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LINKING THE GAP BETWEEN LEGAL COMMITMENTS AND IMPLEMENTATION: AN APPRAISAL OF THE AFCFTA'S DEFICITS IN COMBATING ILLICIT TRADE

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Abstract

This paper assesses the legal framework regulating the African Continental Free Trade Area (AfCFTA), with particular focus on its deficits in combating illicit trade. While the AfCFTA seeks to liberalize intra-African trade through tariff elimination, removal of non-tariff barriers, and promotion of investment, it has largely failed to address illicit trade, thereby undermining its objectives. Using a doctrinal research method, this paper evaluates the AfCFTA Agreement and its protocols, alongside comparative instruments such as the WTO and EU regimes, to reveal gaps in enforcement, harmonization, and dispute resolution. The study argues that without stronger legal safeguards, the AfCFTA risks facilitating illicit trade rather than curbing it. The paper concludes with recommendations for legal and institutional reforms.

Keywords: AfCFTA, Illicit Trade, Legal Framework.

1.0. Background of the African Continental Free Trade Area and the Problem of Illicit Trade in Africa

The African Continental Free Trade Area (AfCFTA) is a trade area in Africa derived from the African union agenda of 2063 with the purpose of reducing poverty, boosting industrialization, creating a single market for goods and services, facilitating free movement of persons and generally strengthening economic integration of the African continent¹. Its existence is a continuation of the long-maintained efforts to unite African economies through the African Union by reshaping commerce across African states especially in the current era where economic integration is of most importance setting aside state boundaries².

Evolution of the AfCFTA can be traced through five phases beginning from the late 19th to the 21st Century. This included attempts to form subregional trade blocs, steps towards enacting a legally binding treaty, sub-regions trading, rationalization of the African economic integration and eventually the formation of the African Continental Free Trade Area in 2018³.

The initial phase (1889 to 1979), was much characterized by small-scale, subregional researches that resulted from the political agenda of the Pan-African movement. At this time African nations used to work together so as to achieve common political ends⁴. The

Advancing the Implementation of the Agreement Establishing the African Continental Free Trade Area: Proposing Transformative Strategic Actions, Economic Report on Africa 2025, p. 27.

³ GEROUT Guillaume, et al., (2019), *The AfCFTA as Yet Another Experiment Towards Continental Integration, Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective, 1st Edition, Routledge, p. 15.*

⁴ Ibid.



following phase (1979-1991) was an important phase where a Treaty Establishing the African Economic Community (AEC) was signed in 1991 in Abuja, Nigeria so as to implement the achievement of common political ends. Prior to the establishment of the AEC other initiatives such as the 1980 Lagos plan of action and the 1979 Monrovia Summit had already taken place. This phase experienced failure due to existence of series of economic crises that African countries faced⁵. The adaptation of the Abuja Treaty marked the initiation of the third phase by recognizing sub-regional integration as a step forward towards continental integration. As a result, a systematic and legally binding framework for Africa's economic integration was laid setting out 6-stages for over 34 years with the purpose of establishing an African Economic Community with a common market and monetary union. This nurtured trade among African countries⁶. Despite the wonderful efforts made, this phase experienced tremendous delay of the fulfilment of purported objectives due to the fact that most African states had self-interests⁷.

Shortcomings in the third phase marked the beginning of the fourth phase which began by boosting the Intra African Trade through creating a single giant free trade area composed of the REC's merging their free trade zones and avoiding the overlapping of the REC's.⁸ For instance, In 2012 during the 18th Ordinary Session of the AU Assembly, the AU Heads of state and Government adopted the decision to establish the continental Free Trade Area (CFTA) and endorsed the action plan on boosting Intra-African Trade (BIAT) focusing on areas such as infrastructure, trade policy and facilitation⁹. Furthermore, discussions for reformation of the AU Institutions were initiated aiming at making such institutions more effective and aligned with the continental goals like the Agenda 2063¹⁰. Eventually, from 2015 efforts to create the AfCFTA emerged through various negotiations which aimed at addressing disparities and policy divergences that characterized the African states' economies through creating a strong legal framework to

achieve mutual ends. This led to the prevalence of the current Agreement establishing the AfCFTA¹¹.

Operationalization of the AfCFTA began in 2019 during the 12th Extraordinary Summit of the heads of states after signing of the five key instruments which are; the African Trade Observatory (ATO), the rules of origin, the tariff concessions, the Online monitoring mechanism and the Pan-African Payment and Settlement System. Since then, there have been several initiatives taken by the AfCFTA in progressing its objectives such as signing and domestication of the Treaty together with its protocols by the member states, setting up of the AfCFTA secretariat, launching of the AfCFTA Guided Trade Initiative in Accra, Ghana, adaptation of the three new protocols on investments, Intellectual property and competition and launching of the African Trade Gateway (ATG) to support the implementation of the agreement establishing the AfCFTA¹².

