sheet On The European Union By European Parliament (Fact Sheets on the European Union),* [2018] PE 618.969
[253] "History of the European Union" (28 February 2020) at 00h 02m 32s, online (video): Geo History <https://www.youtube.com/watch?v=4VCYHTGjr-U> [**https://perma.cc/74NC-MNBQ**]

In 1965, the EURATOM, EEC and the extant ECSC were merged to form one commission, comprising of institutions including the Council, the Parliament and the Court of Justice.[254] The next significant treaty would be the Maastricht Treaty in 1992 which began the discussions about the modalities of Europe existing as an economic union with a single economic currency.[255] Over the years, the continent has grown from merely an alliance of two countries to a conglomerate of forty four countries.

4.4. Underlying Themes from EU's Evolution Story

4.4.1. An Inherent Transformation

The historical development of the European Union reveals a number of themes that highlights the uniqueness of Europe. The first of such themes and probably the foremost is the fact that the European Union set out to be more than just a trading bloc but a unique form of international organization.

According to Porumbescu, EU is best viewed as a transitional entity that generates international relations, but which also remains itself a subsystem of those international relations. As noted earlier, the European Union was contingent on the need to establish a structure that would achieve sustained peace in the region in order to prevent the repetition of the traumas of its checkered history, and this has lied at the core of what it has overtime morphed itself into. It is the popular

[254] *Ibid*

[255] Although, some countries like the United Kingdom did not subscribe to the single currency arrangement, it is still needless to say that Europe has grown to establish itself as a strong economic union as uniquely shaped by its history.

notion that the study of European integration essentially recounts the gradual transformation of a treaty regime through law and courts.[256]

4.4.2. A Fluid Formation of Structure

The uniqueness and originality of the European Union is also reflective in the fluidity of its structure. The structure started from an intention to establish peace between two nations that had been in conflict with one another. Subsequently the discussion navigated towards jointly exploring manufacturing activities involving coal and steel. Overtime, discussions around free movement of people, and the removal of tariffs came to the fore. The fluidity in the maturation story of European Union may be said to inform the structures established within the union and the function that they play.

For example, in 1965, the structure of the EU experienced a dynamic change. From an integration scheme that was simply bound by treaties,[257] the EU transitions into a more systematic structure with legitimate institutions.[258] This was marked by the creation of a single Commission,[259] the Council,[260] the Parliament[261] and the Court of Justice.[262] More expositions would be made on the Court of Justice in subsequent paragraphs.

---

[256] Joseph Weiler, "The Transformation of Europe" (1991) 100 Yale L. J. 2403; Martin Shapiro, "The European Court of Justice." in A. Sbragia, ed., *Euro-Politics*. (Washington, DC: Brookings Institution, 1992)
[257] The EEC, EURATOM and ECSC at the time
[258] *Supra n. 8*
[259] The Commission was composed of commissioners chosen by the Heads of State of the respective EU member States. They had the duty of proposing European laws in the common interest of the EU members
[260] The Council which was made up of the ministers of the member States. They simply approved or otherwise modified or rejected the proposals made by the commission
[261] The Parliament comprised of select nationals of EU member States. They also gave their opinion on the proposals made by the commission.
[262] The Court of Justice had the role of ruling over the legality of the decisions ultimately taken by the Council.

4.4.3. Centrality of Institution

Speaking of structures, the idea of a central institution may also be deduced as an underlying theme in the evolution story of the European Union. Porumbescu considers the transfer of much sovereign power to the EU's central body as a unique achievement.[263] According to Sweet while speaking concerning the judicial arm of the EU, "One of the striking features of European Integration and governance over the past fifty years has been the centrality of the ECJ".[264] To some extent and as opposed to other regional integration arrangements, the EU may be said to exist as a supranational body.

In alluding to the EU, Hettne & Söderbaum speak of a geographical area that is "transformed from a passive object to an active subject capable of articulating the transnational interests of the emerging region".[265] The European Union carefully combines the notion of individual sovereignty with the idea of collective consensus. Without undermining the right of the State parties to their respective autonomy, the EU has come to be recognized to carry the corporate mandate of the respective State parties to exercise overarching oversight through its institutions.

According to Antczak, "European integration is based on the idea of overcoming nationalism and the avoidance of war among the Member States as well as combining the notion of sovereignty with the policy of consensus".[266] One of the notions behind this arrangement can be traced to the

[263] Alexandra Porumbescu. "The Evolution of the European Union as Global Actor in the Light of the Lisbon Treaty." (2015) 20:1 Analele Universitatii Din Craiova - Seria Istorie, pp. 171–181.
[264] Alec Stone Sweet, "The European Court of Justice and the Judicialization of EU Governance." (2010) 5:1 LREG.
[265] Björn Hettne & Fredrik Söderbaum "Theorising the Rise of Regionness." (2000) 5:3 *New Political Econ.* pp. 457–472.
[266] Anna Antczak, "Interdependencies between European Strategic Culture and the Evolution of the European Union International Roles." (2012) 18:2 Journal for Perspectives of Economic, Political, and Social Integration, pp. 123 – 143.

very purpose of establishing the European Union in the first place, which is to maintain peace among the nations and sustain same.

The intention is that as European countries are collectively submitted to European Union, interests are better unified, and uprisings are more easily curtailed. In Van Ham's words, "bad countries make war, good Europeans tend to compromise".[267] Baun regards the idea behind the EU as "a framework organization creating the conditions to resolve external conflicts through the inclusion of neighbouring countries and surrounding regions into a network of economic, political and institutional interrelations of various intensity".[268]

The idea behind Europeans throwing their weights in support of a central system can be seen as reinforcing its common identity and an assurance of adequate level of mutual trust. This is part of what Antczak describes as the European common strategic culture.[269] The shared sense of mutual trust is essentially a conviction that the activities would be in tandem with the common values of the Europeans in fostering stability and development. Hence, in some way, the EU does not just serve the purpose of coming to the aid of European countries in distress, but also serves as a wise guide in making policies that European countries naturally abide by.

4.4.4 Notion of Convergence

Another sense in which the underlying theory behind the European Union can be conceived is the popular notion of convergence. This is evident from the primitive steps of the Union. The ECSC could be seen as a sheer effort of countries to combine economies together in the bid to promote

[267] P. Van Ham, "Europe's Strategic Culture and the Relevance of War" (2005) 2:1 OJGG 39-44.
[268] M. Baun, "How Necessary is a Common Strategic Culture?" (2005) 2:1 OJGG 33-38.
[269] *Supra* n. 12

peace and cooperation. As time passed, the developments that is attributed to the union is largely characterized by even more attempts at a convergence.

The establishment of free market and the free movement of people through the creation of the EEC, the ECSC and the EURATOM, as well as the subsequent creation of the Commission, the Council, the Parliament and the Court of Justice, including the creation of a single economic currency all speak to the idea of convergence.

According to Bolea et al, the promotion of economic, social and territorial cohesion has always been inherent in the goals leading to the development of European Union as we know it today.[270] To Porumbescu, the motive for convergence that runs inherent in the European integration process has always involved a vision for a political union as well.

Quite some degree of empirical studies have been done in respect to the convergence notion and its relevance to the existence of the EU as well as it practices.[271] From an economic perspective, a plausible justification for the convergence approach to integration as adopted by the EU may be adduced from the seminal work of Solow in his neo-classical growth model.[272] According to him, when there is an effort to achieve technological homogeneity and identical preferences, there will be a shrink in the differences in the per- capita across the various countries within the region such that on the long run, there is a balanced economic growth path across board.

[270] Lucía Bolea et al. "From Convergence to Divergence? Some New Insights into the Evolution of the European Union." (2018) 47 Structural Change and Economic Dynamics, pp. 82–95.
[271] R. J. Barro & Sala-i-Martin X "Convergence" (1992) 100:2 J Polit. Econ. 223–251; N. G. Mankiw, D. Romer, D. N. Weil, "A contribution to the empirics of economic growth" (1992)107:2 Q J Econ 407–437; P Evans, G Karras "Convergence Revisited" (1996) 37 J Monet Econ 249–265; P. Evans "Using panel data to evaluate growth theories" (1998) 39:2 Int Econ Rev. 295–306; P. L. Siklos "Meeting Maastricht: nominal convergence of the new member states toward EMU" (2010) 27:2. Econ Modell 507–515;
[272] R. M. Solow "A contribution to the theory of economic growth" (1956) 70:1 Q J Econ 65–94

However, Solow's neo-classical growth model has not been without rebuttals, particularly by the New Growth Theorists who point out the impracticality of Solow's theory as it relates to the disparity between poor and rich countries in reality.

