



MFN in Services Trade: A Comparative Analysis of the General Agreement on Trade in Services and the African Continental Free Trade Area Agreement

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Abstract

The Most – Favoured – Nation (MFN) as a principle of international trade stipulates that trading partners are obliged to offer the same levels of market access to like goods and services irrespective of country origin. However, due to inequality in income levels and various other social, economic, and political factors, states have considered it necessary to take regulatory measures inconsistent with this obligation. Apart from regulatory regimes, States are more inclined to enter into Preferential Trade Agreements with selected trading partners. This research explores the MFN principle at the multilateral level by examining the General Agreement on Trade in Services (GATS) and at the regional level by analysing the African Continental Free Trade Area Agreement (AfCFTA). The analysis focuses on the difference between the unconditional MFN in GATS and the novel reciprocal MFN in the AfCFTA.

The research undertakes a review of the literature and scholarly articles on the GATS and AfCFTA to analyse the legal implication of key distinguishing terms such as unconditionality and reciprocity. Further, it provides an overview of the foundation of the AfCFTA to determine the rationale behind the newly formulated reciprocal MFN clause. The analysis indicates that politically AfCFTA Members need to have absolute autonomy in negotiating trade preferences. The thesis further highlights practical and administrative challenges to the implementation of the AfCFTA reciprocal MFN. On this basis, it is recommended that the term *reciprocal* is clearly defined to minimise complexity and uncertainty in the negotiation process. As existing agreements under the Regional Economic Communities form part of the AfCFTA legal architecture, Member States must focus on the overall reduction of trade barriers as opposed to creating new preferential agreements.

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List of Acronyms

AEC	-	African Economic Community
AfCFTA	-	African Continental Free Trade Area Agreement
AMU	-	Arab Maghreb Union
CEN – SAD	-	Community of Sahel-Saharan States
CM	-	Common Market
COMESA	-	Common Market for Eastern and Southern Africa
CU	-	Customs Union
EAC	-	East African Community
EC	-	Economic Union
ECCAS	-	Economic Community of Central African States
ECOWAS	-	Economic Community of West African States
EIA	-	Economic Integration Agreements
FTA	-	Free Trade Area
GATS	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariffs and Trade
IGAD	-	Inter-Governmental Authority on Development
MFN	-	Most – Favoured – Nation
MIP	-	Minimum Integration Programmes
OAU	-	Organisation of African Unity
PTA	-	Preferential Trade Agreements
REC	-	Regional Economic Communities
RTA	-	Regional Trade Agreements
SACU	-	Southern African Customs Union
SADC	-	Southern African Development Community
TFTA	-	Tripartite Free Trade Area
UNECA	-	United Nations Economic Commission for Africa
WTO	-	World Trade Organisation

Introduction

One of the fundamental principles of trade liberalisation is non-discrimination among trading partners. At its most general level, the non-discrimination principle presupposes that states accord equal treatment to like goods and services irrespective of their country-origin. In achieving this objective, a method used in international trade law is the insertion of an unconditional Most-Favoured-Nation (MFN) clause in trade agreements as a general obligation that automatically applies to every member.¹ This paper seeks to explore the MFN principle in services trade at the multilateral and regional levels. Specifically, it compares the notion of “unconditionality” MFN under the General Agreement on Trade in Services (GATS) to the notion of “reciprocity” MFN under the newly established African Continental Free Trade Area Agreement (AfCFTA).

The MFN principle in its simplest form is a treaty provision which imposes a legal obligation on a member granting a trade advantage, privilege, immunity or concession to another member, to accord equal treatment to all other trading partners “without request or compensation”.² The scope of an MFN obligation varies depending on the geographic nature of the trade agreement and depth of economic integration it intends to achieve, sectors covered by the agreement and the desire of Member States to regulate sensitive areas of domestic policy. Often, the intention is to achieve an equilibrium between the elimination of trade barriers and the regulatory autonomy of contracting states.³

¹ Gardner Patterson, ‘Non-Discrimination in International Trade’ (1977) 46 Nordisk Tidsskrift International Ret 20, 22.

² Snyder Richard Carlton, *Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press) 52.

³ Marion Panizzon, Nicole Pohl and Pierre Sauvé, *GATS and The Regulation of International Trade in Services* (1st edn, CUP 2008) 6.

Member States of the African Union on the 21st March 2018 entered into an agreement establishing the African Continental Free Trade Area (AfCFTA).⁴ The agreement contains a Protocol on Trade in Services seeking to achieve a deeper level of integration in the service sector. AfCFTA Article 4(1) introduces an MFN clause and further states under Article 4(6) that a list of exemptions shall be agreed upon by the Member States. However, Article 4(3) gives Members the right to enter negotiations on trade preferences with selected trading partners and an obligation to extend concessions to other Members States *only* on the condition of reciprocity. This reciprocity clause raises novel and important questions, especially with respect to its relationship with the unconditional nature of typical MFN clauses. Is there a contradiction between reciprocity in MFN and the rationales of the non-discrimination principle? Since the AfCFTA is still at its inception stage, the application and practicality of its reciprocal MFN obligation is yet to face any real test. It is, therefore, necessary to analyse the purpose behind and legal implications of the reciprocal MFN clause on AfCFTA Members.

Unlike the AfCFTA, the GATS contains an unconditional MFN clause, which states that a country cannot accord a treatment "less favourable than it accords to like services and service suppliers of any other country."⁵ The GATS further sets several exceptions and exemptions to the obligation that allows Members to depart from the MFN principle on condition that the requirements set out by the Agreement are strictly adhered to. There is, however, no obligation on other Members to offer compensation for concessions received. As the GATS is a more established Agreement, the application and implementation of its MFN clause will be used as a reference point in interpreting the scope and effect of the unconditional MFN obligation and relevant exceptions.

⁴ Agreement Establishing the African Continental Free Trade Area Citation for African Continental (adopted 21 March 2018, entered into force 30 May 2019) (2018) 58 ILM 1028 (AfCFTA).

⁵ General Agreement on Trade in Services (15 April 1994) (1994) 33 I.L.M. 1167 art II:2 <http://docsonline.wto.org> (GATS).

This thesis moves from the hypothesis that the underlying intention behind the reciprocal MFN clause is to enable AfCFTA Member, when extending trade concessions, to autonomously determine the terms and conditions under which they negotiate trade preferences with every trading partner. The argument is that although the primary objective of the AfCFTA is economic integration, the rationale for the reciprocal MFN is to address political and bureaucratic concerns. The clause is therefore intended to reassure Member States and Regional Economic Communities (RECs) that their sovereignty and freedom to regulate will not be eroded upon accession to the AfCFTA. This thesis argues that although the effectiveness of the clause as a non-discrimination principle is debatable, exclusive reciprocity-based negotiations may induce other AfCFTA to grant market access as opposed to “free riding”⁶ on concessions.

Extensive research has been conducted on regional integration in Africa. In the context of the AfCFTA Agreement, the main focus has been the expected economic benefits and challenges in its successful implementation.⁷ However, even though scholars have recognised that its reciprocal MFN clause is “non-traditional” for a regional agreement of this magnitude, little attention has been given to the specific legal obligations arising from it and the underlying rationales.

The relevance of this thesis is in three - folds. Firstly, the study undertakes a comprehensive examination of the reciprocal MFN clause in the AfCFTA as a novel concept which is yet to be implemented. Secondly, it embarks in on a comparative analysis of the unconditional and reciprocal MFN clauses in relation to the legal architecture and objectives

⁶ Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 159 – (Free riders are Members who exploit the MFN principle by benefiting from trade liberalization without granting market access to trading partners).

⁷ Regis Y Simo, ‘Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility’ (2020) *Journal of International Economic Law* 1, 2 <<https://academic.oup.com/jiel/advance-article/doi/10.1093/jiel/jgz031/5627761>> accessed 23 March 2020.

of a multilateral and regional services trade agreements. It further brings to the forefront practical and realistic challenges which Member States may encounter in fulfilling their legal obligations under the reciprocal MFN clause in the AfCFTA. The research is limited by the fact that the AfCFTA Members are yet to produce lists of exemptions which may either make the application of the rule simpler or much more complicated. In light of these circumstances, the study reflects the present situation.

The first chapter examines the interpretation and scope of the MFN clause under GATS Article II:1. The analysis will focus on identifying the legal obligations which MFN imposes on WTO Members. Central to the interpretation is the notion of unconditionality and its legal implication on granting WTO Members. Further, to give a holistic perspective on the extent of the obligation, exemptions, exceptions, and factors which contributed to their formulation will be discussed.

The second chapter begins by briefly examining the levels of integration under the RECs together with some practical and administrative challenges faced by the African Union and its predecessors in enhancing regional integration. The research finds that the motivation behind the reciprocal MFN is the preservation of the existing agreements under the RECs. Against this background, the chapter turns to the impact of the principle of reciprocity on the MFN clause in the AfCFTA, its impact on the bargaining process and the obligation it imposes on the granting and receiving AfCFTA Members.