The AfCFTA reflects economic priorities of its member states such as increasing intra-Africa commerce, industrialization and sustainable economic growth¹³. This can well be achieved if illicit trade is dully combated within the trade area. In recognition of this, the AfCFTA has established several mechanisms to combat illicit trade. The first mechanism is through ensuring that there is trade facilitation and transparency. The agreement authorizes the exchange of information among customs authorities and regulatory bodies aiming at improving the detection of fake documentation and illegal consignments, this exposes and helps in the reduction of counterfeit trade and fraud¹⁴. Another initiative is through harmonization of customs procedures. AfCFTA has standardized the customs procedures making them uniform between countries and eventually creating a difficult condition for smugglers. Furthermore, it encourages the use of electronic tracking and documentation systems something which helps in tracing different goods¹⁵. However, by reading the provisions of the AfCFTA's legal framework, they are framed in encouraging and persuasive terms rather than binding authoritative obligations thereby creating enforcement environment against illicit trade practices difficult¹⁶.

There are also rules of origin established basically to ensure that products which are genuinely made within the member states enjoy trade preferences. This has to a large extent discouraged importation of goods from outside Africa and fraudulently

⁵ GEROUT G. et al., (2019), *Supra Note 3*, pp. 17-19.

⁶ Article 4 (1)(d)(e), 6(2)(f), 22(1), 44(2)(4) and 45(1) of the Treaty Establishing the African Economic Community (Abuja treaty), 1991.

⁷ United Nations Economic Commission for Africa, African Union Commission and African Development Bank, (2017), *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About*, United Nations Economic Commission for Africa, 8th Edn., p. 112.

⁸ GEROUT G. et al., (2019), *Supra Note 3*, pp. 24 -26.

⁹ African Union (AU), *Decision on the Establishment of a Continental Free Trade Area (CFTA) and the Action Plan on Boosting Intra African Trade (BIAT)*, Assembly/AU/Dec.394(XVIII), 18th Ordinary Session of the Assembly, 29-30 January 2012, Addis Ababa, Ethiopia.

¹⁰ AFRICAN UNION, (2017), *Building a More Relevant African Union, Draft Technical Report on the African Union Institutional Reform*, pp. 10-18.

¹¹ The Preamble, *Supra Note 1*.

¹² African Union, (2024), *Operational Phase of the African Continental Free Trade Area Launched*, <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched>, retrieved on 5/12/2024.

¹³ <https://www.brookings.edu/articles/intra-african-trade-and-its-potential-to-accelerate-progress-toward-the-sdgs/>, Accessed on 25/09/2025 at 11:11 AM and *Supra Note 2* at pp. 120-21.

¹⁴ Annex 4 to the Protocol on Trade in Goods, 2028.

¹⁵ Article 4(f) and Annex 3 of the Agreement, *Supra Note 1*.

¹⁶ AfCFTA's Annex on Customs Cooperation and Mutual Administrative Assistance (Annex 3).

relabeling them as made in Africa. The Annex 2 has provided for the criteria to determine origin of goods and the AfCFTA Rules of Origin Manual provides for detailed guidance on the operationalization of the Annex 2¹⁷. However, in practice, fraud risk through false certificates and mislabeling is still very high, existence of customs capacity gaps and overly complex rules which risk discouraging trade rather than facilitating it¹⁸.

The AfCFTA calls for a stronger cooperation between state parties as another initiative to prevent illicit trade. Collaboration among customs authorities of member states to prevent illicit trade is so much encouraged and facilitated by demanding member states to investigate, prevent, and combat customs offences through exchange of information and having joint efforts in implementation and compliance. Alignment of national laws with continental trade law is also required among member states for the purpose of eliminating loopholes which may be used by criminals¹⁹. Ultimately, the AfCFTA discourages the use of informal trade routes by lowering the tariffs, reducing non-tariff barriers and elimination of tariffs on intra-African trade. To make this possible, it provides incentives to the traders so that they can make use of the formal channels²⁰. Nevertheless, even with the available provisions for cooperation, cooperation is yet to succeed because of weak regional institutions which create a fruitful ground for illicit trade²¹.

2.0. Relationship Between Trade Liberalization and Illicit Trade

Trade liberalization is basically the removal or reduction of trade barriers such as tariffs, quotas and customs restrictions²². Trade liberalization is considered to be the major factor for economic globalization and this is the central objective of the AfCFTA where it helps in promoting the African Union economic integration, market competitiveness, and trade efficiency of market for African-produced goods²³. Despite the fact that trade liberalization can significantly boost intra-African trade, it can also inadvertently

create a clear opportunity for illicit trade especially when strong legal and institutional framework are absent²⁴.

Through trade liberalization a dual impact of liberalization occurs where trade in Africa is made more attractive through reduction of tariffs and restructuring cross-border procedures. This in turn leads to the increase of trade volumes leading to weakening of state control over transported goods. This happens mostly when liberalization overtakes development of strong border and regulatory control, border control as well as legal harmonization²⁵. Trade liberalization in Africa while weak enforcement mechanisms such as having limited customs infrastructure, underdeveloped legal regimes, and difference in the ability to enforce trade laws prevail, may be a reason to facilitate illicit trade because illicit trade actors use existing loopholes to conduct illicit trade²⁶.

In most African states, informal trade constitutes to a wide contribution to states' economy. This has gone far to the effect of existence of Informal Cross Border Trade (ICBT) which contributes to intra-African commerce²⁷. The ICBT creates a difficult condition of distinguishing illegitimate trade from legitimate ones because liberalization shadows the line between legal and illegal trade. Normally the informal cross border trade operates besides the formal trade and involves alike untaxed goods, counterfeit goods, and dodging of regulatory controls such as customs, taxation and product standards regulations as a result it leads to unfair competition, weaker formal private sectors and loss of states' revenues²⁸.