While the concern of the New Growth Theorists may appear ostensibly valid, it seems glaring that on a general note, the idea with which the EU seems to operate tilts more towards the notion of convergence. This is reflective in the recent decision of the EU to engage the idea of a collective European Debt towards helping countries that have been hit hardest by the Covid-19 pandemic.[273] The convergence theory can be buttressed by the fact that there are certain decisions made within the EU that can only be made unanimously.[274]

In a nutshell, the EU depicts in substance, an institution that has fluidly transformed into a unique system which is characteristic of the European continent and which has as its goal, the convergence of a network of countries under a unified central system in order to promote Eurocentric values and foster growth and development across board. In the words of Larsen, "Across EU documents a discourse can be identified according to which the Union is constructed as a unit which defends its own interests and has an obligation to take on responsibilities in the light of international challenges".[275]

Invariably, this idea is also reflective in the dispute resolution structure that is put in place to resolve its disputes. In avoiding the risk of going off on a tangent, it is pertinent to consider the

[273] Steven Erlanger, "Merkel, Breaking German 'Taboo', Backs Shared E.U. Debt to Tackle Virus" (18 May 2020), online: *The New York Times* <https://www.nytimes.com/2020/05/18/world/europe/coronavirus-european-union-fund.html?smid=tw-nytimes&smtyp=cur> [**https://perma.cc/PV6Z-RF2E**]

[274] For example, decisions on common foreign and security policy, EU citizenship and membership, EU Finance etc. can only be made unanimously. "Unanimity" (last modified 28 January 2020), online: *European Council* <https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/> [**https://perma.cc/Y5HK-QQCP**]

[275] H. Larsen, "Discourse analysis in the study of European foreign policy", in B. Tonra, & T. Christiansen, eds, *Rethinking European Union Foreign Policy* (Manchester: Manchester University Press, 2004) 67.

Court of Justice established under the EU and to what extent its mandate and operations reflect these Constructivist Eurocentric ideas.

4.5. CJEU: The Dispute Resolution Arm of the EU

Established in 1952, the Court of Justice of the European Union (CJEU) has existed to interpret and apply the EU law in EU countries and ensuring that EU countries and the EU institutions abide by the EU law.

The CJEU generally comprises of two courts including the Court of Justice and the General Court. The Court of Justice deals with requests for preliminary rulings from national courts. The Court also deals with applications for annulment of judgments of national courts as well as appeals from national courts. The General court is more concerned with actions for annulment brought by individuals, companies and in few cases, EU governments.[276]

So far, the CJEU has delivered over 25,000 ruling on various matters,[277] and it is only bound to increase especially with the recent expansion of the jurisdiction of the court to include human right matters, by virtue of the Lisbon Treaty. The CJEU stands to ensure some form of uniformity in the interpretation and application of EU laws. As such, national courts of EU countries may seek for clarification from the CJEU on the compatibility of a national law or practice with EU law.

[276] "Court of Justice of the European Union (CJEU) (last modified 26 March 2020), online: *European Union* <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>[**https://perma.cc/TVQ9-6W5V]**

[277] Court of Justice of the European Union, "What has the Court of Justice done for me?" (30 March 2017) at 00h: 00m:15s, online (video): *YouTube* <https://www.youtube.com/watch?v=mlNoq7Kn6I4&feature=youtu.be>[**https://perma.cc/LT3P-RVAM**]

In the event that national governments are seen to violate EU laws or fundamental human rights, enforcement proceedings can be instituted before the CJEU and such actions can be annulled.[278] The CJEU may in fact condemn the Member State for acting against EU law and may impose monetary sanctions.[279] Overtime, the CJEU has come to be effective even in enforcing property rights of transnational actors who are engaged in cross-border trade and keep a close monitoring of the compliance of Member States with the EU Treaty and other EU statutes.

The oversight function of the CJEU is not just limited to the EU national governments, but also the EU institutions. The CJEU can make orders to ensure that EU institutions keep up with their responsibilities and may in fact sanction them for actions and inactions.[280] The jurisdiction of the CJEU is not limited to the EU governments and institutions, but its jurisdiction is expansive enough to cover individuals.[281] According to section 267 of the Treaty on the Functioning of the European Union (TFEU), the CJEU has the jurisdiction to give preliminary rulings concerning the interpretations of the treaties and the validity and interpretation of the acts of the institutions, bodies, offices or agencies of the Union.[282]

4.6 Theoretical Undertone to the Operations of the CJEU

The CJEU, as the dispute resolution arm of the EU lies as a vital part of the EU operation. Having existed since the creation of the first treaty, the ECSC, there is no gainsaying that the operation of

[278] Since 1961, some 3,000 infringement proceedings have been registered by the Court; over the last decade, the Commission filed between 150 and 200 such actions each year. *Supra* n. 13
[279] Art. 260 Treaty on the Function of the European Union
[280] *Supra n. 25*
[281] For example, if a flight is delayed for more than three hours, an EU citizen can claim compensation at the CJEU and the airline cannot present technical faults as a defence. An EU citizen can also enforce before the CJEU, the right to have their names removed from a search engine. *Supra* n 26
[282] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390 …

the CJEU is grossly integral to the existence of the EU. The affinity between the CJEU and the EU is not just accounted for on the ground of time, but it is also founded on theoretical grounds. The supranationality and the convergence notion of the EU, as discussed above is largely depicted in the operation o the CJEU. In the subsequent paragraphs, this will be highlighted as a cursory look is taken at some themes that are deducible from the operations of the CJEU and the consideration of some of its landmark cases and rulings.

4.6.1 Preliminary Reference Rule

The procedure that best comes to mind in thinking about the centrality of the operation of the CJEU is the Preliminary Reference Procedure. Article 267 provides that where there is a question on the interpretation of the Treaties or on the validity of the acts of the EU or any of its parastatals, and such question is raised before any court or tribunal within a Member State, such court or tribunal may request the CJEU to give a ruling thereon if it considers the that the CJEU's decision on the question is necessary to give judgment.

The Article further provides that where any such question is raised in a case that is pending before a court or tribunal within a Member State, and against whose decision, there is no judicial remedy under national law, the court or tribunal is expected to bring such matter before the CJEU.

The Preliminary reference rule serves as a notable premise to create a relationship between the national courts of the member States duly created by their constitutions and the CJEU which is created pursuant to the EU Treaty. Invariably, it provides an opportunity to access the nature of such interaction in order to appreciate what by custom has come to be accepted as the European style of engaging trade disputes.

While it does seem like the provisions of Article 267 leaves much discretion in the hands of the national court by providing that preliminary reference is only required when the national court deems it necessary, the manner in which the proceeding paragraph is couched betrays such intention. This has been a persistent question among scholars and jurists alike. In a bid to recognize the sovereignty of the respective EU Member States and their judicial system without disparaging the centrality of the operations of the CJEU, some scholars have strived to explore "the uncomfortable task of balancing the co-operative nature of proceedings and the national court's duty to ask the CJEU for an authoritative interpretation of EU law".[283]

Perhaps one principle that is helpful in the quest to achieve such balancing is the Acte Clair rule. The Acte Clair rule which was further established in the Cilfit case,[284] is deduced from Article 267. It is to the effect that where a rule of law or a judgment of the CJEU is clear enough, there will be no requirement for the national court of a EU member State to refer such matter to the CJEU for preliminary ruling. In that case, the CJEU observed that the correct application of the EU law was so obvious and gave no room for any reasonable doubt as to how the question raised is to be resolved. As such, it was held that no preliminary reference was required in the circumstance.

Nevertheless, CJEU did not omit to further provide stringent conditions upon which the Acte Clair rule is permitted to be applied. Thence, in order for the Acte Clair rule to apply, the national court must itself must not be in doubt as to the right interpretation of the EU law, and must also be convinced that the matter is equally obvious to the courts of the other Member States and to the

[283] Agne Limante, "Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards A More Flexible Approach." (2016) 54:6 JCMS 1384–1397.
[284] CILFIT v Ministero della Sanità 283/81 [1982] ECR 3415.

CJEU.[285] Moreover, the acte clair principle does not apply to national courts that are not courts of last instance.[286]

In goes to say that although the preliminary reference rule as couched under Article 267 of the TFEU presents it as a right to be exercised by National Courts within the EU Member States, it is a right that is not without many gross restrictions. This buttresses the centrality in the operation of the CJEU.

Moreover, as it relates to the validity of an act done by EU or any of its agencies, it has been held in a plethora of cases that a national court cannot declare such act as invalid even though the circumstances fall within the scope in which acte clair would ordinary operate. It also would not matter that such act or a comparable act has earlier been declared invalid by the CJEU.[287] National courts cannot also rely on the acte clair rule to determine that an EU provision is invalid, and it would also not matter that similar a provision in a comparable legal act has already been declared invalid by the CJEU.

It would be specious to posit that the preliminary reference procedure, the acte clair rule and the stringent conditions for their application are all put in place to promote mutual trust between the national courts and CJEU. Rather, it is more pragmatic that it depicts the pre-eminence of the CJEU over the National courts. This may probably be justified by the need to ensure uniform

[285] N. Fenger & M. P. Broberg, "Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine" (2011) *30*:1 *Yearbook of European Law* 180-212.
[286] *Ibid*
[287] *Foto-Frost v Hauptzollamt Lübeck-Ost.* 314/85 Foto-Frost [1987] ECR 4199; *IATA and ELFAA* C-344/04 [2006] ECR 1-403; Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA C-119/05 [2007] ECR 1-6199; and Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit C-461/03 [2005] ECR 1-10513

interpretation and application of the EU Law, the uniformity of which is also one of the themes that fall under what may be described as the Constructivist Eurocentric idea.