The third and final chapter compares the legal architectures of the GATS and the AfCFTA. Starting with the GATS, it undertakes a brief examination of its core legal disciplines including reciprocity and non-discrimination, as well as principles that enable the efficient functioning of the system. In addition, it briefly examines some of the disadvantages of the unconditional MFN principle. Turning to the AfCFTA, the chapter evaluates its legal framework in comparison to the GATS. Some fundamental distinctions between unconditional

and reciprocal MFN will be discussed with a view of providing further insight on the reciprocity condition under the AfCFTA. Also, emphasis will be laid on some of the practical challenges that will be faced in its implementation.

The thesis concludes with findings on the suitability of the reciprocal MFN clause under the AfCFTA and recommendations will be made regarding its successful implementation.

Chapter One

1. An Analysis of the Most-Favoured-Nation Treatment Clause under the General Agreement on Trade in Services

The MFN principle of non-discrimination is one of the core disciplines of the World Trade Organisation (WTO) and forms part of the legal architecture of its multilateral trading system. This chapter examines the concept of MFN from the GATS perspective to determine its interpretation, scope, and the obligations it imposes on WTO Members. Under the GATS, MFN is a general obligation that applies to all regulatory measures by WTO Members that have an impact on services trade. There is, however, the flexibility to depart from that obligation under certain circumstances based on compliance with conditions set forth in the Agreement.

As a point of departure, an analysis of the unconditional MFN in the GATS will assist in understanding the legal implications of the reciprocity condition in the AfCFTA. It is a settled view that apart from core principles such as the MFN obligation, trade liberalisation depends on other social, economic and political factors.⁸ Owing to these factors, the GATS allows for departures from the MFN obligation, granting Members the ability to undertake discriminatory measures. In fact, the unconditional MFN obligation does not always satisfy the policy requirements of Members; hence its erosion over the past few decades.⁹ It is therefore not entirely unexpected that Regional Trade Agreements (RTAs) such as the AfCFTA in this situation will create an alternative version of the MFN obligation.

1.1. The Interpretation and Scope of the MFN Clause under the GATS

The GATS sets out the legal and regulatory framework for services trade liberalisation amongst WTO Members. Services trade transcends the conventional notion of trade in goods

⁸ Alexander Foteh, 'Exceptions to and the Fate of the Most – Favoured – Nation Treatment Obligation under the GATT and GATS' (MPRA Paper No.41237) < <https://mpra.ub.uni-muenchen.de/41237> > accessed 19 March.

⁹ Warren H Maruyama, 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 Stan J Int'l L 177, 196.

as it encompasses the movement of labour and capital. These additional dimensions often conflict with domestic, economic, and social policy objectives. Consequently, GATS takes a “positive list” approach to trade liberalisation, allowing WTO Members to grant market access concessions through specific commitments in their National Schedules.¹⁰ Due to its multifaceted nature, the GATS classifies services into sectors – ranging from transportation and telecommunication to financial services and energy – and further categorizes sectors into modes of supply.¹¹ Members have the flexibility to liberalise specific sectors and within sectors the accessible modes of supply. There is no obligation to make binding commitments in every sector or mode.¹² As a treaty provision, it is necessary to examine the elements which constitute the MFN obligation based on an interpretation of the clause itself in the context of services trade.

The MFN Treatment clause is provided for in Article II: I of the GATS as follows;

“With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.”¹³

According to the clause, the MFN obligation applies to “*any measure covered by the Agreement*”. The scope of application therefore extends to all service sectors regardless of whether it has been listed in a Member’s schedule of specific commitments.¹⁴ Measures encompass legislation, regulations, policies, and any actions undertaken by a WTO Member

¹⁰ GATS art XVI – XVII.

¹¹ ‘WTO | Services - The GATS: Objectives, Coverage and Disciplines’
<www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 19 March 2020

¹² Sherry M Stephenson, *Approaches to Liberalizing Services* (The World Bank 1999), 29
29<<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-2107>> accessed 22 March 2020.

¹³ GATS art II:1.

¹⁴ R Adlung and A Carzaniga, ‘MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?’ (2009) 12 Journal of International Economic Law 357, 358.

which has an impact on service sectors. Although the primary obligation is on government authorities, the conduct of other regional, local and non-governmental organisations may also be attributed to government and considered as discriminatory.¹⁵ Further, the Panel in *EC – Bananas III* held that taking measures in other areas of trade which have an adverse effect on service suppliers constitute a violation of the GATS.¹⁶ When compared to its counterpart in the General Agreement on Tariffs and Trade (GATT), the MFN clause in the GATS has a somewhat broader scope, as it covers both services and service suppliers. Therefore, State regulations restricting the free movement of persons may potentially be classified as a measure under the GATS due its impact on service suppliers.¹⁷

An essential element is the “*like services and service suppliers*” requirement which is the basis upon which the MFN obligation ensues. The MFN obligation prohibits discrimination among WTO Members in respect of similar or comparable services and suppliers.¹⁸ However, given the complexity of services trade, several factors must be considered in determining “likeness”.

In *Argentina – Financial Services*, the Appellate Body in its analysis considered the literal meaning of the term as having similar characteristics or something that is similar.¹⁹ They further opined that the degree or extent of the similarity is dependent on the “competitive relationship of services and service suppliers at issue”.²⁰ In effect the competitive relationship between services and whether one can be substituted for another may be used to determine

¹⁵ Aaditya Mattoo, ‘The MFN and GATS’ (World Trade Forum Conference, Neuchâtel, 28-29 August 1998)1, 2 <https://www.iatp.org/sites/default/files/MFN_and_the_GATS.htm> accessed 13 March 2020.

¹⁶ WTO, *European Communities — Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel* (25 September 1997) WT/DS27/R (EC – *Bananas III*).

¹⁷ Mattoo, ‘The MFN and GATS’ (n 15) 2.

¹⁸ Rolf H Weber and Mira Burri, *Classification of Services in the Digital Economy* (Springer Berlin Heidelberg 2013) 15.

¹⁹ WTO, *Argentina - Measures Relating to Trade in Goods and Services – Report of the Appellate Body* (9 May 2016) WT/DS453/AR/B [6.21] (*Argentina – Financial Services*).

²⁰ *ibid.*

“likeness”.²¹ Also, the end-use of services may also be compared to determine similarity.²² In so far as services suppliers are concerned, “likeness” means performance of the same²³ or similar services²⁴. Despite these indicators, it is impossible to set an exhaustive, all-encompassing test to assess likeness; the assessment depends on the specific circumstances in each case.

Upon proving likeness, the MFN obligation applies “*immediately and unconditionally*” to every measure within the scope of GATS applicability. Generally, when a granting Member extends a trade concession, every other WTO Member becomes automatically entitled to the same concession regardless of whether it claims it.²⁵ Therefore, when a Member does make a binding commitment, the MFN obligation requires an extension of that concession to every other WTO Member unconditionally.

In practice, a trade policy or regulatory measure may be more beneficial to one or a group of trading partners amounting to a trade concession in violation of the MFN obligation. Under the GATS, “immediately” means the obligation to extend concessions without delay to other WTO Members.²⁶ The “unconditional” aspect of the clause connotes that in negotiating trade concessions or preferences with third States on a reciprocal basis, the MFN principle applies to the extent that other beneficiaries have no obligation to reciprocate.

The notion of “unconditionality” is yet to be litigated under the GATS. However, GATT jurisprudence offers constructive interpretation albeit in the context of goods trade. The term “unconditionally” is not synonymous to “without conditions” as the word implies. In *EC – Seal Products*, the Appellate Body in its analysis stated that the MFN principle does not

²¹ Weber and Burri (n 18) 15.

²² Mattoo, ‘The MFN and GATS’ (n 15) 19.

²³ *WTO, Canada - Certain Measures Affecting the Automotive Industry – Report of the Appellate Body* (19 June 2000) WT/DS139/AR/B and WT/DS142/AR/B [170] [171].

²⁴ *Argentina – Financial Services* (n 19) [6.21].

²⁵ Endre Ustor, ‘The Most-Favoured-Nation Clause in the Law of Treaties’ (1968) Yearbook of the International Law Commission Yearbook 7, 169.

²⁶ *Matsushita and others* (n 6) 570.

prohibit WTO Members from attaching conditions on concessions. Rather the prohibition relates to the detrimental impact of the measure to competitive opportunities among like products.²⁷

A further clarification of the term “unconditionality” was articulated by the Panel in *Canada – Autos*. In this WTO dispute, the measure at issue was a Special Remission Order offering import tariff exemptions to vehicle exporters affiliated with a manufacturer or importer in Canada.²⁸ Japan, the complainant, alleged that because the tariff exemption was contingent on contractual relations with an importer, the measure violated the notion of “unconditionality” under the MFN. The Panel opined that unconditionality cannot be determined independently of whether it entails a semblance of discrimination.²⁹ The Panel stated that under GATT Article I:1 the word “unconditionally” imposes an obligation to accord the same advantage to all Members irrespective of country origin.³⁰ Therefore, an advantage may be contingent upon a condition but not “necessarily implying that it is not accorded “unconditionally”.”³¹

The term “unconditionality” may alternatively be interpreted as “without compensation”. In *EC – Tariff Preferences*, the Panel opined that this was a limited interpretation and it was much wider in scope. Here, tariff concessions were granted on condition that the receiving WTO Members had prescribed levels of drug problems. It was held that preferences were not granted unconditionally to like products originating from other WTO Members. ³² The fact that there was no compensation or positive conduct on the part of the beneficiary Members did not prevent a violation of the unconditional MFN obligation.