As seeking to eliminate tariffs through the AfCFTA, trade liberalization remains to be one of the major objectives. Existence of non-tariff barriers (NTBs) and legal differences across member states creates obstacles in the processes of enforcement. For instance, detection and prosecution of illicit trade practices becomes difficult due to inconsistent rules on product standards, transportation monitoring and licensing because illicit goods can be

¹⁷ Article 13 of the Protocol on Trade in Goods, 2018 and Its Annex 2.

¹⁸ Economic Commission for Africa, (2024), *AfCFTA Implementation Strategies, Synthesis Report*, Economic Commission for Africa, Addis Ababa, Ethiopia, p.20.

¹⁹ *Supra* Note 16.

²⁰ Annex 1 and 5, *Supra* Note 16.

²¹ Economic Commission for Africa, (2024), *Supra* Note 18 at p.13.

²² GRANT R., (2009), *International Encyclopedia of Human Geography*, ElsevierLtd, found at <https://www.sciencedirect.com/referencework/9780080449104/international-encyclopedia-of-human-geography>. Accessed on 28/05/2025 at 02:33 PM.

²³ BOSSCHE Peter Van den (2005), *The Law and Policy of the World Trade Organization*, Cambridge University Press, p. 4 & 5 and The Preamble and Article 3 (a), *Supra* Note 1.

²⁴ Southern and Eastern African Trade Information and Negotiations Institute (SEATINI), (2023), *Addressing health implications of the African Continental Free Trade Agreement in East and Southern Africa*, Policy Brief 49, EQUINET, Harare, p. 3.

²⁵ FINGER Michael J. and SCHULER Philip, (2004), *Poor People's Knowledge, Promoting Intellectual Property in Developing Countries*, The World Bank, p. 86.

²⁶ OECD, (2018), *Trade Facilitation and the Global Economy*, OECD Publishing, Paris, pp. 89-98.

²⁷ UGWU Uchenna Felicia, (2020), *Harnessing the Multilateral Patent and Plant Variety Protection Regimes to Advance Food Security: Implications of the EU-ECOWAS Economic Partnership Agreement*, A Thesis Submitted in Partial Fulfilment of the Requirements for the Doctorate in Philosophy Degree in Law, University of Ottawa, Canada, p. 150.

²⁸ LESSER C. and MOISE-LEEMAN E., (2009), *Informal Cross Border Trade Facilitation Reform in Sub-Saharan Africa*, OECD, Trade Policy working Papers, No. 86, OECD Publishing, © OECD, pp. 5, 23–25.

laundered through more permissive jurisdictions²⁹. While looking at trade liberalization in Africa, legal implications can never be disregarded. The relationship between trade liberalization and illicit trade calls for the need to have a comprehensive legal safeguard rooted from the trade agreements, strong and enforceable provisions, and integrated customs cooperation, cross border investigation, prosecution and information sharing. Absence of these, liberalization may only be seen and serve as a channel for illicit trade rather than a deterrent something which undermines AfCFTA's objectives³⁰.

3.0. Legal Deficiencies in Addressing Illicit Trade

Despite the AfCFTA's approach in promoting intra-African trade, its Legal architecture is yet to prevent illicit trade. There are a lot of shortcomings seen in the AfCFTA's legal framework hindering strict and efficient enforcement against illicit trade and these are as follows: -

3.1. Absence of Explicit Provisions on Illicit Trade

Persistence of illicit trade across member states of the AfCFTA attracts a considerable attention under the legal framework. The AfCFTA agreement and its associated protocols entail member states' commitments to trade facilitation, customs cooperation and transparency but do not address on illicit trade and its detection, prevention and prosecution. Article 3 of the agreement focuses on boosting trade, industrialization and sustainable development but makes no explicit mentioning of illicit trade, counterfeiting, smuggling or under invoicing. Article 4 has provisions for promoting and attaining sustainable and inclusive socio-economic development but fails to establish prohibitions or enforcement measures against illicit trade. This omission constitutes a normative gap limiting member states' ability to cooperate effectively in preventing illicit trade³¹.

This legal vacuum under the AfCFTA's legal framework proceeds to the legal system of its member states where there is lack of clear and legal definition of illicit trade. Despite the fact that illicit trade within the AfCFTA is defined to include trade in counterfeit goods, smuggling of natural resource, trade-based money laundering, trade in prohibited pharmaceuticals and illegal exchange of goods banned under international conventions, many member states are yet to explicitly recognize and define such illegal activities in their

legal frameworks³². For instance, while some of the member states prohibit and criminalizes possession of illicit commodities like pharmaceuticals, the same states' pieces of legislation lack provisions which addresses on importation and distribution of such illicit commodities thus leaving a critical legal gap which hampers the ability of the law enforcement bodies to prosecute offenders committing such illicit trade³³.

Apart from having a legal vacuum, some of the laws among member states which address illicit trade are fragmented and outdated having their origin since the colonial era. Such kinds of laws ordinarily fail to capture the complex modern illicit trade networks and means used by the illicit traders. Others have weak provisions and enforcement mechanisms because the punishments provided are seen to be light compared to proceeds of relevant crimes³⁴.