4.6.2. The Doctrine of Res Judicata

The influence of the underlying themes that form the Eurocentric notion on the operations of the CJEU can also be unmasked by considering the doctrine of Res Judicata and its operation within the procedure under the CJEU. First, it is important to understand what Res Judicata means, or at least the context in which it is being considered in this thesis. Res Judicata is a latin phrase that infers that a matter has been tried or that it has been settled.[288] It infers the finality and irrevocability of the court's judgment.[289] According to Deleanu, the basis for res judicata authority lies in the idea of immutability of the judicial act by which the dispute was tried and settled[290]

The case of *Commission v Italy (Art Treasures)*[291] is note worthy on the application of the principle of res judicata to the operations of the CJEU. In that case the CJEU held that a prior judgment of the CJEU, declaring a breach of Union law by Italy has "the full force of law on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Union law to be fully applied".[292]

The principle of res judicata within the context of the operations of the CJEU affords its decision the benefit of finality and immutability as against the decisions of even the apex courts within the

[288] Daniela Cristina Cret & Mihaela Narcisa Stoicu "Theoretical and Jurisprudential Considerations on Res Judicata Authority" (2016) 6 Tribuna Juridică, 61–76.
[289] Andrés De La Oliva Santos, *Sobre la cosa juzgada*, Ramón Areces, Madrid, 1991, p. 17, apud Emilio Alfonso Garotte Campillay,
[290] Ion Deleanu, *Tratat De Procedură Civilă,* vol. II, (Bucharest: Universul Juridic Publishing House, 2013) p. 72.
[291] *Commission of the European Communities v Italian Republic* 48/71 [1972] ECR
[292] Ibid

Nations States as far as EU matters are concerned. This again is an evidence of its supranationality in this regard.

Interestingly, the application of the principle of res judicata within the context of the CJEU extends beyond just the operative part of the judgment but is also applicable to the ratio decidendi.[293] It is considered that the ratio decidendi form necessary supports to the operative part and are inseparable from it.[294] They are even considered "necessary to determine the exact meaning of what is stated in the operative part."[295]

4.6.3. The Rule of Precedential Effect

Very similar to the rule of res judicata is the rule on precedential effect. The decisions of the CJEU have precedential effect.[296] Thus, not only are the decisions of the CJEU final and immutable, they are also binding on National courts.[297] Also, the implication of the decision of the CJEU are not only valid as against the parties concerned in a given dispute but also in respect of all members of the EU.

The discussion on the precedential effect of the decisions of the CJEU can be traced as far back as 1962 where the question was brought in respect of the case of Van Gend en Loos v Nederlandse Administrative der Belastingen;[298] whether the judgment o the court in that case has any effect on

[293] Iva Fellerova Palkovska "Characteristics of Judgments of The EU Court of Justice" (2018) 3 Law & Political Science Conference
[294] CJEU judgment in joined cases C-442/03 P and C-471/03 P… Judgment of the Court (Third Chamber) of 1 June 2006. P & O European Ferries (Vizcaya) SA (C-442/03 P) and Diputación Foral de Vizcaya (C-471/03 P) v Commission of the European Communities. Joined cases C-442/03 P and C-471/03 P.
[295] CJEU judgment in joined cases C-442/03 P and C-471/03 P
[296] Article 99 of the Rules of Procedure of the Court of Justice
[297] Article 91 of the Rules of Procedure of the Court of Justice (RPCJ) and Article 121 of the Rules of Procedure of the General Court (RPGC) provide that the judgments of the respective courts become binding from the date of its service.
[298] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* **C-26/62 [1963] ECR**

a subsequent case.[299] The court ruled in the Da Costa case that "authority of an interpretation […] already given by the Court may deprive the obligation [to refer a question for preliminary ruling] of its purpose and thus empty it of its substance."[300]

Ostensibly, it seems like the intention of the court is to prevent a situation where similar questions are brought before the court on a repeated basis and to forestall a situation where the court is inundated with cases. However, subsequent cases interpret the decision of the court as rather a declaration that the judgment of the CJEU possess precedential effect.[301]

The CJEU takes its precedential effect very paramount, and has in fact held over and again that where a member State disregards its case laws, it is tantamount to a breach of the EU treaty.[302] The argument is that disregarding CJEU case laws amounts to a breach of Article 4(3) of the Treaty on the European Union, which obligates Member States to abstain from any measure that might jeopardize attainment of the objectives of Treaties and thereby goes to the very basis of the Union's legal order.[303]This duty also extends to actions and inactions of the courts within the member States since a breach by the court of the member State is considered attributable to the member State.[304]

Again, the essence of the rule of precedential effect is to promote uniformity in the interpretation and application of EU laws as well as reinforce the centrality of the EU institutions, particularly the CJEU. Meanwhile, another justification might be the protection of the rights of individuals

[299] *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, Cases 28, 29, 30/62 [1963] ECR
[300] *Ibid*
[301] *Supra,* n. 42
[302] *Commission of the European Communities v Italian Republic Supra* n. 298; *Commission of the European Communities v Italian Republic* 101/91 [1993] ECR and *Gervais Larsy v Institut National D'assurances Sociales Pour Travailleurs Indépendants (INASTI)* C-118/00 [2001] ECR
[303] *Commission of the European Communities v Italian Republic* C- 101/91 [1993] ECR, para 23
[304] *Commission of the European Communities v Italian Republic* C-129/00 [2003] ECR

within the EU member State. This has come to become a valid issue, particularly after the expansion of the jurisdiction of the CJEU to include human right matters by virtue of the Lisbon treaty of 2009.

While commenting on the exercise of its human right jurisdiction, Burca notes the minimal reference of the CJEU to the European Court on Human Right (ECHR).[305] The reticent attitude of the CJEU in deferring to other institutions is not only evident in relation to the ECHR but also to other international institutions and norms. The basis for this conservative approach is said to be traceable to the original style, methodology and procedure outlined for CJEU when it was first established under the ECSC Treaty in the early 1950s and which is modelled after the French *Conseil d'État*. Overtime, the CJEU has maintained a certain style in its adjudication that has been described as collegiate, formulaic, impersonal and fairly minimalist.[306]

Although, some judges have tried to defend the style of the CJEU and its practice on not deferring to comparative and international case laws, and have posited that the rulings are sometimes influenced by international and comparative law, only that those international case laws and references are not cited when the CJEU judges write their rulings and judgments.[307] Whether they are attributed directly or not, it is glaring that the CJEU's operations are simply motivated by the underlying understanding that the EU as well as its agencies exists as a uniquely transformed international body that is distinct from the international legal order and which has its unique operations.

---

[305] Gráinne De Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013) 20:2 M. J. 168–184.
[306] *Ibid*
[307] C.N. Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities', (1994) 6:2 Pace Int. Law Rev. 276–277.

4.6.4 Constitutionalization of the Regime

In some circles, this Constructivist Eurocentric approach taken by the CJEU and EU generally is referred to as the constitutionalization of the regime.[308] The notion of constitutionality is derived from the understanding that a constitution is essentially the *grundnorm* and the *fons et origo* of any regime. Every other legal norm would derive their validity from it and any law that is inconsistent with it would be rendered invalid to the extent of its inconsistency.

A constitution is by its very nature supreme. A consideration of the premium placed on EU laws as against national laws and the enormous power given to its agencies, particularly the CJEU,[309] reveals that there is no gainsaying the prevalence of a constitutionality idea, which itself can be said to lie at the heart of what may be described as Eurocentricity.

Examples abound of how the CJEU has managed to exercise its constitutionality thereby influencing policies through the outcomes of its case laws. Some of those examples are considered here. In *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*,[310] the United Nations Security Council by it resolution identified the Kadi as being involved with terrorism and mandated that his assets be frozen and the European Commission sought to implement the resolution.

---

[308] Mattias Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" (1999) 36 CMLR: 351; Koen Lenaerts, "Constitutionalism and the Many Faces of Federalism." (1990) 38 American Journal of Comparative Law 205; Federico Mancini, "The Making of a Constitution for Europe." in Robert. Keohane & Stanley Hoffman, eds., *The New European Community: Decision making and Institutional Change*.(*Boulder:* Westview Press, 1991);. Joseph Weiler, "The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration" (Cambridge: Cambridge University Press, 1999); Christian Timmermans, "The Constitutionalization of the European Union." (2002) 21:1 Yearb. Eur. Law,

[309] According to Sweet, "Constitutionalization significantly enhances the capacity of the ECJ to shape how the other EU organs of governance interact with one another, and to influence the substantive content of the treaties, EU statutes, and other law". *Supra* n.

[310] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communit*ies C-402/05 P and C-415/05 P [2008] ECR

However, the CJEU delivered a judgment annulling the implementing measures by the European Commission on the ground that it violates Kadi's fundamental right which is duly protected under the European Union legal order. The court amplifies the autonomy of European Union even in relation to the international legal order and that priority ought to be given to the fundamental rules of the EU.