²⁷ *WTO, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body* (16 June 2014) WT/DS400/AB/R and WT/DS401/AB/R [5.88].

²⁸ *WTO, Canada - Certain Measures Affecting the Automotive Industry – Report of the Panel* (19 June 2000) WT/DS139/R and WT/DS142/R (*Panel Report Canada – Autos*).

²⁹ *ibid* [10.22] – [10.25].

³⁰ ‘WTO Analytical Index – GATT 1994 Article I (Jurisprudence)’

<https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm> accessed 20 April 2020 (GATT Art I Jurisprudence).

³¹ *Panel Report Canada – Autos* (n 28) [10.22] – [10.25].

³² *WTO, European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries – Report of Panel* (20 April 2004) WT/DS246/R.

An expansion of the notion of “unconditionality” in a manner particularly relevant to GATS Art II was articulated in *Canada – Autos*.³³ The Panel opined that “the fact that the conditions attached to such an advantage are not related to the product itself” does not eliminate the probability of country origin discrimination on imports.³⁴ The converse of this analysis, as illustrated in *EC – Bananas III*, is that measures affecting trade in goods may have an adverse effect on services trade. The focus therefore is not on the product or the service but the violation of the unconditionality requirement.

In summary, the notion of ‘unconditionality’ is not limited to being subject to a condition or not requiring compensation. It is a concept that cannot be examined in isolation and the obligation varies depending on the prevailing circumstances.

The phrase “*less favourable treatment*” is interpreted as amounting to discriminatory treatment of other Members. In the formal or *de jure* sense, discrimination occurs when a state offers concessions, privileges, or immunities to selected trading partners and does not extend the same treatment other Members. However, there are circumstances when the discrimination may not be express or direct. In *EC – Bananas III*, the measure at issue was a procedure for the allocation of banana importation licences. Under the Lomé Convention, the European Union applied a more favourable tariff regime to imports from Africa, the Caribbean, and the Pacific (ACP).³⁵ However, the allocation of licenses to wholesale distributors was not based on nationality.³⁶ Formally, the measure was a violation of GATT Articles I & III. Additionally, the Panel proceeded to analyse the principle of *de facto* discrimination by stating that import rules offered a competitive advantage to distributors of EC and ACP bananas to the detriment

³³ Matsushita and others (n 6) 570.

³⁴ *Panel Report Canada – Autos* (n 28).

³⁵ ‘Most-Favoured-Nation Treatment Principle’ 305, 314
www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf.

³⁶ Federico Ortino, ‘The Principle of Non-Discrimination and Its Exceptions in GATS: Selected Legal Issues’, Kern Alexander and Mads Andensa (eds), *The World Trade Organization and Trade in Service* (Brill | Nijhoff, 2008) 3 – 4.

of foreign suppliers, therefore in violation of GAT Article II.³⁷ The Appellate Body further reiterated that “if Article II was inapplicable to *de facto* discrimination.....it would be easier especially in relation to services trade to formulate discriminatory measures.”³⁸ The measure was held as indirect or *de facto* discriminatory because of its adverse impact on wholesale distributors considered as service suppliers under the GATS. ³⁹ Both bodies opined that if MFN were limited to express or *de jure* discrimination, WTO Members could easily circumvent it *de facto*, thereby frustrating the goals of the obligation. ⁴⁰ In *Argentina – Financial Services*, the Appellate Body referencing the above decision, stated that in analysing the term ‘less favourable treatment’ the primary consideration is the measure’s modification of the competitive relationship as opposed to its regulatory objective.⁴¹

Against the preceding, it is clear the MFN obligation consists of various elements extending the scope of its application to a wide range of regulatory measures. The applicability of the rule depends on several factors, including likeness and discrimination against the prevailing circumstances. In addition, the MFN obligation extends to internal regulatory measures that implicitly grant more favourable treatment to selected trading partners. A recurring theme in the jurisprudence is the element of equality among WTO Members. The analysis shows that the alteration or modification of the competitive relationship to the detriment of like services and service suppliers is the basis upon which decisions are made.

1.2. Exemptions and Exceptions to the MFN Obligation

By the late-1980s, when negotiations on the GATS commenced, an active trading system for services was already in existence in the world economy and countries were reluctant

³⁷ GATT Art I Jurisprudence (n 30) 4.

³⁸ *EC – Bananas III* (n 16) [231] – [234].

³⁹ *Ortino* (n 36) 4-6.

⁴⁰ ‘WTO Analytical Index — GATS Article II (Jurisprudence)’

<www.wto.org/english/res_e/publications_e/ai17_e/gats_e.htm> accessed 20 April 2020 (GATS Art II Jurisprudence).

⁴¹ *ibid.*

to make significant commitments.⁴² Firstly, several states had concluded bilateral and regional trade agreements in specific service sectors such as telecommunications and maritime transportation which were incompatible with the MFN principle.⁴³ Secondly the MFN principle imposes far-reaching obligations on WTO Members, thereby reducing the scope of their regulatory autonomy in sensitive policy areas such as migration, movement of capital and the protection of national businesses. According to the Appellate Body in *Argentina – Financial Services*, the GATS sought “to strike a balance between a Member’s obligations assumed under the Agreement and that Member’s right to pursue national policy objectives”.⁴⁴

Against this background, there are several exemptions and exceptions under the GATS legal framework which gives WTO Members a wide latitude to undertake measures inconsistent with their MFN obligations. Firstly, under Article II:2, “A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions”⁴⁵ In recognition of existing prior trade agreements and the desire to give preferential treatment in certain areas of services trade, the GATS gave WTO Members the option to schedule MFN Exemptions before the commencement of the Agreement or upon the accession. Listed exemptions are enforceable for ten years, after which they are subject to negotiations in trade rounds to progressively comply with the MFN obligation. A Member may also impose reciprocity conditions allowing market access contingent upon the same market access being accorded to them.⁴⁶ Also, under Article II:3 of the GATS, adjacent Members may extend advantages to each other to facilitate the cross-border supply of local services.

⁴² Bernard Hoekman and Patrick A. Messerlin, ‘Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform’ (Services 2000 Conference, Washington DC, 1-2 June 1999), 28.

⁴³ Adlung and Carzaniga (n 14) 359.

⁴⁴ *Argentina – Financial Services* (n 19) [6.114].

⁴⁵ GATS art II:2

⁴⁶ Mattoo, ‘The MFN and GATS’ (n 15) 6 - 22 – (these are quite common in financial and air transport services).

Secondly, several horizontal exceptions apply to any measure that Members could take in respect of their obligations under GATS. These exceptions are based on the belief that certain values override the concerns of trade liberalization and therefore Members should be allowed to pursue policy goals through regulatory measures. The regulating Member must meet several requirements to invoke exceptions. General Exceptions are contained in GATS Article XIV, which covers measures necessary to fulfil economic, social and political values such as protection of public order or morals, human, animal or plant life or health and relating environmental protection.⁴⁷ Under Article XIV*bis*, Members can undertake measures for protection of national security ⁴⁸ while the annex on Financial Services allows for fiscal policies to ensure financial stability. Furthermore, Members may request a waiver by declaring exceptional circumstances according to Article IX:3 subject to a three-fourths majority vote and an annual review.⁴⁹

Thirdly, and crucially, Article V allows Members to enter Economic Integration Agreements (EIAs) to pursue regional integration and trade promotion objectives for an unlimited duration. This is usually undertaken in the form of PTAs or RTAs. Pursuant to Article V, Members are not bound by their MFN or any other GATS obligation when they pursue regional integration. However, certain conditions must be fulfilled as follows: a) the attainment of ‘substantial sectoral coverage’, meaning that the PTA/RTA must cover a considerable number of sectors, volume of trade or mode of supply; b) eliminate ‘substantially all discrimination’ including restriction on additional discriminatory measures; c) prior agreement with other WTO Members cannot be negatively affected; therefore, an increase in overall barriers to trade in services is prohibited. ⁵⁰ Also, a notification must be sent to the WTO

⁴⁷ GATS art XIV: (a) - (e).

⁴⁸ GATS art XIV bis: 1(a) – (c) – 2.

⁴⁹ Adlung and Carzaniga (n 14) 366 – 367.

⁵⁰ Stephenson (n 12) 62.

Council for Trade in Services.⁵¹ Under Article *Vbis*, Members can also enter into labour market integration agreements provided citizens are exempt from work and residence permits.⁵²

In consideration of the imbalance of economic abilities of Members, GATS allows for Special and Deferential treatment giving flexibility to developing countries in fulfilling MFN obligations. In its preamble, it recognises that the commitment to eliminate discriminatory measures is dependent upon, "the level of development concerned both overall and in individual sectors and subsectors".⁵³ As a result, EIAs comprised exclusively of developing countries may not fulfil the conditions set out in Article V above.⁵⁴ This is to enable developing countries to progressively integrate into the world trading system.⁵⁵

1.3. Conclusion

The liberalisation of services trade under the GATS did not gain momentum after the Uruguay round due to Members' reliance on the above exemptions and exceptions to the detriment of their MFN obligations. Over the past few decades, the world trade regime has seen a proliferation of PTAs and RTAs as WTO Members increasingly rely on this exception to further economic integration policies. Scholars have opined that there has been an erosion of the MFN principle and some regions remain disadvantaged by this practice.⁵⁶ In addition, developing countries have also relied on the economic development and EIA exceptions to conclude RTAs as in the case of AfCFTA.