Illicit trade in Africa is basically transnational caused by legal discrepancies in the legal systems of member states, a major problem being absence of harmonization of laws between them and the Regional economic communities. For instance, ECOWAS, SADC and EAC have not fully harmonized their legal instruments on illicit trade causing variation of definitions of such crimes, penalties and trial procedures something which assures criminal actors to operate in jurisdictions with weak control³⁵.

This is different from other trade regimes like the EU and the WTO. For instance, the EU has a strong legislative framework providing for protection and enforcement of intellectual property rights, grant of access to injunctions, damages, disclosure of information against counterfeiters³⁶. Furthermore, customs authorities are empowered to detain and destroy goods infringing intellectual property rights³⁷. This is made possible through the EU Customs Information System (CIS) which enables cross-border data sharing on illicit consignments and the European Anti-Fraud Office (OLAF) which investigates customs fraud, smuggling and counterfeit goods³⁸. This protection offered extends to consumer

³² OECD, (2018), *Supra Note 26*, p. 52.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ United Nations Economic Commission for Africa, (2025), *Supra Note 2*, pp. 35 and 83.

³⁶ Article 3,4,5,7,8,11 and 13 of the Directive 2004/48/EC of the European Parliament and of the Council of 29th April, 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L 157/45, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048> accessed on 5th June, 2025 at 7:45 PM.

³⁷ Article 17,18 and 23 of the Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12th June 2013 Concerning Customs Enforcement of Intellectual property Rights [2013] OJ L 181/15 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0608> accessed on 5th June, 2025 at 7:45 PM.

³⁸ CALLEJA C., (2016), *The European Union Customs Information*

²⁹ Trade Law Centre, (2025), *Breaking the Barriers: Tackling NTBs to Realise the AfCFTA's Objectives*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, pp. 1-3.

³⁰ Trade Law Centre, (2025), *Supra Note 26*.

³¹ OYALEKE Bukola, (2019), *Advocating for a Concise Trade-Based Anti-money Laundering Legal and Regulatory Framework Under African Continental Free Trade Area*, *Afronomics law*, P. 4 also LYANDA Adebayo E., (2018), *The threat of Trade-Based Money Laundering to the African Continental Free Trade Area*, *Journal of Anti-Corruption Law*, Vol. 2, No. 2, p. 155.

safety most especially on products like counterfeit medicines, unsafe electronics, toxic cosmetics and toys where there is an established EU's Product Safety and Market Surveillance Package to eliminate unsafe goods from the market³⁹.

The WTO on the other hand has the Trade Facilitation Agreement which guarantees customs cooperation across member states through allowing exchange of information, confidentiality and legal safeguards verification requests and coordinated border enforcement to detect, track and forbid illicit consignments. This helps in improving border-level intelligence exchange, promoting risk management inspection systems and facilitating coordinated verification across the borders⁴⁰. Other agreements include the Agreement on Customs Valuation which prevents under-invoicing and misclassification which are common elements of illicit trade and the TRIPS which target counterfeit goods which are a core component of illicit trade flows through containing provisions that define counterfeit goods, impose enforcement obligations and provide for complementary civil and administrative remedies against counterfeiters⁴¹.

3.2. Weak Enforcement and Dispute Settlement Mechanisms

Enforcement by state parties involves actual implementation and compliance with the AfCFTA's obligations at both national and regional level. This encompasses the capacity to make sure that common objectives enshrined in the agreement are adhered to accordingly not only after the occurrence of violations but also in the course of existence of the agreement⁴². This involves domestic incorporation of the laws where member states commit themselves through their domestic laws, regulations and enforcement

procedures that they shall comply with or perform trade activities aligning themselves with the AfCFTA's objectives⁴³. Not only this, but state parties should also have a regulatory oversight where customs authorities, trade ministries, and border agencies monitor trade flows and prevent illicit trade accordingly. The states must also have an institutional coordination where inter-agency cooperation, sharing of information and border management are seen effective and eventually there should be an accountability of the available mechanisms where several inspections, auditing and administrative sanctions are made available to those officials, entities or state actors that are responsible for ensuring AfCFTA's objectives are attained⁴⁴.

Looking at the hereinabove mentioned mechanisms, the AfCFTA lacks strong supranational enforcement ability because the trade area depends on the national authorities to enforce their commitments something which do not bring positive results due to the fact that there are a lot of disparities in the domestic laws of the member states and willingness of the member states to prosecute violators⁴⁵. Furthermore, there is an absence of a common compliance monitoring mechanism or penalty regime for breaches of enforcement obligations something which implies that member states are yet to face legal consequences in case of breaches⁴⁶.

The AfCFTA has established a system to enforce its objectives including the settlement of disputes. Settlement of disputes follows arranged mechanisms established under the Dispute Settlement Protocol including; consultation, establishment of a dispute settlement panel and appeals⁴⁷. The application of the protocol is limited because Article 20 of the Protocol on Rules and Procedures on the Settlement of Disputes allows only state parties to initiate disputes upon violations of trade obligations rather than also allowing private sector actors who are mostly harmed by illicit trade to institute the same.