The court held that "an international agreement cannot affect the allocation of powers fixed by the Treaties or . . . the autonomy of the Community legal system,… the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty" and that the European Union has an "autonomous legal system which is not to be prejudiced by an international agreement."[311] While being careful not to infer the international legal order as invalid, the court held that its primary obligation is to protect the EU's municipal constitutional legal order, which includes it's human right values.[312]

Similarly, the CJEU has been seen to make decisions that have come to stand as EU policies that are binding on EU member States from grave issues involving chemical[313] to granular issues relating to glucose consumption.[314]

4.7. The Relevance of Constructivist Study

Clearly, an analysis of the integration experience in Europe reveal certain themes that may be considered as typically Eurocentric. These themes are further validated in an examination of the

[311] *Ibid*
[312] Grainne De Burca, "The European Court of Justice and the International Legal Order After Kadi" (2010) 51:1 HarvIntlLJ. 1–49
[313] Gabrielle H. Williamson, "EU Court of Justice Ends a Long Dispute over Chemicals Policy." (2016) 33:2 The Environmental Forum 21.
[314] "EU Court of Justice Confirms Commission's Ban on Glucose-Related Claims." (2016) 26:3 World Food Regulation Review 9–10.

approach its dispute resolution system takes. What constructivists aim to achieve is to draw out such underlying themes by examining the interplay between the actors and the structure. In this chapter, this has been sufficiently explored within the context of Europe.

The European Union may well be said to be leading the global space in the area of economic integration. The essence of engaging a constructivist analysis of the European Union and its dispute resolution system is to highlight the cogency of a constructivist approach to any economic integration and its dispute resolution paradigm, more so in Africa.

To further buttress this idea, the subsequent paragraphs would involve a juxtaposition between an eurocentric idea and the Afrocentric idea in order to be able to delineate between what would amount to rational choices within the respective contexts. In Sweet's words, "Research on judicialization typically blends rational choice and sociological constructivist approaches to institutional change".[315] This thesis is essentially based on such understanding.

The choice of a constructivist analysis is further validated by postulations that there is a huge connection between self realization on a continental basis, and wholesome developments. In the words of Agbakogba, "The universal dimensions of self-realization consists of those values, orientations, attitudes, ideas, practices and objects which are necessary (either as preconditions or as enhancing conditions) for the realization of people across the globe".[316] He notes that whatever would amount to development has to take account the peculiar context in which the system or policy is being applied.

[315] Supra n.
[316] J.C.A. Agbakoba," A Critical Examination of the Concept of Development and Development Philosophy in Relation to Africa". Unpublished Nsukka 2005 p.2

To Agbakoba, the historical, cultural and geographical antecedents, not only defined its common values but also serve as the measuring guide to determine its needs. On a related note, Adedeji posits the "Until factor inputs are primarily and overwhelmingly endogenous and the development paradigm is people-centred and holistic, sustainable development will remain out of the reach of Africa".[317]

4.8 Constructivist Eurocentrism vs Constructivist Afrocentrism

Several kinds of literatures have emanated over the years to pointing at the need for the studies on Africa to reflect the identity of the continent rather than importing notions and values that are rather foreign and exogenous.[318] In responding to a recent publication by the European Commission where it states that "We need to partner with Africa, our twin continent, to tackle together the challenges of the 21st century and to further our common interest and future",[319] Akinkugbe highlights the need to be wary of using the allegory of a twin in describing Europe and Africa considering the fact that "both regions came to be as a result of different histories".[320]

The idea behind this analysis is not to undermine or subjugate the Eurocentric notion as a contrasting idea. Rather, what is sought to be explored here is what Asante describes as

[317] A. Adedeji, "Africa in transition: The Challenge of Pluralism, Democracy, Governance and Development" (1995) The Courier

[318] Trina Daniels, "Decision Making in Eurocentric and Afrocentric Organizations" (2012) 43:3 Journal of Black Studies 327 – 335; Linus Hoskins "Eurocentrism v Afrocentrism: A Geopolitical linkage Analysis" (1992) 23:2 Journal of Black Studies 247 – 257; Bame Nsamenang, "Work Organization and Economic Management in Sub-Saharan Africa: From a Eurocentric Orientation toward an Afrocentric Perspective" (1998) 10:1 PDS; Mark Lawrence McPhail, "From Complicity to Coherence: Rereading the Rhetoric of Afrocentricity" (1998) 62:2 Western Journal of Communication 114- 140.

[319] EC, *High Representative of the Union for Foreign Affairs and Security Policy* 2020/4 of 9 March 2020 on *Joint Communication to the European Parliament and the Council Towards a Comprehensive Strategy with Africa [2020]* <https://ec.europa.eu/international-partnerships/system/files/communication-eu-africa-strategy-join-2020-4-final_en.pdf>[**https://perma.cc/Z772-G67A]**

[320] Olabisi D. Akinkugbe, "In Eu-Africa Trade Relations: Africa is Not Europe's "Twin Continent" (14 March 2020), online (blog): AfronomicsLAW <https://www.afronomicslaw.org/2020/03/13/in-eu-africa-trade-relations-africa-is-not-europes-twin-continent/> [**https://perma.cc/AZ76-FU23**]

"complementarity". Aptly put, Asante notes that Afrocentrism does not seek to replace Eurocentrism and ought to take its place not above but alongside other cultural and historical perspectives.[321]

This is the utility that the constructivist notion offers. Thus, in ascertaining whether a trade dispute settlement system is viable in the context of the African continent, it is plausible to examine the historical, cultural and geographical context to ascertain whether there is a coherence with the inherent African values, idea, attitudes, orientations and practices.

The plausibility of such proposition can be further asserted by examining another trade dispute resolution system like European system, which has proven to be of great success, while highlighting the coherence between the system as it is structured and the European history, value and orientations, for which it is designed to be applied. This is basically what this thesis has attempted to bring to fore.

There is a cogent lesson to be derived from constructivists, which is not foreign to comparatists, and that is the importance of "criteria". To comparatists, it is inappropriate to transport paradigms and systems across jurisdictions without considering certain criteria that is unique to each jurisdiction in order to ensure that such imported systems are conformable to the given jurisdiction. Whereas, to constructivists, it is less crucial to transport paradigms than to develop one from the inherent criteria in a given jurisdiction.

From the expositions done in this chapter and the preceding ones, certain criteria are glaringly inherent within the European jurisdiction that are absent in the African jurisdiction, and vice versa.

[321] *Ibid*

This arguably accounts for the relative failure of the trade dispute resolution system employed by most of the sub-regional integrations in Africa, as they were largely imported from the European system. It therefore follows that being skeptical about the existing dispute resolutions system under AfCFTA is not an exaggerated reaction. Meanwhile, a constructivist study such as the one attempted in this thesis may be helpful in rethinking alternative models. Thus, in a bid to further put the discussion in perspective, the subsequent paragraphs would involve an illustration of some of the criteria that are peculiar to the respective jurisdiction in order to subsequently project what an Afrocentric dispute settlement mechanism ought to look like.

The first and probably the foremost feature of the African continent is its diversity. This is sufficiently highlighted across this thesis. This is not to say that the European countries are not diverse in certain respect,[322] nevertheless the kind of diversity that is being spoken about here is a rather integral one. According to Appiah, "The notion that there is something unitary called African culture that could be thus summarized has been subjected to devastating critique by a generation of African intellectuals. But little sign of these African accounts of African culture appears in the writings of Afrocentrism".[323] As explained earlier, the origin of the African Continent is the story of colonialization which divided the continent into shreds, with each colonizer carving a niche out of the respective colonies. Overtime, the colonies grew apart, estranged from their compatriots from the other end of the continent. Since post colonization era, much of the strives within the African continent has been aimed at finding ways to re-connect the

[322] For example, there are various languages that are spoken within the European continent
[323] K. W. Appiah, "Europe upside down: Fallacies of the new Afrocentricism" (1993) TLS 25

countries that have come to grow apart. This essentially is the idea behind the African Union[324] and by extension, the African Continental Free Trade Area Agreement.

Moreover, upon the emancipation of most and subsequently all the African States in the mid 1960s, there was a tacit resolve by the African States to safeguard their independence. African States were rather impetuous to smugly exercise the right of sovereignty that came with independence. In fact, the scanty instances of some form of integration in the early 1960s, such as the Senegal-Mali union, the Ghana-Guinea- Mali union and subsequently the Gambia-Senegal union, were rather short lived.[325] This was mostly due to the power imbalance that existed as a result of the differences in the economic strength of the respective countries.[326] Contingent to that also is the fear of returning to its colonial past. Thus, the cooperation agenda in the African Continent is a rather nuanced one; one that is definitely remote to the European practice of supranationality. Asante describes it as "a totally different orientation to reality based on harmonious coexistence of an endless variety of cultures".[327] He calls it "Pluralism without hierarchy".

It may be said that lessons that may be derived from the attempt of west African States at regional integration in the 1960s and 1970s are that integration in Africa ought to involve an organic transformation, must be devoid of hierarchy and ought to appreciate the inherent diversity of the African Continent.