When compared to trade in goods, services trade has a broader scope of measures incompatible with the MFN principle, hence the maze of exceptions highlighted above. Scholars argue that the GATS create a weaker MFN obligation due to the extensive exemption

⁵¹ Weber and Burr (n 18) 7.

⁵² Adlung and Carzaniga (n 14) 363.

⁵³ GATS preamble and paragraph 6 under 2001 Negotiating Guidelines.

⁵⁴ Stephenson (n 12) 54.

⁵⁵ Fotoh (n 8) 9.

⁵⁶ Maruyama (n 9) 196.

possibilities.⁵⁷ While others are of the view that it may be too rigid since future modification of general exemptions and Members' adaptation of new policy objectives is impossible.⁵⁸

Either way, it has become necessary for PTAs to focus on overall objectives as opposed to the strict application of rules. In certain instances, an unconditional MFN clause may not achieve the purpose of deeper integration. It is against this background that the drafters of the AfCFTA inserted a conditional or reciprocal MFN clause, the rationale and effect of which the next chapter seeks to analyse.

⁵⁷ Ryan Dain Teksten, 'A Comparative Analysis of GATS and GATT: A Trade in Services Departure from GATT's MFN Principle and the Effect on National Treatment and Market Access' (2000) *Legal and Institutional Aspects of International Trade Journal* 1, 14 <www.ssrn.com/abstract=1664584> accessed 22 March 2020.

⁵⁸ Adlung and Carzaniga (n 14) 30-31.

Chapter Two

2. An Analysis of the Rationale and Interpretation of the Reciprocal MFN Treatment Provision under the African Continental Free Trade Area Agreement

Over the years, Preferential Trade Agreements (PTAs) in the African continent have primarily focused on a linear model of integration, meaning minimal attention was given to the importance of services trade.⁵⁹ This means that negotiations mainly concentrate on goods trade while services trade was relegated to an afterthought. The AfCFTA therefore represents a remarkable departure from the norm and the MFN Treatment clause is no different. This chapter focuses on the reciprocity condition contained in the clause and its legal implication on AfCFTA Members. The research finds that a major challenge to economic integration in Africa is the proliferation of intra-continental PTAs, some of which have been recognised as Regional Economic Communities (RECs) under the AfCFTA.

There is an additional problem of overlapping memberships in PTAs, which according to an African Union audit report, has led to “irrational configurations, negotiating positions and inconsistencies in harmonisation and coordination of trade liberalisation and facilitation”.⁶⁰ Taking these issues into account, it was necessary to formulate rules that will simultaneously promote further integration and preserve Members’ autonomy on policy measures. In simple terms, reciprocity imposes an obligation on every beneficiary to grant equivalent concessions offered by Members in the initial bargain.

The assumption is that the rationale behind the reciprocal MFN is to encourage liberalisation from a political as opposed to a non-discriminatory angle in the sense that AfCFTA Members can maintain control over market access grant, thereby eliminating the unconditional MFN externality. This chapter briefly examines the levels of integration in

⁵⁹ Simo (n 7) 2.

⁶⁰ African Union, *Audit of the African Union* (Addis Ababa, 2007) 22.

RECs, plus the practical and administrative problems arising from their existence to establish the rationale behind the reciprocal MFN. Further, it analyses the MFN Treatment clause in the AfCFTA by interpreting the reciprocity condition.

2.1. Overview of Regional Economic Communities and “Preservation of the Acquis” as a Principle under the AfCFTA

RECs are governed by different trade agreements concluded by African countries before the negotiations and entry into force of the AfCFTA. They are referred to as the pillars or "building blocks" for achieving increasing levels of integration by further eliminating trade barriers. As a general objective, the AfCFTA seeks to "maintain, and where possible improve upon" the levels of integration already attained by the eight recognized RECs.⁶¹ This theory, referred to as “preservation of the acquis”, was formally introduced as a principle and defined under the Tripartite Free Trade Area (TFTA)⁶² Agreement as maintaining that which has been agreed upon and building on it.⁶³

Although eight RECs are recognised under the AfCFTA, they constitute a variety of trade arrangements and overlapping memberships. These trade arrangements include: Free Trade Areas (FTA), which involve the removal of tariff and non-tariff barriers among Members; Customs Unions (CU), which is an FTA with common external tariffs imposed on non-Members; Common Markets (CM) which have an additional free movement of labour, capital and other factors of production, and Economic Unions (EC) requiring harmonisation of economic policies.⁶⁴ Some RECs are more angled towards political integration, thereby adding

⁶¹ Landry Signé and Colette van der Ven, ‘Keys to Success for the AfCFTA Negotiations’ (Africa Growth Initiative 2019) 1, 4 <www.brookings.edu/wp-content/uploads/2019/05/Keys_to_success_for_AfCFTA.pdf> accessed 18 January 2020 - (referring to AfCFTA art 8).

⁶² This was an agreement being negotiated in 2008 between COMESA, EAC and SADC.

⁶³ Gerhard Erasmus, ‘How, According to the Founders, Will the AfCFTA Agreement Be Implemented and the Continental Free Trade Area Come About?’ (*tralac Blog*, 18 December 2019)<www.tralac.org/blog/article/14344 > accessed 25 March 2020.

⁶⁴ Matsushita and others (n 6) 508.

another layer of complexity.⁶⁵ Under the RECs there are issues of economic policy objectives, political tensions and several other challenges that stem from the multiplicity of regimes.

In Southern and Eastern Africa, there is the **Common Market for Eastern and Southern Africa** (COMESA) comprising of nineteen Members.⁶⁶ A formal FTA was established in October 2000 and a CU in 2009. Currently, fifteen Members have acceded to the Agreement. In the same region is the **East African Community** (EAC) comprising of six Members ⁶⁷ with its main objective being the formation of a political federation.⁶⁸ Economic integration has been progressive with the establishment of a CU in 2005, CM in 2010 and a Monetary Union (MU) in 2013.⁶⁹ The EAC is a fully functional FTA, and following the establishment of a CM, Members have adopted a liberal stance towards the four freedoms. Similarly, there is the **Southern African Development Community** (SADC), initially formed by Member ⁷⁰ as a response to the end of the apartheid era towards political liberalisation in southern Africa. By 1992, there was a shift towards economic integration and fostering interdependence amongst Members.⁷¹

There is also **Inter-Governmental Authority on Development** (IGAD), initially formed to address economic hardships caused by natural disasters such as drought, famine, and environmental degradation across the region.⁷² The Members'⁷³ aims and objective continuously evolved based on their specific political, social and economic challenges.

⁶⁵ Solomon Gebreyohans Gebru, 'Regional Integration in the Horn of Africa: State of Affairs and Challenges' 1, 4<www.academia.edu/30915771/Regional_Integration_in_the_Horn_of_Africa_State_of_Affairs_and_Challenges> accessed 11 November 2019.

⁶⁶ Burundi; Comoros; Democratic Republics of Congo; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libya; Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan; Swaziland; Uganda; Zambia; Zimbabwe.

⁶⁷ Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania and Uganda

⁶⁸ 'Integration Pillar' <www.eac.int/common-market/14-integration-pillar> accessed 26 March 2020.

⁶⁹ Jaime de Melo, Yvonne Tsikata, 'Regional Integration in Africa: Challenges and Prospects' (2014) WIDER Working Paper 37/2014 <www.wider.unu.edu/node/1425> accessed 23 March 2020.

⁷⁰ Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁷¹ 'Southern African Development Community :History and Treaty' <www.sadc.int/about-sadc/overview/history-and-treaty/> accessed 27 March 2020.

⁷² 'IGAD Structure' <<https://igad.int/about-us/what-we-do?start=3>> accessed 26 March 2020.

⁷³ Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda, Eritrea and South Sudan.

Members are dependent on each other for essential service sectors. For instance, landlocked countries such Ethiopia, South Sudan and Uganda are highly reliant on their coastal neighbours for access to ports, a vital trading requirement.⁷⁴ While Ethiopia is a significant supplier of electricity to Djibouti, Kenya and Sudan, it depends on Sudan for the supply of petroleum products and the use of its ports for agricultural exports.⁷⁵ Infrastructural projects such as road construction, railway construction and development of information technology systems is underway.

The **Community of Sahel-Saharan States** (CEN-SAD) was set up in 1998 and formally reached REC status on approval by its Members⁷⁶ at an Organisation of African Unity (OAU) conference in July 2000. In 2013, the Treaty was restructured to focus on regional security and sustainable development.⁷⁷ The revised Treaty is yet to enter into force as it is yet to receive the required 15 ratifications by Member States.