Limitation in the dispute settlement scope out mentioning the non-state actors implies that the non-state actors are not bound to coordinate in the implementation of the AfCFTA's obligations in

System and the Protection of Fundamental Rights, ERA Forum, Vol. 17 No. 1, p. 65-80 and European Commission, (2020), European Anti-Fraud Office (OLAF): Report 2020, Brussels: EU Publications, <https://anti-fraud.ec.europa.eu>, Accessed on 25/09/2025 at 02:11 PM.

³⁹ Article 9(3), 10, 11, 130 n 139 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trademark [2017] OJ L 154/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1001> accessed on 5th June 2025 at 7: 50 PM.

⁴⁰ Articles 4, 5, 7(4)(5)(7),8 and 12 of the World Trade Organization, Trade Facilitation Agreement, 2017.

⁴¹ ABBOTT, Frederick M., (1998), *The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference, The Journal of World Intellectual Property, Vol. 5 No. 6, pp. 985-91, Articles 51, 41-61 and 45-46 of the TRIPS, 1994 and Articles 1-7 and 17 of the WTO, (1994), Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), Geneva.*

⁴² KIBIRU Jane and ONYANGO Christopher, (2022), *Domestication, Compliance and Enforcement: Key to Keeping Momentum of African Continental Free Trade Area (AfCFTA), COMESA Secretariat, pp. 3 and 9.*

⁴³ SEBAHIZI Prudence, et al., (2023), *AfCFTA National Implementation Committees: Scoping Options and Support Mechanisms, ODI Research Report, London, pp. 21 and 22.*

⁴⁴ DANIEL Marie, (2023), *The Role of Nations in the AfCFTA-What Trade Unions Should Demand, Guide to the AfCFTA, Retrieved from <https://tradeunionsinafcfta.org/unpacking-the-afcftainterventions-and-willingness-at-national-levels/> on 09/06/2025 at 11:38 AM.*

⁴⁵ KIBIRU Jane and ONYANGO Christopher, (2022), *Loc Cit.*

⁴⁶ MUFTAU Ismail, (2023), *Overview of the African Continental Free Trade Area (AfCFTA) and Challenges of Implementation: Nigeria and South Africa's Implementation as Case Studies, A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws, University of British Columbia, pp. 44 and 63.*

⁴⁷ Article 6, 7, 9 and 20 of the Protocol on Rules and Procedures on the Settlement of Disputes, 2018.



anyhow. This proposes for further breaches by illicit traders such as smugglers and counterfeiters. Such legal deficit reduces the credibility of the of the AfCFTA's legal framework as a deterrent towards illicit trade⁴⁸. The AfCFTA's enforcement measures and dispute settlement mechanisms resemble that of the WTO creating a serious gap. For instance, private actors cannot file complaints, but instead, they must rely on governments which often lack political will. Even when rulings are made, weaker members lack the ability to implement reforms leaving space for illicit flows. All these makes enforcement indirect and slow⁴⁹.

Article 8 of the Protocol on Rules and Procedures on the Settlement of Disputes provides for alternative dispute resolution through good offices, conciliation and mediation but relies heavily on diplomatic persuasion rather than binding adjudication leaving uncertain outcomes. Article 5 establishes the Dispute Settlement body but it does not vest it with Sanctioning power comparable to WTO countermeasures. Enforcement is voluntary and political thus weakening deterrence.

The AfCFTA can learn from the WTO on issues of transparency and peer review as the WTO agreements require notification of trade measures such as customs valuation, intellectual property enforcement and monitoring of illicit trade-related practices as measures to ensure combating of illicit trade⁵⁰. Clarity of the DSU that rulings are binding and non-compliance leads to sanctions gives teeth to the WTO rules on customs valuation, intellectual property and trade facilitation which indirectly address illicit trade⁵¹.

Unlike the WTO the EU's legal framework has direct applicability of measures against illicit trade. Measures such as anti-counterfeiting and customs rules are binding on member states and can be enforced in domestic courts⁵². There are specialized enforcement agencies such as OLAF which explores cross-border

schemes and counterfeiting, EUROPOL which coordinates cross-border criminal enforcement and European Court of Justice (ECJ) which issues binding interpretations and sanctions for non-compliance⁵³. Additionally, harmonized customs rules and CIS enables detection of illicit goods⁵⁴. Despite the fact that the EU has such strong mechanisms for combating illicit trade, the same faces disparity among member states due to persistence of weaker institutions⁵⁵. The strong enforcement mechanisms sometimes lead to prioritization of border security over development and trade facilitation which increases compliance costs for legitimate traders⁵⁶. Also, presence of multiple bodies to monitor implementation creates jurisdictional overlaps and bureaucratic delays⁵⁷.

Thus, the AfCFTA has to learn from these two legal frameworks that enforcement must be both explicit and tailored. Rules must go beyond general customs cooperation and directly target illicit trade while also being realistic given Africa's uneven institutional capacity. By combining the WTO-style rules with the EU-style institutions and adopting them to the Africa's developmental context, the AfCFTA can transform from a paper agreement into a credible framework that actively combat illicit trade.

3.3. Inadequate Institutional Coordination and Mandate.

Article 9 of the Agreement establishes the Institutional framework to include the Assembly, Council of ministers, Committee of Senior Trade Officials and the secretariat. Among these institutions the Secretariat evolve to be an autonomous body within the African Union system with an independent legal personality and having

⁵³ European Commission, (2020), *European Anti-Fraud Office (OLAF): Fighting Fraud for Europe's Future*. Publications Office of the European Union, Retrieved from <https://ec.europa.eu/anti-fraud>, on 26/09/2025 at 07:42 PM.

