ADAPTING AfCFTA's SECURITY EXCEPTIONS TO EVOLVING INTERNATIONAL DEVELOPMENTS

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ABSTRACT

The first paragraph of Article 28 of the Agreement setting up the AfCFTA says that every five years, the States Parties can change the Agreement to keep it up with changes in the region and the world. This is to make sure that, for example, the Agreement is still effective. Currently, the effectiveness of the multilateral rules-based trading system (the World Trade Organization (WTO system) is at stake due to the way and manner in which members of the trading system summon up the security exceptions. This international development regarding the use of the exception is facilitated by the current state of the multilateral texts of the security exceptions. The worrying issue is that, as it stands, AfCFTA's security exceptions are a verbatim of the 'debatable' multilateral texts. This begs the question as to whether the unresolved issues regarding the security exceptions that are causing havoc within the international trading environment could be transported from the 'multilateral rules-based trading system' – 'international stage' to the 'regional Free Trade Area' – 'African stage.'

This paper concludes that the use of the exceptions is causing an international uproar and it is imperative for AfCFTA's state parties to anticipate problems that can jeopardize the 'African dream' by addressing critical issues like the question of justiciability, the absence of a chapeau laying down an obligation of good faith, or the disregard of novel security concerns.

Keywords: AfCFTA, justiciablity, regional free trade area, security exceptions, state parties

INTRODUCTION

It is an article of faith in the African Continental Free Trade Area (AfCFTA) that any issues that were overlooked at the outset during the draft of the Agreement or the lacunae that slip inadvertently into the agreement could be addressed after five years of experience.

At the time of writing, the AfCFTA is still a work in progress.[ii] Coincidentally, there is a new development regarding security exceptions on the international stage.[iii]

The AfCFTA entered into force on 30th May 2019[iv] but trading under the Agreement per se kicks off on 1st January 2021.

The first Paragraph of Article 28 of the Agreement establishing the AfCFTA provides *in fine* that the States Parties have the possibility to adapt the Agreement to evolving regional and international developments; this, every five years as to ensure among other things its effectiveness.

As per the proviso of Article 28, five years from now will roughly be 30th May 2024.

However, if the States Parties decide to consider the date the Agreement becomes fully operational instead, 1st January 2026 will make the count.

Either way, five years will come to us as fast as the speed of the light. And it might be appropriate to look into the international development regarding the security exceptions – which does not concern the AfCFTA today but could represent the luxury that the AfCFTA trading environment cannot afford tomorrow.

Five years from now, it is expected that the protocol in trade in goods and trade in services would be at full display. This means that AfCFTA's state parties could potentially invoke the exception under these protocols. The same could be said about the protocols on intellectual property rights, investment and competition policy or the protocol on e-commerce if the deadline to conclude the negotiation were not kept postponing.[v] Also five years from now, tariff liberalization will be completed for non-Least Developed Countries (LDCs) regarding non-sensitive goods.[vi] In short, five year from now, one cannot mention trade in Africa without referring to AfCFTA—this provided that the agreement is implemented free of distortion.

At the international level[vii], the rules governing the protection of security concerns are couched in among things Article XXI of the General Agreement on Tariffs and Trade (GATT), Article XIV *bis* of the General Agreement on Trade in Services (GATS), Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Likewise, at the regional African level, Articles 27 and 16 of respectively the Protocol on Trade in Goods and the Protocol on Trade in Service of the Agreement establishing the AfCFTA deal with protection of security concerns in almost identical terms to those in GATT 1994 and GATS.

Practically, African States are yet to be a party to any WTO's security exceptions dispute be it as a principal party or third party.[viii] This inaction might soon change as the Members of the African Union have decided that their economic relationship would be better off if there are structured under the continental Agreement that provides room for the protection of security concerns.

There might be a change because fundamentally, there is a serious doubt on the way and manner the security exceptions operate at the international level. Hence, one needs to recognize the current reality in order to avoid the disagreement that is unfolding in front of our face. We have to start focusing on the future and on results.

In the future, the African Community would like to have a viable Agreement free of distortion. And as far as the results, the ideal would be that the determination expressed in the third recital of the Agreement establishing the AfCFTA such as *'the strengthening of the economic relationship'* among African would be attained. In short, the point here is concerned the effectiveness of the African trading system. It is in this regard that one needs to read the first Paragraph of Article 28 of the Agreement establishing the AfCFTA. This because, it provides the legal basis for Members to address the issue that can undermine the effectiveness of the AfCFTA *by drawing lessons from regional and international development.*

The issue is that internationally, the security exceptions is causing havoc within the multilateral rules-based trading system. Its invocation and interpretation are all concerning. And the stake of the rules-based system could not higher. This is the new development at the international stage that this Article is referring to.