In Western Africa, the **Economic Community of West African States** (ECOWAS) was established to foster economic and political integration amongst its Member States.⁷⁸ ECOWAS is mainly political union focused on dispute settlement, crisis prevention and promotion of democracy. It is classified as a full economic union and has attained an FTA status.⁷⁹

In Northern Africa, the **Arab Maghreb Union** (AMU) was established by Members ⁸⁰ with the aim of harmonizing regional economic policies, trade integration and sustainable

⁷⁴ Gebru (n 65) 21.

⁷⁵ *ibid*.

⁷⁶ Benin, Burkina Faso, Central African Republic, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.

⁷⁷ 'CEN-SAD - The Community of Sahel-Saharan States | United Nations Economic Commission for Africa' <<https://www.uneca.org/oria/pages/cen-sad-community-sahel-saharan-states>> accessed 26 March 2020.

⁷⁸ 'Fundamental Principles & Achievements | Economic Community of West African States(ECOWAS)' <www.ecowas.int/about-ecowas/fundamental-principles/> accessed 27 March 2020 – (Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali , Niger, Nigeria, Senegal, Sierra Leone, Togo).

⁷⁹ Gebru (n 65) 27.

⁸⁰ Algeria, Libya, Mauritania, Morocco and Tunisia.

development.⁸¹ According to UNECA, implementation of integration has been slow, and an FTA has not been achieved. A significant achievement towards financial integration was the setting up and the inauguration of Maghreb Bank for Investment and Foreign Trade in 2015, geared towards service sector infrastructural development.⁸²

The **Economic Community of Central African States (ECCAS)** was established in 1983 aimed at promoting trade and market integration and harmonization amongst Members.⁸³ An FTA was scheduled for establishment by 2007 and a CU by 2008 but is yet to be fully functional due to some practical challenges.⁸⁴ Similar to AMU, the ECCAS has not achieved a deep level of integration as its counterparts, however in a bid to position themselves for the implementation and negotiation of the AfCFTA, steps are being taken to accelerate the integration process in the region.

In the background, further integration schemes among RECs have been set in motion, for instance in June 2015 Members States of COMESA, EAC and SADC launched the **Tripartite Free Trade Area (TFTA)** aimed at consolidation of the RECs. For the Agreement to become fully operational, it must be ratified by a prescribed number of Members. Progress has been made and it is anticipated that the six additional countries are set to ratify the Agreement in the coming year to enable entry into force.⁸⁵ The AfCFTA was built on TFTA negotiations; as mentioned the “preservation of the *acquis*” principle is directly taken from this Agreement. Further, the TFTA in Article 7 also contains a conditional MFN clause requiring a reciprocity obligation from trading partners if they wish to benefit from concessions negotiated

⁸¹ ‘Arab Maghreb Union | United Nations Economic Commission for Africa’ <www.uneca.org/oria/pages/amu-arab-maghreb-union> accessed 27 March 2020.

⁸² ‘MFW4A - Making Finance Work for Africa’ <www.mfw4a.org/> accessed 27 March 2020.

⁸³ Cameroon, Central African Republic, Chad and the Republic of Congo

⁸⁴ United Nations, African Union and African Development Bank (eds), *Harmonizing Policies to Transform the Trading Environment: Assessing Regional Integration in Africa VI* (Economic Commission for Africa 2013) 17.

⁸⁵ Philip Kambafwile, ‘More Countries Ratify Tripartite Free Trade Area Agreement – Common Market For Eastern And Southern Africa’ (COMESA, 17 January 2020) <www.comesa.int/more-countries-ratify-tripartite-free-trade-area-agreement/> accessed 31 March 2020.

with both Members and third States.⁸⁶ Although the initial focus has been setting up a regional FTA and CU with the RECs, phase two of the negotiations is expected to include trade in services liberalisation.⁸⁷

Despite the entry into force of AfCFTA, plans to accelerate regional integration are still underway. One reason for this is that Members may want to better position themselves for the implementation and negotiation of trade liberalisation commitments. It was therefore important that AfCFTA Members maintain autonomy over the granting of trade concession, hence the reciprocal MFN.

2.2. The Rationale Behind the Reciprocal MFN in the AfCFTA

Apart from the existence of multiple obligations under the RECs, there are several other underlying factors that justify the necessity for the reciprocity condition under the AfCFTA MFN principle. Scholars opine that the purpose of the reciprocal MFN clause is "preserving the *acquis*"⁸⁸, however, it is not that straightforward. An underlying challenge has been the prolonged tensions between the AU and the RECs. Since the emergence of the OAU in May 1963,⁸⁹ efforts towards economic integration in Africa have been made through resolutions and declarations.⁹⁰ The result of these efforts was the proliferation of RECs. However, harmonisation and economic integration were a remote prospect due to lack of coordination and cooperation with the OAU. After the establishment of the African Economic Community⁹¹ there was not much improvement, and this led to the formation of the Protocol on Relations between the AEC and the RECs in 1998. This Protocol, although symbolic, did not yield any

⁸⁷ 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' (*tralac*) <www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html> accessed 31 March 2020.

⁸⁸ Signé and van der Ven (n 61) 4.

⁸⁹ OAU is the predecessor to the AU.

⁹⁰ Rodrigo Tavares, 'Unloving Brothers: The African Union And The Regional Economic Communities' (2009) 62 *Studia Diplomatica* 61, 61 <www.jstor.org/stable/44838629> accessed 4 April 2020.

⁹¹ Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92, 93.

result and a new an updated version was signed ten years later.⁹² The disbandment of the OAU is a clear indication that the partnership was unsuccessful. Even with the inception of the AU, there is a constant disagreement on roles and obligations on either side. The RECs are of the opinion that they are not being involved in decision making and are treated as subordinates while the AU considers them as “disinterested, uncooperative, passive and incapable of collaboration”.⁹³

In every trade liberalisation regime, including the AfCFTA, a central recurring issue is the erosion of national sovereignty. In this situation, sovereignty is also viewed from a regional standpoint, some RECs have political undertones while others such as the ECOWAS were set up based on overt political motivations. According to a 2006 UNECA report, political and strategic reasons are crucial factors which Members take into consideration before joining RECs and for over 50 percent of countries, they rank higher than economic interests.⁹⁴ In addition, purely economic RECs have for the most part harmonised their economic and trade policies in accordance with national and regional development priorities. Some RECs are working toward the creation of an economic union, the ultimate objective being the creation of a single currency, thus harmonising monetary and fiscal policies.⁹⁵ Harmonisation of policies and regulations require a fair degree of compromise to enable uniformity in rules and standards in RECs. Members may view integration at the continental level as potentially imposing restrictions on their ability to determine their economic trajectory and development objectives.⁹⁶

⁹² *ibid.*

⁹³ Mehari Taddele Maru and Sahra El Fassi, ‘Can the Regional Economic Communities Support Implementation of the African Governance Architecture (AGA)? The Case of the Intergovernmental Authority on Development (IGAD)’ (European Center for Development and Policy Management, 2015) 30.

⁹⁴ Tavares (n 90) 64.

⁹⁵ Gebru (n 65) 4.

⁹⁶ *ibid* 29.

Consequently, the political dimension is an essential element of trade negotiations that may either serve as an obstacle or make the process more complex. Pertaining to policies, most RECs have initiated Minimum Integration Programmes (MIP) geared towards boosting integration within their regions.⁹⁷ It is therefore more probable that governments may focus resources on implementation of MIPs, which the AfCFTA is not opposed to. This means that liberalisation at the continental level may not be a priority for AfCFTA Members in the near future.

Against this background, it was necessary to introduce creative and unconventional rules to encourage the cooperation of RECs. One of the general aims of the AfCFTA is the efficient functioning of the RECs as a means of fostering progressive economic integration. Preservation of the *acquis* is an unusual and complex method of economic integration but a persuasive mechanism for AfCFTA Members to accept the terms of the Agreement. The reciprocal MFN clause gives a Members unrestricted autonomy to negotiate trade preferences as there is no obligation to automatically grant concessions agreed upon.

2.3. Analysis of the Reciprocal MFN Clause under the AfCFTA Protocol on Trade in Services

In general, the AfCFTA contains a variation of the MFN clause imposing a reciprocal obligation on other trading partners seeking to benefit from preferential trade concessions. The AfCFTA MFN clause is a general obligation contained in Articles 4 (1) – (6) of the Protocol on Trade in Services. The contents of Article 4 (1) is precisely the same as GATS Article II: I and is therefore subject to the same interpretation contained in the earlier chapter. There is, however, an additional clause in Article 4(3) which prompts the necessity for further analysis of the entire MFN principle under the AfCFTA. The article provides as follows: “Notwithstanding paragraph 1, two (2) or more State Parties may conduct negotiations and

⁹⁷ United Nations, *Harmonizing Policies to Transform the Trading Environment* (n 84) 7-12.

agree to liberalise trade in services for specific sectors or sub-sectors in accordance with the objectives in this Protocol. Other State Parties shall be afforded opportunity to negotiate the preferences granted therein on a reciprocal basis”.

Based on Article 4 (3) above, AfCFTA Members may negotiate and agree upon trade preferences with selected trading partners on condition that they are consistent with the objectives of the Protocol. The primary objective is further integration and elimination of trade barriers, therefore agreements that may result in further complexities may not meet this standard. Of course, this objectives requirement is something that will have to be addressed in subsequent negotiation rounds. However, there is some scope for the qualification of eligible agreements.