⁵⁴ European Commission, (2018), *Customs Information System (CIS)-Evaluation Report*, Publications Office of the European Union, Retrieved from <https://eur-lex.europa.eu>, on 26/09/2025 at 07:45 PM.

⁵⁵ LEVI M. and WILLIAMS P., (2013), *Fighting Serious and Organized Crime in Europe: At the Borders and Beyond*. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 21, No. 3-4, pp. 307-25.

⁵⁶ VAN DER DOES DE WILLEBOIS Emile, (2011), *Non-Conviction Based Asset Forfeiture as a Tool for Recovering Stolen Assets*, In Emile Van der Does de Willebois, Jean-Pierre Brun, Larissa Gray, Clive Scott and Kelvin Stephenson, *The Puppet Masters: How the Corrupt use Legal Structures to hide Stollen Assets and What to do about it*, The World Bank, pp. 125-47.

⁵⁷ CHITI E. and TEIXEIRA P. G., (2013), *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, *Common Market Law Review*, Vol. 50, No. 3, pp. 683-708 and European Court of Auditors, (2016), *EU Response to Cross-Border Organized Crime: stronger Cooperation Needed*, Special Report No. 23/2016, Publications Office of the European Union, Retrieved from <https://www.eca.europa.eu>, on 26/09/2025 at 08:51 PM.

⁴⁸ *Supra* Note 47, Article 3.

⁴⁹ PAUWELEN Joost, (2005), *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, *American Journal of International Law*, Vol. 94, No. 2, pp. 335-47, SHAFFER Gregory and GAO Henry, (2018), *China's Rise: How it Took on the U.S. at the WTO*, *University of Illinois Law Review*, Vol. 2018, No. 1, pp. 115-184 and World Trade Organization, (2017), *Trade Policy Review Mechanism*, Retrieved from https://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm on 26/09/2025 at 07:19 PM.

⁵⁰ World Trade Organization, (1994), *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, In *the Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, pp. 321-55.

⁵¹ ABBOTT, Frederick M., (1998), *Loc Cit*.

⁵² CRAIG P. and DE BURCA G., (2020), *EU Law: Text, Cases and Materials*, 7th Edn., Oxford University Press, pp. 217 and 303, *Van Gen den Loos V. Nederlandse Administratie der Belastingen (Case 26/62)*, *European Court Reports*, 1963, 1. And *Costa V. Enel (Case 6/64)*, *European Court Reports*, 1964, 585.



several functions among others being: providing administrative and coordination among member states to foster implementation of the objectives. The secretariat's role in combating illicit trade can be derived from its very mandate of ensuring implementation of the objectives but the agreement does not empower it to enforce rules, conduct investigation of violations or monitor compliance with the trade related laws across all member states⁵⁸. This is contrary from other supranational compliance authorities such as the EU where OLAF has been legally authorized to investigate compliance and therefore there is no organ under the AfCFTA's mandate vested with the powers to prevent, detect and penalize illicit trade among member states⁵⁹. Absence of empowerment to the secretariat leads to fragmented implementation and ultimately dependence on national institutions, ineffective response to violations, difficult identification of illicit trade or measure effectiveness of AfCFTA rules and reduced deterrence against illicit trade. Thus, without empowering the secretariat, the AfCFTA's legal framework remains largely aspirational with no central authority to ensure uniform enforcement, monitoring or investigations something which diminishes its ability to prevent illicit trade effectively across Africa.

National customs, police and regulatory authorities are autonomous in enforcement. Despite the reality that the AfCFTA calls for cooperation, its agreement does not establish strict mechanisms for intelligence sharing, joint border patrol, risk profiling systems and inter-agency enforcement task forces. This ultimately allows illicit traders to use such a legal loophole to conduct illicit trade at porous borders between countries with delicate harmonization. For instance, a prohibited cosmetics from one country may simply enter from another country if the customs procedures do not align with each other and that no joint enforcement framework exist under the AfCFTA to punish it⁶⁰. Leaving these authorities each with autonomous enforcement causes fragmented enforcement across member states, inconsistent application of rules, limited coordinated monitoring and information exchange, inefficiency and reduced deterrence. Thus, there is a need for a single coordinated central authority⁶¹.

⁵⁸ Article 13, *Supra* Note 1.

⁵⁹ Article 1, 3 and 5 of the European Union, Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of 11 September 2013 Concerning Investigations Conducted by the European Anti-Fraud Office (OLAF), OJ L 248/1, 18.9.2013, pp. 1-22.

⁶⁰ ANDEMARIAM Senai W. and WOLDEMICHAEAL Shewit, (2019), *Can the Peace-trade equation stabilize the Horn? The Process of Implementing Africa's free trade deal Could Create Conditions for Countries to Coexist Peacefully*, Institute for Security Studies, retrieved at <https://issafrica.org/iss-today/can-the-peace-trade-equation-stabilise-the-horn?> On 09/06/2025 at 02:40 PM.