Besides, regionally, the AfCFTA recognizes the Regional Economic Communities (RECs) as a building block for the Agreement. It also adheres to the best practice developed within RCEs. Hence, it might be appropriate to dig into RCEs to ascertain what type of security exceptions text they provide.

In terms of solutions, the legal literature has explored so far, many adaptations options to cope with the challenges that the use of the multilateral security exceptions raise.

Substantially, prior to the flood of security exceptions cases at the multilateral level, the literature explored the institutional rebalancing of the WTO and the UN, and the legal restructuring of the security exceptions.[ix] The aims are to establish a bridge between the WTO and the UN in order to avoid conflict of interest as regards security matters; and to establish workable security exceptions texts.

By the time of the proliferation of security exceptions cases, some of the literatures have explored the rebalancing of the security exceptions under the safeguard Agreement.[x] The main idea is to put the invocation of the security exceptions under the safeguard agreement, yet with its own characteristics.[xi]

Some also have been very skeptical as regard the role of the WTO dispute settlement system as follows:

> *...it should not be entirely left up to a trade body to set the contours for situations that affect the security of a nation as first, it lacks the geopolitical and strategic expertise to make decisions on these issues and second, the element of subjectivity cannot be neglected in respect of the security concerns as a grave situation of threat to the security of a minor economy might prove, just a law and other situation for a powerful economy i.e. U.S. or Russia.*[xii]

In line of this, the solution provided is that the invoking Member needs to refer to the UN or other security-bound Organization.[xiii]

AfCFTA establishes a large regional trading system. The scale of the Agreement makes it paramount to investigate how the exception fits into the general agenda of African states that is the strengthening of the economic relationship. After all, the use of the security exceptions

is now an everyday reality and this does not show any sign of abating. Hence, the quest of this Article is to explore adaptation solutions propre to the African context.

Substantially, this article did not intend to critically expose the overall challenges raised by the security exceptions in international trade law. Rather, it discusses how this new international development could probably impact one of the biggest FTAs ever negotiated so far. Hopefully, this can bring the awareness to the drafters of AfCFTA that, it is of utmost importance to fix any loophole in the provisions so as to ensure that the 'brand new' Agreement will be applied without distortion in accordance with the *'strengthening of the economic relation'* dream.

This article draws some ideas that the authors included in his doctoral dissertation titled ''The Security Exception in International Trade Law: Challenges and Solutions'' (2021).

The article begins by discussing the international development regarding the security exceptions (Part II). The current practice regarding both the invocation and the interpretation of the exception is well examined. The article considers the concerns regarding AfCFTA's security exceptions (Part III). It ascertains the influence of the WTO on AfCFTA's security exceptions provision and its consequences, and probe RCEs contribution in crafting AfCFTA's security exceptions. The article also considers the adaptation mechanism available (Part IV), and warns against the blind extrapolation of WTO jurisprudence in AfCFTA's security exceptions disputes. Finally, a conclusion is drawn (Part V).

THE INTERNATIONAL DEVELOPMENT REGARDING THE SECURITY EXCEPTIONS

At the same time, the rule of law requires certainty in the meaning of the law and foreseeability in the application of the law, internationally as well as domestically.[xiv]

Current Practice Regarding Invocation of The Security Exceptions

There is a drastic shift at the international stage as regard the invocation of the security exceptions. Contrasting the current practice at the WTO at its establishment to today, one could

argue that the relatively quiet atmosphere that prevails at the multilateral rules-based trading system in the early 1995s seems like a 'honeymoon'.

As matter of fact, the first 20 years of practice at the WTO system was a 'securityless' era compare to the last five years. Notably from 2016 to 2020 security exceptions cases have piled up at the WTO dispute settlement system.[xv] In contrast, the period from 1995 to 2015 was relatively dormant.

The major security exceptions dispute during the 1995 - 2005 span was in 1996.[xvi] It concerned a dispute brought against an Act passed by the United States Congress that imposes sanctions on Cuba but also established a liability in the United State on third parties that had an economic relationship with Cuba.

This dispute has tested the foundation of the new trade Organization that was established. However, challenge-wise, this is merely the tip of the iceberg because at that time, Member exercised restrain in putting the dispute settlement system in agony.[xvii] The grace period between Member of the trading system and the WTO was still running.

What is currently challenging the international trading system after more than 25 years of experience at the WTO, especially during the last five years of practice, is the part of the iceberg under the water that is exemplified by the inexistence of a consensus as regards what the security exceptions stands for in international trade law.