Nonetheless, by virtue of the reciprocity condition, specific trade concessions are offered with “the understanding that its benefits are not to be extended automatically, generally and freely to other States...”⁹⁸ In effect, the MFN principle under the AfCFTA is conditional, and other Members are not automatically entitled to a concession without incurring any obligation.⁹⁹ Consequently, a conditional or reciprocal MFN clause is a negotiation principle granting other beneficiary AfCFTA Members a contingent bargaining position.¹⁰⁰ Therefore, AfCFTA Members are obliged to negotiate the extension of preferences with other Members but are not obliged to extend those preferences automatically *unless* “equivalent” concessions are offered in return.¹⁰¹ As a treaty provision, it requires a consideration in exchange for an offer, however it is a more complex theory.

The exchange of preferences among selected trading partners has two components; an initial bargain resulting in an exchange of specific and equivalent trade concessions and a

⁹⁸ United States Tariff Commission, *Report on Reciprocity and Commercial Treaties* 1919.

⁹⁹ Endre Ustor, ‘The Most-Favoured-Nation Clause in the Law of Treaties’ (1968) Yearbook of the International Law Commission Yearbook 7, 167.

¹⁰⁰ *ibid.*

¹⁰¹ Gary H. Hufbauer ‘Should Unconditional MFN be Revived, Retired or Recast’ RH Snape (ed), *Issues in World Trade Policy* (Palgrave Macmillan UK 1986) 33.

further agreement to refrain from extending similar concessions to 3rd Members without requiring equivalent concessions in return.¹⁰² The reciprocity obligation indicates that on conclusion of the initial bargain, further separate negotiations will be conducted with every other AfCFTA Member. In other words, it is assumed that separate negotiations will commence from initial trade preferences agreed upon.¹⁰³

The main issue in this situation is the notion of “equivalence” and determining the value of concessions. The value of each concession differs from one AfCFTA Member to another depending on several variables, including, but not limited to, its size, development level and other internal economic and social factors. For instance, Sierra Leone will place more premium on electricity supply due to its constant shortage compared to Ethiopia, a supplier of electricity to Djibouti, Kenya, and Sudan. In these instances, the problem becomes how to measure equivalence to determine identical concessions. Some AfCFTA Members will simply be unable to offer equivalent concessions due to the inequality in economic levels for individual Members and integration levels for RECs. Clearly, no AfCFTA Members or RECs may be in the position to offer equivalent concessions. It will therefore be necessary to consider an alternative theory to equivalence such as complementary, rather than identical, concessions.¹⁰⁴

Alternatively, the concept of “relative reciprocity”¹⁰⁵ takes into consideration the dissimilarity in economic levels when measuring equivalent concessions.¹⁰⁶ In any event, an exchange of complementary or relative concessions, requires the granting AfCFTA Member to commence a new bargaining or trade negotiation which may end up being unconnected to the initial one. Yet, according to Art 4(3) of the Service Protocol they are entitled to do so.

¹⁰² S.H. Bailey, ‘Reciprocity and the Most-Favoured-Nation Clause’ (1933) *Economica* 428, 438.

¹⁰³ *ibid.*

¹⁰⁴ *ibid* 444.

¹⁰⁵ Adopted by developing countries during Kennedy and Tokyo Round of GATT negotiations.

¹⁰⁶ Akiko Yanai, ‘Reciprocity in Trade Liberalization’ (2001) IDE APEC Study Center Working Paper Series 00/01 – No. 2, 14.

Upon conclusion of the original bargain, there is the additional challenge that the value of reciprocal concessions will be further influenced by a change in the existing economic conditions. Due to the dynamic nature of the world trading regime, it is inevitable that prevailing conditions under the initial bargain will be distorted by factors such as inflation, balance of trade and internal economic policies.¹⁰⁷ The disturbance of equivalence may negatively influence trade relations as some AfCFTA Member will be required to offer more or less concessions depending on the existing conditions. It will therefore be necessary to consider the implementation of a “sliding-scale” reciprocity, in which complementary or relative concessions are adjusted depending on the economic situation in the individual Member State.¹⁰⁸

Based on the above, it is evident that a reciprocity condition requires economic stability to enable efficient bargaining. Going forward, AfCFTA Members will require more frequent and complicated bargaining processes to be able to achieve the anticipated level of integration.

2.4. Conclusion

Arguments against unconditional MFN contend that the legal obligation it imposes does not support new development objectives as Members have a strong desire for reciprocal concessions alongside the liberty to discriminate if necessary.¹⁰⁹ Also, an unconditional MFN clause may not be suited for the specific objective of particular RTAs as illustrated in the AfCFTA. The analysis reveals that the reciprocal MFN clause was a persuasive mechanism for AfCFTA Members to accept the terms of the Agreement. In principle, it offers absolute regulatory autonomy as there is no obligation to automatically grant concessions. However, the principle of reciprocity and the concept of equivalence will present an overly complex method

¹⁰⁷ Bailey (n 102) 445.

¹⁰⁸ *ibid.*

¹⁰⁹ Bailey (n 102) 429.

of economic integration. In comparison with unconditional MFN, there are several administrative challenges that may need to be taken into consideration.

The next chapter will examine the role of the unconditional MFN in the GATS legal architecture and highlight some of its disadvantages. The second part of the chapter will analyse how the AfCFTA liberalisation policy objectives differ from the GATS and highlight some key differences between unconditional and reciprocal MFN. It further goes on to undertake an examination of challenges to the implementation of the reciprocal MFN principle in the AfCFTA.

Chapter Three

3. Comparative Analysis of the Legal Framework of the GATS and AfCFTA with Emphasis on the Unconditional and Reciprocal MFN Principles

The GATS and AfCFTA are trade agreements signifying differing levels of economic integration. In particular, the AfCFTA belongs to the category of EIA exception to the MFN principle under the GATS, an exemption formulated to encourage deeper levels of integration among selected trading partners. It is therefore possible that a reciprocal and an unconditional MFN clause may result in similar outcomes as far as successful implementation of the core objectives of both Agreements are concerned. The research finds that the reciprocal MFN clause in the AfCFTA is intended to ensure that the RECs are an integral part of its legal architecture.

This chapter therefore examines the fundamental differences in the legal architecture of the GATS and AfCFTA with emphasis on the role of unconditional and reciprocal MFN as an economic integration mechanism. It will then analyse some of the practical and administrative challenges that may be encountered by the AfCFTA due to the existence of RECs with a view of proffering some recommendations.

3.1. The Unconditional MFN as a Core Discipline Under the GATS Legal Architecture

Upon accession to the WTO, Members agree to be bound by the entire body of rules and covered Agreements, including the GATS. Therefore, the WTO and the GATS set out the legal framework and minimum requirements for services trade liberalization. The rules of the trade regime have been described as sufficiently rigid to enable adequate compliance, save for exceptional circumstances, and adequately flexible to allow for Members' sovereignty.¹¹⁰

¹¹⁰ John Ravenhill, 'APEC and the WTO: Which Way Forward for Trade Liberalization?' 19. Contemporary Southeast Asia, Vol. 21, No. 2 (August 1999)1, 22.

The rigidity of the rules emanate from the strict cornerstone principles of MFN, national treatment, and transparency,¹¹¹ while the exemptions and exceptions to the rules offer flexibility. These fundamental legal principles, together with certain key characteristics, ensure the efficient functioning of the WTO trading regime. As described in chapter one, GATS Members are bound by specific market access commitments which are legal obligations. In addition, the effectiveness of the system relies on reciprocity-based bargaining.

In relation to reciprocity-based bargaining, the GATS does not require precise equivalence of concessions, which is an administratively efficient choice for multilateral trade agreements.¹¹² Nevertheless reciprocity is an integral component of the GATS legal framework. Back when prospective WTO Members negotiated their Services Schedules (1987-1994), each made concessions either as to market access or national treatment for selected sectors and modes of supply. Reciprocity was certainly part of the deal; State A would liberalize sector 1 and mode 2 if State B agreed to liberalize sector 3 and mode 4.

The MFN principle also informed the negotiations. Indeed, Members knew that, were they to make specific concessions, they would have a legal obligation to extend them to all WTO Members, without selecting among trading partners. The purpose of the MFN principle as a rule under the WTO trading system is equality of trading partners. Based on GATS jurisprudence, rules and obligations are interpreted in light of the prevailing conditions of competition between products or services. As analysed in chapter one, the notion of unconditionality does not necessarily mean without condition or compensation, but conditions that alter the competitive relationship to the detriment of like products or services.

The unconditional MFN principle under the GATS has several advantages. Due to the multilateralisation of concessions, the MFN principle facilitates the efficient functioning of the

¹¹¹ Mitsuo Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy' (2004) 3 Washington University Global Studies Law Review 363, 363.