⁶¹ UNCTAD, (2020), *Trade Facilitation and Illicit Trade: Lessons for Developing Countries*, United Nations Conference on Trade and Development, Retrieved from

Through the Agreement establishing the AfCFTA, there are annexes on NTB's, Customs, Trade facilitation and others but there is no special annex addressing illicit trade which exists in different forms. This is unlike the WTO TRIPS Agreement which has provisions for enforcement of intellectual property rights including border measures. Absence of such important legal instrument or mandate targeting illicit trade causes institutions under the AfCFTA to lack authority to develop a common strategy, penalties or enforcement standards⁶². By not including a dedicated annex, the AfCFTA repeats weaknesses of the WTO which only tackles illicit trade indirectly through customs and intellectual property rules. Unlike the EU which has specialized regulations and agencies, the AfCFTA risks leaving illicit trade as a national problem rather than continental one⁶³.

The AfCFTA builds on the foundation of the Africa's REC's. These REC's have their own trade facilitation rules but the AfCFTA agreement does not harmonize enforcement procedures across all REC's. The agreement only establishes its supremacy under Article 19 that it shall prevail whenever any conflict of laws occur but still difference in tariff regimes, customs rules and enforcement procedures within the RECs affect trading under the AfCFTA. This is because member states cannot depart easily from the commitments they had to such RECs leading to overlapping mandates and eventually causing institutional gaps⁶⁴. Furthermore, criminal networks exploit regulatory gaps and weak links by routing goods through RECs with weaker enforcement. For instance, they under-invoice goods in a REC with lax customs and exporting them under AfCFTA's preferences⁶⁵. This reduces the efficiency of the AfCFTA to curb illicit trade.

3.4. Insufficient Legal Harmonization Among Member States

The AfCFTA operates in a way that domestic trade laws, customs codes and criminal statutes of member states differ. Despite the fact that the agreement promotes harmonization of all means

<https://unctad.org/webflyer/trade-facilitation-and-illicit-trade>, on 27/09/2025 at 03:57 PM.

⁶² Articles 51, 61, 64 and 69 of the World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the WTO, 1994, 1867 U.N.T.S. 154.

⁶³ Regulation (EU) No. 608/2013, Directive 2004/48/EC (IP Enforcement Directive), Directive 2014/40/EU (Tobacco Products Directive), Union Customs Code (Regulation EU) No. 952/2013, Customs Information System (CIS) (Council Regulation (EC) No. 515/97, Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests (PIF Directive) and EUROPOL & OLAF Regulations.

⁶⁴ BYIES B., et al., (2024), *How AfCFTA-Regional Relations Can Support Continental Trade*, The Nelson Mandela School of Public Governance, Discussion Paper No. 379, ECDPM, pp. 3-6, 15 and 16.

⁶⁵ World Bank, (2025), *Africa's Pulse: An Analysis of Issues Shaping Africa's Economic Future*, World Bank, Vol. 31, p. 80.



fostering trade liberalization, there is no binding protocol compelling member states to align their domestic pieces of legislation with the minimum standards for trade-related criminal offences and punishments. This situation leads to a regulatory arbitrage within the AfCFTA where illicit traders get an opportunity to explore and exploit differences in the domestic laws and enforcement actions to avoid detection and penalties⁶⁶.

There have been no strict mechanisms for mutual legal assistance on matters contained in the agreement. This could have been made possible through establishment of a Mutual Legal Assistance Treaty to avail exchange of information, evidence, extradition of suspects, enforcement of foreign judgments and joint investigation. Absence of this mutual legal assistance treaty under the AfCFTA's legal framework has caused lack of formal means to support investigations and generally controlling criminal network causing criminal networks to exploit jurisdictional boundaries while the state's authorities face procedural blockage⁶⁷.

Unlike the WTO which only encourages harmonization, the AfCFTA has much to learn from the EU which has strong harmonization through binding laws, direct effect and centralized institutions. Such laws are like; Regulation (EC) No 515/97 on mutual assistance and Regulation (EU) 2019/1020 on market Surveillance and Compliance of Products⁶⁸. There are also Institutions such as European Commission (EC) which monitors compliance and can bring infringement proceedings before the ECJ, the OLAF which investigates cross-border fraud and counterfeiting and EUROPOL which coordinates policing of illicit trade networks across member states⁶⁹.

The EU also has harmonized procedures through Customs Information System (CIS) permitting consistent risk management, inspections and data sharing across the EU⁷⁰. All these strategies

ensure high legal and procedural harmonization which reduces gaps for illicit trade and creates predictable enforcement across all member states⁷¹. Therefore, the AfCFTA has much to learn from the EU as its mere encouragement, state-to-state model causing absence of common harmonization across all member states leads to differed interpretation of obligations creating gaps exploited by illicit traders. It also amounts to weak deterrence of illicit trade and exploitation of procedural differences between states undermining the AfCFTA's goal to have a single African market.

4.0. Conclusion and Recommendations for Legal Reform

4.1. Conclusion

The AfCFTA presents a transformative approach to strengthen intra-African trade, foster economic integration and build stronger legal and institutional system through trade liberalization. Despite the fact that these objectives are strong and potential for trade growth, they are undermined by regulatory and enforcement gaps which persist in the legal framework. The success of the AfCFTA depends much on the ability of its members to safeguard all economic opportunities from all forms of illicit activities through creating a legal framework that links members determinations and implementation. Absence of such ability leads to prevalence of illicit trade in different forms to the effect of undermining AfCFTA's objectives and eventually leading to failure of the AU ambitions and efforts to improve economic condition across African states which began a longtime ago.