---

[324] Kwame Nkrumah, *Supra n. 234*; Muchie, Mammo & Ebooks Corporation. *Unite or Perish Africa Fifty Years after the Founding of the OAU*. (Africa Institute of South Africa, 2014).
[325] Thomas Hodgkin; Morgenthau, & Ruth Schacter. "Mali". in James Scott Coleman, ed*., Political Parties and National Integration in Tropical Africa*. (Berkeley, CA: University of California Press, 1964). pp. 216–258.
[326] Lynn K. Mytelka, "A Genealogy of Francophone West and Equatorial African Regional Organizations" (1974) 12 J. Mod. Afr. Stud. pp. 297 – 320; William J. Foltz, *From French West African to the Mali Federation* (New Haven, Connecticut: Yale University Press, 1965); Donn M. Kutz "Political Integration in Africa: The Mali Federation" (1970) 8 J. Mod. Afr. Stud. pp. 405 - 425
[327] P. Petrie, "Afrocentrism in a multicultural democracy" (1991) American Visions

The Europeans did not have such history. For them, it is a different narrative. At the origin of the European continent is the need to end war by promoting peace through coalition and united government. In order for nations to rebuild after the loss emanating from the two world wars, the need for coalition was rather pertinent.

As time passed, countries joined the union, understanding the terms and conditions that governed their membership. The supranationality of the EU was voluntarily subscribed to by the European countries. As the European Union grew successful and the benefits of its members grew apparent, so did its membership.

In a manner of speaking, Europe can be described as essentially centripetal while Africa is rather centrifugal. In the sense that while the need for a central overarching governmental body is what drew European nations together, African countries on the other hand are inherently averse to such notion as a result of their checkered history. No doubt, this distinction ought to be accounted for in developing a trade dispute resolution system in Africa.

Thence, an ideal trade dispute resolution framework in Africa would not be authoritative in its approach but rather persuasive. This is with the understanding that that there is actually no overarching body in Africa to which all the African countries have empowered to issue sanctions. Rather what we have are initiatives that set out to encourage cooperation and coalition even on the ground of trade.

Odumosu, while engaging to the Constructivist theory in another context brilliantly suggests the need to "hone a peoples' initiative, which encourages peoples' participation in dispute settlement system" as well as engage a "tribunals' initiative that recognizes the agency of Third World

peoples and takes their perspectives seriously in reaching robust decisions".[328] In that wise, a dispute resolution system in Africa may be more effective if its operations are enforced through the agency of the sub-regional institutions. Considering the diversities inherent in the continent, States apparently form stronger bonds at the sub-regional level. This is even more so considering the prevalence of sub-regional communities over the years. These sub-regional platforms may be of better utility in effecting a pragmatically effective dispute resolution system. Afterall, it has been noted that AfCFTA does not exactly intend to subvert the influence or relative achievements of the sub-regional institutions but to build on and consolidate the progress they have achieved.[329] It is noteworthy that the idea of a dispute resolution system that incorporates the agency of the sub-regional institutions is not an entirely novel one but one that has been explored by other scholars in other contexts.[330]

Moreover, flexibility would also probably be of great efficacy. Flexibility in the system, the rules of engagement, and even the personnel involved. There must be enough flexibility in the system as to accommodate the cultural dynamics of the given sub-region. For example, in the Northern part of Africa where Sharia law is prevalent, some of those ideals and structures may be exploited in resolving trade disputes in that sub-region. Notably, there is an emerging body of literature that profoundly highlights the significance of religion in promoting world peace.[331]

---

[328] *Supra* n. 128

[329] James Gathii, *supra* n. 19; see Article 20(2) & 21(2) of the AfCFTA Agreement; as well as Article 7(1) of the AfCFTA Protocol on Trade in Goods.

[330] For example, see Emilia Onyema, *Supra n.* 24

[331] An example is the recent work; Diana Ginn & Edward R. Lewis, "Living Well Together: Insights from a Philosopher, a Theologian and a Legal Scholar" in eds Dawid Bunikowski & Alberto Puppo, *Why Religion? Towards a Critical Philosophy of Law, Peace and God* (New York City: Springer, 2020)

By this, an Afrocentric approach to dispute resolution, which does not only speak to the idea of a non juridical system but also to the notion of engaging disputes on a granular level and not just at a central level may well be underway.

CHAPTER FIVE

CONCLUSION

International trade has come to form a vital part of the discourse in the international arena. As time passes, the necessity of inter-State dependence is becoming more glaring than always. Also, growing within the international trade discourse is the essence of Preferential Trade Agreements, particularly Regional Trade Agreements as they are reputed to foster trade liberalization at a more granular level and of course foster peace and cooperation among nations within the region.

The proliferation of Regional trade agreements has come to be seen to have the immediate benefits as highlighted above, but much more they may be seen to have much more political and normative consequence within the international sphere. As various kinds of scholarship spring up that question the inherent monopoly and prejudices that is replete in extant international normative structure which is seen to be largely in favour of the global north, Regional Trade Agreements strategically stands as instrumental in proffering counter narratives that favours the third world.

One of such Regional Trade Agreement which also represents the recent biggest development to regionalization in Africa is the African Continental Free Trade Area Agreement. Not only does AfCFTA create a platform where States across Africa can cooperate with one another through trade, it also presents a unique opportunity to carve a niche for itself and gather enough momentum and leverage that would be effective in negotiating its unique interest at the inter national arena.

From its incubation till dates, various kinds of scholarship have been presented in analysing its prospects from various perspective including the feminist, historical as well as economic perspective. A broad glance at the various scholarship that have arisen reveals a potpourri of

skeptics and optimists alike. While optimists are determined to bank on indices such as the economies of scale as well as population growth to envision a successful AfCFTA implementation, skeptics would rather call to remembrance the failures of previous attempts at regionalization in Africa as well as the hiccups that were faced as negotiations were ongoing.

In any case, whether in maximizing the potentials that the AfCFTA presents or to pre-empt any impending fallout, the importance of an effective dispute resolution system cannot be overemphasized. In analysing the dispute resolutions regime as it stands under AfCFTA, which is largely an adaptation from the WTO template, some scholars have spoken to the need to have a system that is more characteristic of African continent, and this forms the first strand of the narrative on which this thesis is based.

In thinking about what it means for a dispute settlement regime to be characteristic of the context within which it is applied, this leads to thinking about conflict and how it is resolved. A quest for an intrinsic approach to conflict and its resolution leads to the engagement of various theories that tackle these phenomena to the root. These theoretical elucidations may be said to form the other strand on which this thesis is based.

An in-depth study on the theoretical underpinnings to conflict, not only reveals its inevitability but also highlights how its is woven into the fabric of the society and is essentially contingent on the interest, goals and values of the actors that exists and interact within the given society. Thus, a thorough conception of conflict resolution strategy would at best be specious if it fails to account for the unique values of the actors and the structure within which they have come to find themselves operating.

These thoughts about conflict and its resolution apparently cohere with an emerging body of scholarship known as constructivism. Constructivists find their root in the Sociological school of thought. To them, legal norms derive their validity and legitimacy from their coherence with established social norms. In order words, the arrangement of the society by virtue of the nature of the protracted manner of relationship among the actors form the basis on which norms are created. Thus, norms are not exogenously transported but endogenously constituted. In relations to conflict resolution, the rules that ought to govern the resolution of conflict as between States, ought not to be directly transported from another clime but ought to be generated from the nature of the interactions within the given context.

In thinking about how the constructivism idea applies to resolving trade disputes in Africa, values from the conflict transformation theory are helpful as well as an understanding of what Pan-Africanism or Afrocentrism entails. The values from conflict transformation help to understand how to utilize impending conflict to reconstruct the African region as a society. Also, the values from the Afrocentrism help to appreciate the African region as a society within which conflicts are to being reconstructed. Thus, an engagement with the Africanism notion brings to fore the notion of Transcendent African Solidarity, which basically stresses how unity and solidarity are at the core of what it means to be African. Thus, any attempt to resolve trade dispute in Africa, must not just aim and promoting justice but rather to promote unity and solidarity. Similarly, the agency for resolving disputes ought not to be such as guarantees justice but one that is able to transform the conflict in fostering unity and solidarity.

The practical implications of this is only as wide as the mind can conceive and the realities accommodate. This thesis mostly provides a theoretical framework. Nevertheless, some examples are not far-fetched, including the utilization of sub-regional institutions as agents in the proceed of

dispute resolution, the flexibility in the normative structure as to accommodate socio-cultural and religious norms as well as the use of persuasion rather than sanction and diplomacy rather than judiciary.

In proving the utility of the Constructivism approach to resolving trade disputes, a comparative analysis is done with the European Union, which is a much more established and advanced regional integration scheme with a dispute resolution scheme that has endured many decades. In strengthening the case for a constructivist approach, the idea is to reflect how the constructivists ideas are deductible from the structure that forms the dispute resolution system under the EU system in relation to its historical, political and socio-economic context.