¹¹² Yanai (n 106) 14.

market by "levelling the playing field" amongst WTO Members, thereby promoting a competitive trading system.¹¹³

Administratively, it encourages efficient bargaining by ensuring that subsequent agreements with selected trading partners do not either intentionally or otherwise undermine prior agreements.¹¹⁴ In this instance, the MFN principle preserves the "balance of bargain" in that it provides WTO Members with a sense of security "that the value of any concession that they obtain under MFN will not be impaired by subsequent more generous concession".¹¹⁵

Moreover, it promotes transparency which is also an essential element in an Agreement consisting of 164 participating WTO Members. The principle of transparency is expressly provided for in GATS Art: III, intended to maintain stability, uniformity and predictability of WTO Members' regulations and obligations.¹¹⁶ Due to the one step negotiation process offered by the unconditional MFN principle, there is certainly a correlation with transparency.

3.1.1. Analysis of Some Disadvantages under the GATS MFN Principle

The MFN principle is expected to facilitate economic integration by ensuring that WTO Members do not renege on specific commitments in their National Schedules by granting increased preferences to third countries.¹¹⁷ Legal scholars and economic analysts have put forward several arguments supporting the positive effects of the MFN principle on trade liberalisation, however, there are equally salient criticisms.

The effect of the MFN principle, especially on multilateral trade, is theoretical as there are other economic realities which influence Members' decisions to grant market access to their trading partners and determine the overall impact on the world market. Due to the constant developments in the world market, the MFN principle may preserve the balance of the original

¹¹³ Tomer Broude, 'Most-Favoured Nation Principle, Equal Protection, and Migration Policy' (2010) 24 *Geo Immigr LJ* 553, 556.

¹¹⁴ Hufbauer (n 101) 36 – 37.

¹¹⁵ Mattoo, 'The MFN and GATS' (n 15) 13.

¹¹⁶ Matsushita (n 111) 368.

¹¹⁷ Teksten (n 57) 5.

bargain only for a limited duration until an upset occurs due to other market forces.¹¹⁸ Due to the complexity of trade involving state institutions, multinational corporations and increase in countertrade among WTO Members, unconditional MFN can no longer ensure equality or efficiency. This argument is quite similar to the determination of equivalence in a reciprocal MFN scenario though the latter is more complicated.

A major concern of the MFN principle is Members' potential to "free ride" on trade concessions granted because of reciprocal negotiation among selected trading partners. The MFN externality results in non-reciprocating countries benefiting from trade preferences and concession offers.¹¹⁹ As a consequence, some WTO Members may abstain from participating in negotiations in expectation that they will free ride on the liberalisation of others.¹²⁰ Some scholars argue that the free riding problem is mitigated by the overall impact of multilateral trade liberalization as a result of reciprocal negotiations.¹²¹ Be that as it may, it still remains a problem, especially when the outcome is not in line with economic policy objectives of Members.

The harmonising effect of the MFN obligation may not necessarily have the same impact on developing countries because, "equality of treatment is equitable only between equals"¹²². Inequality in economic levels is a recurring problem in multilateral trade agreements and this is one of the situations that exceptions and exemption were formulated to tackle. These acceptable departures, particularly those relating to EIAs discussed in chapter one, have led to the proliferation of PTAs and erosion of the MFN principle. According to the Sutherland Report, by October 2004 there were approximately 300 PTAs notified to the WTO.¹²³ As a

¹¹⁸ Hufbauer (n 101) 37-38.

¹¹⁹ Rodney D. Ludema, Anna Maria Mayda, 'Do Countries free ride on MFN?' *Journal of International Economics* 77 (2009) 137, 137.

¹²⁰ *ibid.*

¹²¹ Broude (n 113) 556.

¹²² K. Rai, 'Most Favoured Nation and Developing Countries' (2014) *Economic Affairs* 204, 204.

¹²³ Peter Sutherland and Others, *The Future of the WTO* (Report by Consultative Board, World Trade Organisation 2004) 21 – (these notifications include exceptions under the GATT XXIV, GATS Art: V and the Enabling Clause) (*The Sutherland Report*).

result, the role of the unconditional MFN has diminished to the extent that it referred to as “no longer the rule; it is almost the exception”.¹²⁴

3.2. The Reciprocal MFN as a Core Discipline Under the AfCFTA Legal Framework

The AfCFTA seeks to establish a single integrated trading system facilitated by the free movement of goods and services and elimination of trade barriers across the African continent.¹²⁵ The idea is to firstly create a functioning FTA that will develop into a CU and eventually the establishment of a single market.¹²⁶ Similar to the GATS, the AfCFTA sets out the legal and regulatory framework for the enhancement of services liberalisation among AfCFTA Members.

The legal framework of the AfCFTA is in the process of being formulated, however we can conclude that as an RTA the focus will be on further economic integration within the region. Like the GATS, before the commencement of the Agreement various Members had concluded PTAs which were incompatible with the MFN principle. In contrast with the GATS, this is not Africa’s first integration scheme; the continent has experienced some failures mainly due to lack of cooperation among Members as Agreements rarely go beyond the signing stage.¹²⁷ In the meantime, integration at the sub-regional level has been comparatively successful hence the various levels of integration in the RECs. These peculiarities together with the performance of the unconditional MFN principle may have led to the necessity for the incorporation of rules geared towards the overall objective of further integrating the RECs.

3.2.1. The Fundamental Differences between Unconditional and Reciprocal MFN Principles

Reciprocity is a central principle of trade negotiations due to the expectation that trading partners will offer concessions in return for the removal of trade barriers by a

¹²⁴ *ibid* 60.

¹²⁵ AfCFTA art 3.

¹²⁶ Gebu (n 65) 8.

¹²⁷ Simo (n 7) 3.

Member.¹²⁸ It is therefore believed that reciprocity induces the extension of concessions resulting in more beneficial outcomes than unilateral liberalisation.¹²⁹ Reciprocity can either be diffuse or specific.¹³⁰ Diffuse reciprocity exemplified by the GATS, does not require direct exchange of concessions but imposes a future MFN obligation on other trading partners. Specific reciprocity as envisaged in the AfCFTA relies on simultaneous exchange of equivalent concessions. In other words, the divergence between unconditional and reciprocal MFN principle is that in the former, upon conclusion of reciprocity-based negotiations, the offer is automatically extended to all Members¹³¹ while the latter requires the fulfilment of specific obligations by the receiving AfCFTA Member. The MFN principle influences trade negotiations and bargaining processes.¹³² Therefore, negotiations under the GATS unconditional and the AfCFTA reciprocal MFN will result in completely different outcomes.

Under the GATS, negotiations between two WTO Members begin with a bilateral request and offer on trade concessions. The role of the MFN in these circumstances is, on conclusion of the bargaining process, it obliges a WTO Member to grant equivalent levels of market access to every other trading partner without obtaining concessions in return.¹³³ This however does not mean that conditions cannot be attached to the offers in the form of regulatory measures. The central feature of the obligation is that any such condition must not alter the competitive relationship to the detriment of like services originating from a beneficiary Member. Therefore, on conclusion of the initial bargain, WTO Members cannot impose dissimilar or discriminatory conditions on other trading partners.

¹²⁸ Aaditya Mattoo, *Shaping Future GATS Rules for Trade in Services* (The World Bank 2001) 24 <<http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-2596>> accessed 22 March 2020.

¹²⁹ *ibid* 229.

¹³⁰ Yanai (n 106) 2-3.

¹³¹ Mattoo, *Shaping Future GATS Rules for Trade in Services* (n 128) 24.

¹³² Aaditya Mattoo and Carsten Fink, 'Regional Agreements and Trade in Services: Policy Issues' (2004) 19 *Journal of Economic Integration* 742, 763 <<http://www.e-jei.org/journal/view.php?doi=10.11130/jei.2004.19.4.742>> accessed 16 May 2020.

¹³³ *ibid*.

For that reason, a Member will always consider its willingness to grant market access to every other WTO Member. Often countries may refrain from engaging in negotiations, hoping that other Members' agreements will be sufficient to induce the market access that they require. For instance, least developed countries do not engage in negotiations simply because they lack the economic ability make market access commitments. This opinion is supported by limited engagement of developing countries in GATS multilateral services negotiations and their reluctance to undertake service sector reform.¹³⁴ Nevertheless, an unconditional MFN makes the bargaining process straight forward and ensures certainty and transparency going forward.

The reciprocal MFN in the AfCFTA presents a more complicated bargaining process and administrative challenges. In this instance, bilateral requests and offers are implicitly reciprocal in nature. This first stage in the negotiation process is similar to the GATS. On conclusion, concessions are not automatically granted to other trading partners, instead separate negotiations are borne out of the initial offer. The effect of the MFN principle is that, granting Members have an obligation to negotiate with other AfCFTA Members who are entitled to benefit from concessions. However, the reciprocity obligation means that the entitlement to the same levels of market access depends on condition that concessions supposedly equivalent to the initial bargain are extended to the granting AfCFTA Member.¹³⁵ There is also the issue of equivalence, some AfCFTA Members may not be in a position to offer equivalent concessions thereby defeating the purpose of progressive integration. In addition, negotiated concessions are unprotected as subsequent offers of higher levels of concessions are not multilateralised, thereby automatically depreciating the value of initial bargains. There is also the issue of whether bargaining will be carried out between individual

¹³⁴ Pierre Sauv , 'The GATS and Developing Countries' (2004) Sida < <http://www.sida.se/publication> > accessed 23 March 2020.

¹³⁵ Hufbauer (n 101) 33.