4.2. Recommendations

In order to ensure that the AfCFTA does not become a facilitator of illicit trade alongside legitimate trade, there is an urgent need to create a stronger legal framework that encompasses all members determination and links them with the obligation to combat illicit trade. The following are the proposed recommendations for a stronger legal framework with the capacity to combat illicit trade within the AfCFTA: -

4.2.1. Advancing Legal Harmonization Across Member States.

Member states should initiate a procedure with the AfCFTA secretariat leading to the enactment of a special legal instrument focused on illicit trade. A specific protocol or Annex concerned with illicit trade which *inter alia* will define key offences such as smuggling, customs fraud and trade in counterfeit goods and provide common legal standards for detection, prosecution and

States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

⁷¹ European Commission, (2020), *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Taking the Customs Union to the Next Level: A Plan for Action*, (COM (2020) 581 final), Brussels, European Commission, pp. 16-17.

⁶⁶ United Nations Office on Drugs and Crime, (2024), *Making the World Safer from Drugs, Crime, Corruption and Terrorism, Annual Report*, p. 17.

⁶⁷ United Nations Office for South-South Cooperation, (2023), *E-Commerce and Trade Agreements in the Global South: Lessons for the African Continental Free Trade Area*, United Nations Development Programme, pp. 29 & 30.

⁶⁸ Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. OJ L 082, p. 1 and Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011. OJ L 169, pp. 1-44.

⁶⁹ Loc Cit.

⁷⁰ Preamble of the Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9th July 2008 Amending Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member

penalties to illicit traders. This will enable closure of the legal vacuum and add a binding instrument to the continental legal framework for coordinated enforcement for the purpose of addressing illicit trade as a core trade governance priority. Furthermore, the law enacted should; promote transparency, public reporting, create a centralized compliance monitoring and enforcement body as well as leveraging digital tool for trade surveillance for the purpose of creating more technical capacity, enhancing accountability and fostering trust in the AfCFTA legal framework.

Member states should harmonize domestic trade and criminal laws to establish consistent definitions of illicit trade, penalties, and enforcement procedures, thereby reducing opportunities for regulatory arbitrage. The secretariat which has the primary function to spearhead the functionality of the AfCFTA's objectives should make sure that it harmonizes the domestic trade and commerce laws, criminal laws as well as customs for the purpose of reducing and eventually eliminating all loop holes to improve effectiveness of enforcement. However, a model law or guidelines should also be adopted for the purpose of guiding member states to align their domestic laws with regional (AfCFTA's) standards.

A Mutual Legal Assistance mechanism should be established under the AfCFTA's legal framework which will stand to assist member states to cooperate in legal matters such as evidence sharing, extradition of offenders and investigation of crimes. This will strengthen the judicial cooperation by overcoming the barriers and perpetuate transnational enforcement.

4.2.2. Strengthening Institutional Capacity of the AfCFTA's Secretariat and National Agencies

The AfCFTA secretariat should improve institutional coordination across all Regional Economic Communities (RECs) in Africa through establishment of a special protocol for inter-agency task forces, intelligence sharing and capacity building. Such a protocol should have clear legal provisions with the capacity to formalize and mandate collaboration between AfCFTA's secretariat, RECs and national enforcement authorities such as police and customs for the purpose of improving real-time responses against illicit trade and joint operational planning.

The Secretariat should be empowered through amendments or protocols so as it can have an ability to monitor, coordinate and report on enforcement of trade rules. It should be able to publish compliance scorecards for member states similar to the WTO's Trade Policy Review Mechanism. Simultaneously, it should coordinate training programs and providing technical support to under-resourced states.

Institutional capacity building should focus on digital customs systems, data sharing platforms and specialized enforcement units with technical support from development partners and modeled partly on the EU's OLAF and EUROPOL structures. Such platforms should extend to national customs authorities, police and regulatory bodies who should be trained and resourced to detect

under-invoicing, misclassification and counterfeit goods through the digitalized platforms.

Dispute settlement mechanisms under the AfCFTA should be expanded to include disputes related to illicit trade and procedures for addressing non-compliance of the AfCFTA's objectives of combating illicit trade. This is because, the current illicit trade issues fall outside the ambit of the prescribed dispute settlement scope of the AfCFTA. This will create a chance to hold violators and states accountable. Furthermore, the dispute settlement mechanism should be expanded to include disputes arising from individual persons affected of illicit trade so as to allow them to seek redress through formal channels within the AfCFTA.

4.2.3. Enhancing Regional Enforcement Cooperation

Regional cooperation is indispensable because illicit trade flows do not stop at national borders. In this respect the AfCFTA members should establish a continental enforcement network that link customs, police and competition authorities across borders. This would facilitate real-time intelligence sharing, joint investigations and coordinated operations against smuggling and counterfeiting syndicates. Lessons can be drawn from the WTO's transparency and peer review mechanisms as well as the EU's CIS which streamlines enforcement across multiple jurisdictions. Such cooperation would reduce duplication, close cross border enforcement gaps and create a more credible deterrent against illicit trade.

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