In all, this thesis can well be seen as another contribution to the imagination of how AfCFTA will be strategically utilized in such a manner that it does not just form another addition to the existing series of the PTAs across continents but actually carve out a normative structure that is characteristic of the African Continent. In expressing a similar view, Kuhlmann & Agutu hope that "AfCFTA will establish departure from past approached and put Africa in the driver's seat as trade and investment law continues to evolve internationally"

BIBLIOGRAPHY

JOURNALS

1. Adedeji, A. "Africa in transition: The Challenge of Pluralism, Democracy, Governance and Development" (1995) The Courier
2. Ajibo, Collins C., 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects' (2019)53:5 J.W.T.L
3. Akinkugbe, Olabisi D., 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment', Afr. J. Int. Comp. Law (Forthcoming, 2020)
4. Alavi, Amin, "African Countries and the WTO's Dispute Settlement Mechanism" (2007) 25:1 Development Policy Review Journal
5. Alexander, Nadje "From Common Law to Civil Law Jurisdiction: Court ADR on the move in Germany" (2002)4:8 ADR Bulletin
6. AlZoughbi, Basheer "The Operation of the Oslo Treaties and the Pacific Mechanisms of Conflict Resolution Under Public International Law", (2013) 45:2 J. Peace Res.
7. Alter, Karen J., James Gathii & Laurence R. Helfer, "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences" (2016) 27:2 EJIL
8. Amason , A. & H. Sapienza "The Effects of Top Management Team Size and Interaction Norms on Cognitive and Affective Conflict (1997)23 J. Manag
9. Andrain, Charles F. "The Pan-African Movement: The Search for Organization and Community," (1962) 23:5.Phylon
10. Antczak, Anna "Interdependencies between European Strategic Culture and the Evolution of the European Union International Roles." (2012) 18:2 Journal for Perspectives of Economic, Political, and Social Integration
11. Appiah, K. W, "Europe upside down: Fallacies of the new Afrocentricism" (1993) TLS
12. Bacharach, S. B. "Extraordinarily ordinary: Working in the Social Economy" (1989) 14:4 Soc. Enterp. J.
13. Bach Daniel C., "The Politics of West African Economic Co-operation: C.E.A.O. and E.C.O. S.W.A.S" (1983) 21:4 J. Mod. Afr. Stud.
14. Barro, R. J. & Sala-i-Martin X "Convergence" (1992) 100:2 J Polit. Econ.
15. Baun, M, "How Necessary is a Common Strategic Culture?" (2005) 2:1 OJGG

16. Behfar, Kristin J. *et al*, "Conflict in Small Groups: The Meaning and Consequences of Process Conflict" (2011) 42:2 Small Group Res.
17. Bolea, Lucía et al., "From Convergence to Divergence? Some New Insights into the Evolution of the European Union." (2018) 47 Structural Change and Economic Dynamics
18. Bourneuf, Pierre- Etienne "'We Have Been Making History'; The League of Nations and the Letitia Dispute (1932- 1934)" (2012) 39:4 Int. Hist. Rev.
19. Brunee , Jutta & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39:1 Colum J Transnat'l L 19
20. Brunee, Jutta & Stephen Toope, "Interactional International Law: An Introduction" (2011) 3:2 Int. Theory
21. Bueno De Mesquita, Bruce, "Domestic Politics and International Relations" (2002) 46:1 Int. Stud. Q.
22. Bueno De Mesquita, Bruce, "Toward a Scientific Understanding of International Conflict: A Personal View (1985) 29:2 Int. Stud. Q.Búrca, Gráinne De, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013) 20:2 M. J.
23. Burca, Grainne De, "The European Court of Justice and the International Legal Order After Kadi" (2010) 51:1 HarvIntlLJ.
24. Bush, Robert & Sally Pope, "Changing the Quality of Conflict Transformation: The Principles and Practice of Transformative Mediation, (2002) 3:1 Pepp. Disp. Resol. L.J.
25. Chinkin, C. M & Romana Sadurska, "Learning About International Law Through Dispute Resolution" (1991) 40 Int. Comp. Law Q
26. Cleek, Margaret G. & T. A. Pearson, "Perceived Causes of Divorce: An Analysis of Interrelationships" (1985) 47:1 J Marriage Fam.
27. Cowell, Frederick, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction", (2013) 13:1 HRLRev
28. Cristina, Cret Daniela & Mihaela Narcisa Stoicu "Theoretical and Jurisprudential Considerations on Res Judicata Authority" (2016) 6 Tribuna Juridică,
29. Daniels, Trina, "Decision Making in Eurocentric and Afrocentric Organizations" (2012) 43:3 Journal of Black Studies

30. Del'a, A., "Nkrumah and African unionism. African Perspective" (2000) 1:3 Pan-Africanism.
31. Devlin, Richard F., "The Charter and Anglophone Legal Theory" (2013) 4:1 Rev. Const. Stud
32. Dirar, Luwam "Norms of Solidarity and Regionalism: Theorizing State Behaviour among Southern African States" (2016) 24 Mich St Int'l L Rev
33. Dressler, David, "What's at Stake in the Agent-Structure Debate?" (1989) 43 Int. Organ.
34. Evans, P & G Karras "Convergence Revisited" (1996) 37 J Monet Econ
35. Evans, P, "Using panel data to evaluate growth theories" (1998) 39:2 Int Econ Rev.
36. Fenger N. & M. P. Broberg, "Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine" (2011) *30*:1 *Yearbook of European Law*
37. Felstiner ,William F. *et al*, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…" (1981) 25:3/4 Law Soc. Rev
38. Finnemore, Martha & Kathryn Sikkink, "TAKING STOCK: The Constructivist Research Program in International Relations and Comparative Politics" (2001) Ann. Rev. Polit. Sci.Fisher, R. J. & L. Keashly, "The Potential Complementarity of Mediation and Consultation Within a Contingency Model of Third Party Intervention." (1991) 28 J. Peace Res
39. Fisher, Ronald J., "Third Party Consultation as a Method of Intergroup Conflict Resolution: A Review of Studies" (1983) 27:2 J. Confl Resolut
40. Foltz, William J., *From French West African to the Mali Federation* (New Haven, Connecticut: Yale University Press, 1965)
41. Galtung, Johan, "Theories of Conflict Definitions, Dimensions, Negations, Formations" (1973) Foreign Affairs
42. Gathii, James Thuo, "African Regional Trade Agreements as Flexible Legal Regimes." (2010) 35:3 N. C. J. Int'l L. & Com. Reg.
43. Gathii, James, 'Agreement Establishing the African Continental Free Trade Area' (2019) 58 ILM
44. Guetzkow, H. & J. Gyr, "An Analysis of Conflict in Decision- Making Groups" (1954) 7 Hum. Relat.

45. Ginn, Diana & Edward R. Lewis, "Living Well Together: Insights from a Philosopher, a Theologian and a Legal Scholar" in eds David Bunikowski & Alberto Puppo, *Why Religion? Towards a Critical Philosophy of Law, Peace and God* (New York City: Springer, 2020)
46. Hoskins, Linus, "Eurocentrism v Afrocentrism: A Geopolitical linkage Analysis" (1992) 23:2 Journal of Black Studies
47. Henrich, Joseph *et al,* "Economic Man" in Cross-cultural Perspective: Behavioural Experiments in 15 Small-Scale Societies" (2005) 28:6 Behav. Brain Sci.
48. Henry, Paul M., "Pan–Africanism: New Aspirations of an Old Movement" (1959) 49:196 The Round Table
49. Hettne, Björn & Fredrik Söderbaum "Theorising the Rise of Regionness." (2000) 5:3 *New Political Econ*
50. Jehn, K. "A Multimethod Examination of the Benefits and Detriments of Intra Group Conflict" (1995) 40 Adm. Sci. Q.
51. Jehn, K. "A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups" (1997) 42 Adm. Sci. Q
52. Jensen, Erik, "The Evolution of the United Nation" (1986) 2:2 ISIA
53. Kakouris, C.N., 'Use of the Comparative Method by the Court of Justice of the European Communities', (1994) 6:2 Pace Int. Law Rev.
54. Katrin, Kuhlmann & Akinyi Lisa Agutu, "The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development", (2020) 15:4, Georget. J. Int. Law, (Forthcoming)
55. Kratochwil, Friedrich "The Embarrassment of Changes: Neorealism as the Science of Realpolitik without Politics" (1993) 19 Rev. Int'l Stud
56. Kumm, Mattias, "Who is the Final Arbiter of Constitutionality in Europe?" (1999) 36 CMLR
57. Kutz, Donn M "Political Integration in Africa: The Mali Federation" (1970) 8 J. Mod. Afr. Stud.
58. Landsberg, Chris. "Afro-Continentalism: Pan-Africanism in Post-Settlement South Africa's Foreign Policy." (2012) 47:4 JAAS