Members, RECs, or as part of other trade arrangements such as FTAs, CUs and CMs. To address these challenges, it is necessary for the AU to create and clarify the rules on negotiations.

3.3. Practical Challenges to the Implementation of the Reciprocal MFN Under the AfCFTA

The reciprocal MFN, on its own, is already a challenging rule to implement, as analysed above. However, there are other challenges to the successful implementation of the AfCFTA. Firstly, the extent to which individual AfCFTA Members can negotiate independently is unclear. Since AfCFTA seeks to preserve the *acquis*, a potential issue is Members' lack of capacity to negotiate and conclude trade preferences without considering existing agreements. The AfCFTA provides that, "State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves."¹³⁶ In effect, negotiating the removal of trade barriers comprises a legal obligation to refrain from going below the level of liberalisation already attained by existing RECs. Bargaining will therefore begin from extending a considerable measure of concessions which Members may not be willing to offer without receiving something in return; hence the reciprocal MFN clause. In implementing the MFN obligation under the AfCFTA, the first step will be identifying the legal obligations of each Member to their respective RECs.

In conformity with the AfCFTA Article :19(2), the expectation is that trade concessions will be negotiated preferably between RECs or as AfCFTA Members that belong to various RECs.¹³⁷ Apart from the EAC, ECOWAS and CEMAC are CUs, which are likely to offer trade concessions as a bloc. A problem then arises when one AfCFTA Member is an unwilling

¹³⁶ AfCFTA Art 19:(2).

¹³⁷ Signé and van der Ven (n 61) 6.

participant in negotiations due to its own domestic policies. This presents a first hurdle. Further, the reciprocal MFN thus means that a third country seeking to benefit from concession has to offer equivalent market access to an entire trading bloc comprising of several countries. This may be a difficult decision as some countries may be unwilling to open their markets to several countries simultaneously. As a result, there may be difficulty in achieving further integration past the initial preferences, therefore bringing into question the non-discriminatory nature of the reciprocal MFN clause.

Secondly, the most clearly visible issue is that of overlapping memberships by countries in various RECs. This situation is prevalent amongst the southern and eastern African RECs; COMESA, EAC and SADC. For instance, EAC was set up as a CM in 2010, however its Members Burundi, Kenya, Rwanda, and Uganda are also Members of COMESA while Tanzania is part of SADC. There is also the Southern African Customs Union (SACU) comprising of five SADC Members. Across the region there are existing memberships in CUs in which the same Members are currently negotiating further integration and establishing additional membership in CUs. According to the UNECA, of the twenty-six Members in COMESA, EAC and SADC, seventeen of them are already Members of a CU, negotiating either an alternative one or two separate CUs.¹³⁸

The legal implications of overlapping memberships depend on states' obligations under their respective trade arrangements. In a CU, Members eliminate internal tariffs and impose a common external tariff on third countries. Evidently a uniform tariff requires harmonisation of trade and economic policies.¹³⁹ The implication of belonging to two separate CUs in itself is quite complex but this goes way beyond trade in goods and tariff negotiations. Some Members also belong to Common Markets (CM); indicating a deeper level of integration. Membership

¹³⁸ United Nations, African Union and African Development Bank (eds), *Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area* (Economic Commission for Africa: African Union: African Development Bank 2012) 1.

¹³⁹ Gebru (n 65) 4.

in a CM requires harmonisation of policies such as recognition of professional qualifications, immigration, labour regulations, licenses to establish businesses within the region and other services trade related measures.¹⁴⁰ Under these circumstances there are legal limitations on preferential services trade offers which can be negotiated with beneficiary Members. AfCFTA Members may not be permitted to make offers below the minimum standards set by the CM regardless of whether the third country is making an economically beneficial offer in return. There is the additional consideration of belonging to more than one PTA and having to deal with parallel legal obligations.

The TFTA when it becomes operational may resolve the overlapping membership issue among its Members in the region, however negotiation at the AfCFTA level will nevertheless remain complicated. Also considering the reciprocal MFN obligation, Members in a CU will have to consider whether its counterparts are willing to offer equivalent trade concessions to third-party Members.

Thirdly, a common feature of multilateral trade agreements is the inequality in economic levels among trading partners. The disparity in economic levels amongst AfCFTA Members and RECs presents an additional challenge. Moreover, the level of integration in the various RECs indicate an inequality in the development levels across regions in the continent. For instance, it is evident that southern and eastern African countries have made a lot of progress compared to their northern and western counterparts. The RECs which are at a more advanced level of integration may be reluctant to trade with less progressive counterparts.¹⁴¹ Assuming that the TFTA is successfully implemented, the disparity in integration levels will be even greater as its Members make up 53 percent of the region.¹⁴² Even within regions, some

¹⁴⁰ibid.

¹⁴¹ Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 92, 95.

¹⁴² United Nations, *Assessing Regional Integration in Africa V* (n 138) 56.

countries are comparatively more economically prosperous than others and will therefore be more reluctant to grant market access to trading partners. This reluctance is seen in how long it took Nigeria and South Africa, the continent's biggest economies to become signatories to the AfCFTA.¹⁴³ Some countries may be more interested in protecting their thriving economies while the least developed states may be threatened by opening their markets to unfair competition.

3.4. Conclusion

This chapter reveals interesting similarities between the AfCFTA and the GATS; the existence of PTAs and inequality in economic levels being the most prominent. The reciprocal MFN in the AfCFTA adds another layer of complexity to the negotiation of preferences under the Agreement. However, although the unconditional MFN under the GAT is administratively less complex, its overall effectiveness is currently under attack. A recommendation put forward by the Sutherland Report with reference to PTAs was that “the remedy to the spaghetti bowl of discriminatory preferences that they spawn would be to attack them directly through effective reduction” of trade barriers.¹⁴⁴ Essentially if there are absolutely no barriers to services trade liberalisation then preferences are automatically eliminated. Therefore, rules governing the negotiation process under the AfCFTA must be geared towards elimination of trade barriers.

¹⁴³ Daniel Idibia Obida, ‘The Quest for Africa’s Trade Growth: Intra-African Trade and the Proposed African Continental Free Trade Areas (AfCFTA): A Commodification of Old Practice or Maintenance of New Order?’ (2019) 6 WJLR 42, 42.

¹⁴⁴ Sutherland Report (n 123) 26.

4. Concluding Remarks

The research finds that since the Uruguay round of negotiations, the GATS has not had a significant liberalizing effect on the world services trade regime.¹⁴⁵ Although several reasons may be put forward for this outcome, at the forefront of the criticism is its MFN obligation which has often been described as weak due to its several exemptions which WTO Members rely on to take regulatory measures inconsistent with the obligation. Achieving an equilibrium between trade liberalisation and the necessity for WTO Members to maintain regulatory autonomy comes at a price and has resulted in a weak MFN obligation and proliferation of PTAs. Against the foregoing, we can conclude that liberalisation at the WTO level is not in the foreseeable future.

Even though WTO rules provide adequate flexibility to developing countries to encourage progressive liberalisation, the research finds that they have particularly refrained from making binding commitments. Instead the proliferation of PTAs includes those concluded by WTO Members also belonging to the AfCFTA. Interestingly these PTAs also referred to as RECs have slowed down economic integration in Africa and the AfCFTA is therefore facing a similar challenge as the GATS. The selection of a reciprocal MFN is indicative of the fact that the unconditionality obligation was unsuitable for the AfCFTA legal framework.

This research finds that the reciprocal MFN clause under the AfCFTA does not amount to non-discrimination principle in the theoretical sense. However, scholars have acknowledged that “good economic theory does not necessarily make good politics”.¹⁴⁶ In the case of the AfCFTA, it was necessary to prioritize the cooperation of Members over non-discrimination. From a policy perspective, it was a necessary to consider domestic opposition to reform and the assurance that reciprocity brings to the negotiation process. The reciprocal MFN, though

¹⁴⁵ Weber and Burr (n 18) 37.

¹⁴⁶ Ravenhill (n 110) 228.

an important and strategic addition to the MFN obligation, requires further modification and clarification so as not to result in chaos and a patchwork of agreements.

It is submitted that the rationale behind the reciprocal MFN is AfCFTA Members' cooperation and preservation of the *acquis* under RECs. Although this objective is rather similar to the function of the exceptions and exemptions under the GATS, it is necessary to clarify the legal meaning of reciprocal concessions to enable a uniform application of the rule.

4.1. Recommendations

Under the AfCFTA legal framework, it is necessary that the term *reciprocal* is clearly defined. As seen in the analysis, it is impossible for every AfCFTA Member to offer equivalent concessions. Therefore, a set of cumulative factors will have to be identified as a means to determining reciprocal concessions.

In respect of the bargaining and negotiation process, it is relevant to determine AfCFTA Members' capacity to negotiate preferences. It is preferable for negotiations to be carried out between RECs thereby eliminating barriers among several countries simultaneously.

In negotiating MFN exemptions and exceptions, AfCFTA Members must be cautious, especially relating to Economic Integration Agreements. It is advisable that they refrain from creating additional PTAs with the exception of situations when RECs are being merged as seen in the TFTA. In conclusion, the focus must ultimately be on integrating the existing RECs.

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