59. Lenaerts, Koen, “Constitutionalism and the Many Faces of Federalism.” (1990) 38 American Journal of Comparative Law
60. Lieberfeld, Daniel, “Theories of Conflict and the Iraq War” (2005) 10:2 Int. J. Peace Stud.
61. Little, Andrew T. & Thomas Zeitzoff, “A Bargaining Theory of Conflict with Evolutionary Preferences” (2017) 71 Int. Organ.
62. Limante, Agne, “Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards A More Flexible Approach.” (2016) 54:6 JCMS
63. Mack, R. W. “The Component of Social Conflict” (1965) 12:4 Soc. Probl.
64. Magliveras, Konstantinos D. & Gino J Naldi, “The African Union - A New Dawn for Africa” (2002) 51:2 ICLQ
65. Mamo, Andrew, “Getting to Peace: Roger Fisher’s Scholarship in International Law and the Social Sciences” (2016) 29 LJIL
66. Mancini, Federico, “The Making of a Constitution for Europe.” in Robert. Keohane & Stanley Hoffman, eds., *The New European Community: Decision making and Institutional Change*. (*Boulder:* Westview Press, 1991)
67. Mankiw, N. G, Romer, D. & D. N. Weil, “A contribution to the empirics of economic growth” (1992)107:2 Q J Econ
68. McPhail, Mark Lawrence, “From Complicity to Coherence: Rereading the Rhetoric of Afrocentricity” (1998) 62:2 Western Journal of Communication
69. Michaelson, Karin, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 Wis. Int’l L. J.
70. Mitchell, Christopher, “Beyond Resolution: What Does Conflict Transformation Actually Transform?” (2002) 9:1 Peace and Conflict Studies
71. Moagi, Miriam et al, “Mozambican Immigrants to South Africa: Their Xenophobia and Discrimination Experiences” (2018) 28:3 J. Psychol. Afr.
72. Muchie, Mammo, “Pan-Africanism: An Idea Whose Time Has Come” (2000) 27:2 Politikon
73. Mytelka, Lynn K., “A Genealogy of Francophone West and Equatorial African Regional Organizations” (1974) 12 J. Mod. Afr. Stud.
74. Ng’ong’ola C. “Replication of WTO dispute settlement process” (2011) 1 SADC LJ,

75. Nsamenang, Bame, “Work Organization and Economic Management in Sub- Saharan Africa: From a Eurocentric Orientation toward an Afrocentric Perspective” (1998) 10:1 PDS
76. Obeng-Odom, Franklin. "The African Continental Free Trade Area."(2020)79:1 Am. J. Econ. Sociol. P.
77. Odusote, Abiodun, “Integration of Regional Economic Communities as Panacea for Africa’s Economic Growth: Lessons from Comparative Models.” (2015) 8:2 Acta Universitatis Danubius. Relationes Internationales
78. Ofodile, Uche Ewelukwa, “South-South Trade and Investment Relations: Harmony and Disharmony – African Perspectives” (2011) 105 Proceedings of the Annual Meeting (American Society of International Law)
79. Okafor, Obiora Chinedu, “Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective” (2005) 43:1 Osgoode Hall Law J.
80. Onyema, Emilia “Reimagining the framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement”, (2019) World Trade Rev.
81. Orfield, Lester B., “Divorce for Temperamental Incompatibility” (1953-1954) 52:5 Mich L Rev
82. Palkovska, Iva Fellerova, “Characteristics of Judgments of The EU Court of Justice” (2018) 3 Law & Political Science Conference
83. Paffenholz, Thania “Understanding Peacebuilding Theory: Management, Resolution and Transformation” in Kristina Lundqvist, ed, **“**Conflict transformation: Three lenses in one frame” (2009) 14:2 Journal of Peace Research and Action
84. Petrie, P., “Afrocentrism in a multicultural democracy” (1991) American Visions
85. Porumbescu, Alexandra, “The Evolution of the European Union as Global Actor in the Light of the Lisbon Treaty.” (2015) 20:1 Analele Universitatii Din Craiova - Seria Istorie
86. Priem, R. & K. Price, “Process and Outcome Expectations for the Dialectical Inquiry, Devil’s Advocacy, and Consensus Techniques of Strategic Decision Making” (1991) 16 Group and Management Studies
87. Reimann, Cordula “Assessing the State-of-the-Art in Conflict Transformation- Reflections from a Theoretical Perspective (2004) Berghoff Handbook on Conflict Transformation

88. Seydina, Sene. "Impact of the African Continental Free Trade Agreement (ALECA) on Exports." (2019) 9:2 IJEFI
89. Shepperson, George, “Pan-Africanism and ‘Pan-Africanism’: Some Historical Notes,” (1962) 23 Phylon
90. Signe, Landry & Collette Van Der Ven, “Keys to Success for the AfCFTA Negotiations” (2019) Africa Growth Initiative Policy brief
91. Siklos, P. L, “Meeting Maastricht: nominal convergence of the new member States toward EMU” (2010) 27:2. Econ Modell
92. Simo, Regis Y. ‘Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility’ (2020) 23:1 J. Int. Econ. Law
93. Sørensen, Karsten Engsig, “The Most-Favoured-Nation Principle in the EU” (2007) 34:4 Leg. Issues Econ. Integrat
94. Solow R. M. “A contribution to the theory of economic growth” (1956) 70:1 Q J Econ
95. Stefanova, Boyka, “Regional Integration as a System of Conflict Resolution: The European Experience” (2006) 169:2 World Aff. 81–93.
96. Sweet, Alec Stone “The European Court of Justice and the Judicialization of EU Governance.” (2010) 5:1 LREG
97. Tageldin, Shaden M., “The Place of Africa, in Theory: Pan-Africanism, Postcolonialism, Beyond.” (2014) 27:3 Journal of Hist. Sociol
98. Timmermans, Christian, “The Constitutionalization of the European Union.” (2002) 21:1 Yearb. Eur. Law
99. Van Ham, P., “Europe’s Strategic Culture and the Relevance of War” (2005) 2:1 OJGG
100. Wall, V. & L. Nolan, “Perceptions of Inequity, Satisfaction, and Conflict in Task-Oriented Groups” (1986) 39 Hum. Relat
101. Weiler, Joseph, “The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration” (Cambridge: Cambridge University Press, 1999)
102. Wendt, Alexander, “Anarchy is what States Make of It: The Social Construction of Power Politics” (1992) 46 Int’l Org
103. Wendt,,Alexander, “Collective Identity Formation and the International State” (1994) 88 Am. Pol. Sci. Rev.

104. Wendt, Alexander, “The Agent-Structure Problem in International Relations Theory” (1987) 41 Int. Organ.

105. Williamson, Gabrielle H. “EU Court of Justice Ends a Long Dispute over Chemicals Policy.” (2016) 33:2 The Environmental Forum

106. Yanagizawa-Drott, David “Propaganda and Conflict: Evidence from the Rwanda Genocide” (2014) 129:4 Q. J. Econ.

107. . Young, Kurt B, “Towards a Holistic Review of Pan-Africanism: Linking the Idea and the Movement” (2010) 16:2 Nationalism and Ethnic Politics

BOOKS

1. Adejugbe, M.O.A, “Inter-State Economic Cooperation” in G. O. Ogunremi & E.K. Faluyi, eds, *An Economic History of West Africa Since 1750* (Oyo State, Nigeria: Rex Charles Publication, 1996)
2. Agbakoba, J.C.A, “A Critical Examination of the Concept of Development and Development Philosophy in Relation to Africa”. Unpublished Nsukka 2005
3. Amankwah, H. A. “International Law, Dispute Settlement and Regional Organizations in the African Setting” in Frederick E. Snyder & Surakiart Sathirathai (eds) *Third World Attitudes Toward International Law: An Introduction* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1987)
4. Asante, Charles et al. *Ghana's Foreign Policy Post-Independence: A Study of Kwame Nkrumah's Pan-Africanism* (PhD Dissertation, Griffith University, 2018).
5. Azar, E. & John Burton, *International Conflict Resolution: Theory and Practice* (Boulder: Lynne Rienner and Wheatsheaf, 1986)
6. Bercovitch, Jacob & Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches* (Michigan, USA: The University of Michigan Press, 2012)
7. Björkqvist, Kaj, “The Inevitability of Conflict but Not of Violence: Theoretical Considerations of Conflict and Aggression” in Douglas P. Fry & Ors, 3rd ed, *Cultural Variation in Conflict Resolution: Alternatives To Violence* (Mahwah, N.J.: Lawrence Erlbaum Publishers, 1997)

8. Blake, James J., "International Conflicts: The Resolution of African Conflict Situations: Prospects and Problems" in Ross Stagner (ed.) *The Dimensions of Human Conflict* (Detroit, Wayne State University Press, 1967)
9. Bloomfield D. &Ben Reilly "The Changing Nature of Conflict and Conflict Management" in Peter Harris and Ben Reilly (eds.) *Democracy and Deep-Rooted Conflict* (Stockholm: Institute for Democracy and Electoral Assistance (IDEA), 1998).
10. Bohannan, Laura & Paul Bohannan, *The Tiv of Central Nigeria. Ethnographic Survey of Africa. Western Africa*; Pt. 8. (London: International African Institute, 1953.) Boulding, Kenneth, *Conflict and Defence: A General Theory* (Michigan: Harper & Brothers, 1962).
11. Clement, Kevin, "Towards Conflict Transformation and a Just Peace", Alex Austin & ors. (eds), *Transferring Ethnopolitical Conflict. The Berghof Handbook* (Wiesbaden:VS Verlag, 2004)
12. Coser, Lewis, *The Function of Social Conflict* (Glencoe Illinois, The Free Press of Glencoe, 1956)
13. Cryer, Robert et al. *Research Methodologies in EU and International Law* (Oxford; Portland, Or.: Hart, 2011)
14. Deleanu, Ion, *Tratat De Procedură Civilă,* vol. II, (Bucharest: Universul Juridic Publishing House, 2013)
15. Eagleton, Terry, *The Significance of Theory. Bucknell Lectures in Literary Theory*. (Oxford, UK; Cambridge, MA: Blackwell, 1990)
16. Elias, Taslim Olawale, *Africa and the Development of International Law* (Leiden; A. W. Sijthoff, 1972)
17. Fisher, Roger et al. Getting to Yes: Negotiating Agreement without Giving In, (2ed) (Boston: Houghton Mifflin, 1991).
18. Fuller, Lon. L *The Morality of Law* (New Haven: Yale University Press, 1967)
19. Gathii, James Thuo "The Agenda of Third World Approaches to International Law (TWAIL)" Jeffrey Dunoff & Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers,* (UK: Cambridge University Press, 2019)
20. Giddens, Anthony, *The Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Los Angeles: University of California Press, 1979)

21. Giddens, Anthony, *The Constitution of Society: Outline of the Theory of Structuration* (Los Angeles: University of California Press, 1984)
22. Gould, Harry D., "What is at Stake in the Agent-Structure Debate?", in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)
23. Hauser, Phillip & Otis Dudley Duncan, eds. *The Study of Population: An Inventory and Appraisal* (Chicago: University of Chicago Press, 1959)
24. Hardt, Michael & Antonio Negri, *Commonwealth* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009
25. Hodgkin, Thomas; Morgenthau, & Ruth Schacter. "Mali". in James Scott Coleman, ed., *Political Parties and National Integration in Tropical Africa*. (Berkeley, CA: University of California Press, 1964)
26. Jackson, Richard "Constructivism and Conflict Resolution" in Jacob Bercovitch et al, eds, *The SAGE Handbook of Conflict Resolution* (London, California, New Delhi, Singapore: SAGE Publications Ltd, 2009)
27. Katzenstein, Peter, *Cultural Norms and National Security: Police and Military Power in Postwar Japan* (Ithaca, N.Y.: Cornell University Press, 1996)
28. Katzenstein, Peter, ed., *Tamed Power: Germany in Europe* (Ithaca, N.Y.: Cornell University Press, 1997)
29. Kowert, Paul, "Agent Versus Structure in the Construction of National Identity" in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)
30. Kubálková, Vendulka, "Reconstructing the Discipline: Scholars as Agents" in Vendulka Kubálková & ors (eds) *International Relations In a Constructed World* (New York, M.E. Sharpe, 1998)
31. Kulgler, Tadeusz, "Demography and International Relations: Economics, Politics, Sociology, and Conflict" in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)
32. Kratochwil, Friedrich, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014)

33. Larsen, H. “Discourse analysis in the study of European foreign policy”, in B. Tonra, & T. Christiansen, eds, *Rethinking European Union Foreign Policy* (Manchester: Manchester University Press, 2004)
34. Lauterpatch, Hersch, *The Function of Law in the International Community* (Great Britain: UK, Oxford University Press, 1933).
35. Lederach, John Paul *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington: United States Institute of Peace, 1997)
36. Lederach, John P, *Preparing for Peace: Conflict Transformation Across Cultures* (New York: Syracuse University Press. 1995)
37. Lee, Robert, “Religion and Social Conflict: An Introduction” in Robert Lee & M. E. Marty (eds), *Religion and Social Conflict* (New York: Oxford University Press, 1964)
38. Lester, Simon, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary,* 3ed (UK: Oxford, Hart Publishing, 2018)
39. Lipsey, R.G., *The Theory Of Customs Unions: Trade Diversion And Welfare* (Económica. New Series, 1957)
40. Luke, David & Jamie Macleod, *Inclusive Trade in Africa: The Africa Continental Free Trade in Comparative Perspective* (London: Routledge, 2019)
41. Mammo Muchie, & Ebooks Corporation. *Unite or Perish Africa Fifty Years after the Founding of the OAU*. (Africa Institute of South Africa, 2014).
42. M’baye, Babacar, “Pan Africanism”, in Richard M. Juang & Noelle Morrissette, eds, *Africa and the Americas: Culture, Politics and History: A Multidisciplinary Encyclopedia,* volume 1 (California: Greenwood Publishing Group, 2008)
43. Meadh, J.E. *The Theory of Customs Unions* (Greenwood Press, 1955)
44. Miall, Hugh “Conflict Transformation: A Multi-Dimensional Task” in Alex Austin, Martina Fischer & Norbert Ropers, (eds.), *Transforming Ethnopolitical Conflict. The Berghof Handbook* (Wiesbaden: VS Verlag, 2004)
45. Nkrumah, Kwame, *Africa Must Unite* (London: Panaf, 1963)
46. Odumosu, Ibironke, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010)

47. Onuf, N. “Constructivism: A User’s Manual” in V Kubalkova, N Onuf & P Kower (eds), *International Relations in a Constructed World* (London, ME Sharpe, 1998)
48. Parsons, Talcott, *The Social System* (England: Routeledge, 1951)
49. Petersen, Roger D. *Understanding Ethnic Violence: Fear, Hatred and Resentment in Twentieth- Century Eastern Europe* (Cambridge, UK: Cambridge University Press, 2002)
50. Powelson, John P. *Institutions of Economic Growth: A Theory of Conflict Management in Developing Countries* (Princeton, N.J: Princeton University Press, 1972)
51. Reus-Smith, Christian, “Constructivism” in Scott Burchill *et al, Theories of International Relations* (Hampshire; New York: Palgrave Macmillian, 2005)
52. Scupin, Raymond “Anthropology, Conflict, and International Relations” in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)
53. Smelser, Neil, *Theory of Collective Behaviour* (Glencoe Illinois: The Free Press of Glencoe, 1963)
54. Stagner, Ross, “The Analysis of Conflict” in Ross Stagner (ed.) *The Dimensions of Human Conflict* (Detroit, Wayne State University Press, 1967)
55. Strauss A. & J. Corbin*, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (London: Sage Publications, 1998)
56. Väyrynen, Raimo (ed.), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage, 1991)
57. Vayrynen, R,.”To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts”, (ed.), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation (*London: Sage, 1991)
58. Vasquez, John A., *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era* (Ann Arbor: University of Michigan Press, 1995)
59. Viner, Jacob, *The Customs Union Issue* (Carnegie Endowment for International Peace, 1950)
60. Waltz, Kenneth, *Theory of International Politics* (Redding, MA: Addison-Wesley, 1979)
61. Weiler, Joseph, “The Transformation of Europe” (1991) 100 Yale L. J. 2403; Martin Shapiro, “The European Court of Justice.” in A. Sbragia, ed., *Euro-Politics*. (Washington, DC: Brookings Institution, 1992)

62. Weldes, Jutta, Mark Laffey, Hugh Gusterson, & Raymond Duvall, "Introduction: Constructing Insecurity" in Jutta Weldes et al., Cultures of Insecurity: States, Communities, and the Production of Danger (Minneapolis: University of Minnesota Press, 1999)
63. Wendt, Alexander *Social Theory of International Politics* (New York: Cambridge University Press, 1999)
64. Yetiv, Steve, "History, International Relations, and Conflict" in Steve Yetiv & Patrick James (eds) *Advancing Interdisciplinary Approaches to International Relations* (Switzerland, Palgrave Macmillan, 2017)

INTERNATIONAL MATERIALS

Treaties and Other International Agreements

1. *Charter of the United Nations*, 26 June 1945, 1 UNTS 16 (entered into force 24 October 1945)
2. *Constitutive Act of the African Union*, 1 July 2000
3. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)
4. Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993.
5. European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957
6. GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 1, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
7. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994)
8. *The Hague Convention for the Pacific Settlement of International Disputes,* 18 October 1907, 2 AJIL Supp. 43 (entered into force 26 January 1910)

9. UN General Assembly, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, 24 October 1970, A/RES/25/2625

International Court of Justice

1. CILFIT v Ministero della Sanità 283/81 [1982] ECR 3415.
2. *Commission of the European Communities v Italian Republic* 48/71 [1972] ECR
3. *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, Cases 28, 29, 30/62 [1963] ECR
4. *Factory at Chorzow, Germany v Poland, Jurisdiction* (1927) PCIJ (Ser A) No. 9
5. *Foto-Frost v Hauptzollamt Lübeck-Ost.* 314/85 Foto-Frost [1987] ECR 4199
6. Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit C-461/03 [2005] ECR 1-10513
7. *Mavronmmatis Palestine Concessions (Greece v. UK),* (1924) PCIJ (Ser. B) No. 3,
8. Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA C-119/05 [2007] ECR 1-6199
9. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* Advisory Opinion, [1969] ICJ Rep
10. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* C-26/62 [1963] ECR
11. *South-West African Cases; Advisory Opinion Concerning International Status,* [1950] ICJ Rep 128
12. *Rights of Minorities in Upper Silesia (Germany v. Poland)* (1928), PCIJ (Ser A) No 15 at 22.
13. *Status of Easter in Corelia* (1923)*,* Advisory Opinion, PCIJ (Ser B) No. 5 at 27
14. *The Legal Consequences for States of the Continued Presence of South Africa in Namibia,* Advisory Opinion, [1971] ICJ Rep 3
15. *The Steamship Lotus (France v Turkey)* (1927), PCIJ (SerA) No 10
16. *Ukor v Lalaye*, 2005 ECW/CCJ/APP/04/05

17. *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communit*ies C-402/05 P and C-415/05 P [2008] ECR