For instance, in 2016 Russian take action against Ukraine on the ground of the security exceptions of the WTO framework.[xviii] The underlying controversy is well established - tension between Russia and Ukraine regarding the Crimea region.[xix]

Russia announced among other things that it limits transit from Ukraine to Kazakhstan and Kyrgyz through its territory via exclusively the Belarus-Russia border, this subject to a thorough border control at the Belarus – Russia and Russia – Kazakhstan. It also imposes a total transit ban across its territory on some specific products from Ukraine to Kazakhstan and Kyrgyz. The transit of product subject to veterinary and phytosanitary monitoring from Ukraine through Russia subject to the Belarus border control are prohibited.[xx]

Ukraine contended that Russian's actions violated Article V of the WTO/GATT 1994 and related commitments in Russia's Protocol.[xxi]

However, Russia stated that the actions were taken to protect what it considers essential for its security interests as set out in Article XXI (b) (iii).[xxii] Precisely, Russia claims that the tense situation between Russia and Ukraine can be considered an emergency in international relation that warrant a response.[xxiii]

The gray area in this dispute is that the mere fact that Russia characterizes its existing 'situation' with Ukraine grants it the license to impose some measures without providing any unequivocal argument that corroborate the existence of a connecting point between the measures taken and the essential security interests involved.[xxiv] Russia did use a hypothesis and the Ukraine Trade Policy Review to make its 'emergency in international relation' case.[xxv] Knowing that as per Article XXI of WTO/GATT 1994, there is no obligation on Member to disclose the measures taken under the security exceptions, the fundamental question is the extent to which Russia's practice attests that the measures where truly taken pursuant the protection of one essential security interests. There is no measurement standard provided by the legal text to test that. Besides, there is not even an organ to monitor the invocation of the exception, in this case Article XXI of GATT 1994.

The cacophony as regard the overall stance on the security exceptions is well exemplified in the *US – Certain Measures on Steel and Aluminium.* The cases came to prominence after the United States imposed a 25 percent and 10 percent tariff on Steel[xxvi] and Aluminium[xxvii] articles.

The major issue in the *US – Certain Measures on Steel and Aluminium* is that the measures were imposed to address the economic challenge that the steel[xxviii] and aluminum[xxix] industries are facing in the United States. One of the important legal issues in this dispute concern the reach and the limit of the actions taken under the security exceptions.

As per Article XXI of the WTO/GATT 1994, a Member State can act to protect what it considers essential to its security interests. The concern here however is whether the leeway granted to Member to act when their security is involved or at risk cover a situation where it is an economic threat that is at stake.

Obviously, Article XXI did not mention expressly a situation that involves an economic security threat. Yet, some actions were taken in this regard in the context of the *US – Certain*

Measures on Steel and Aluminium case. This is just an accurate manifestation regarding the obscurity surrounding the intended meaning of the term 'essential security interests.'

Some complainants contended that the actions on its face resemble more to a safeguard measure[xxx] than a security exceptions action per se. The flip side is that the United States acted under Section 232 of the US Trade Expansion Act of 1962;[xxxi] a domestic Act that allows the President of the Republic to act pursuant the protection of national security concerns rather than Section 201 of the Trade Act of 1974, the Act that regulates safeguard measure.[xxxii]Besides, the United States challenges the position of the Panel in the *Russia-Measures Concerning Traffic in Transit* case DS512. For the United States, the panel misconstrued the meaning of the historical document.[xxxiii] The United States also argues that the language adopted by the drafters in Article XXI proscribed the dispute settlement system to assess any security exception case. There is no consensus on the language issue as exemplified by the opposing view expressed by the EU in its first submission in the *US – Certain Measures on Steel and Aluminium* case.[xxxiv]

The cacophony regarding the way and manner the security exceptions should be summoned up continued in the *Saudi Arabia – Protection of IPR* DS567 case.[xxxv] This dispute was brought before the WTO dispute settlement system after Saudi Arabia imposes a range of measures against Qatar; allegedly to protect itself against a terrorism and extremism threat.[xxxvi]

The practice observed in this case is that not all the acts and omissions allegedly attributable to Saudi Arabia were directly connected to the security threat at stake. In fact, among the range of measures at issue in the case, Saudi Arabia contended only one measure that is the travel restrictions should be considered.[xxxvii] Yet, Saudi Arabia was not ready to separate the measures that was specifically directed toward the protection against the alleged ''terrorism and extremism'' threat from the overall measures at stake.[xxxviii]

As the practice regarding the security exceptions shows, Members invoke the exception to cover a broad range of situation. Conversely, as the texts of the exception shows,[xxxix] Member are entitled to invoke the exception specifically in case they withhold essential information, or when they want to protect themselves in relation to fissionable materials or traffic in arms, or in time of war or other emergency in international relation. The exception also ensures that

nothing in the WTO prevents Members from taking actions to fulfill their United Nations obligations regarding international peace and security.

The discordance as regard the invocation of the security exceptions is just appalling. The cherish on top of the cake is certainly the highly questionable justification of the measures in the *US – Certain Measures on Steel and Alumium*. The alarming issue is that the invocation of the security exceptions is now an everyday reality and this does not show any sign of abating. The recent invocation of the exception in the resurfaced conflict between Ukraine and Russia (2022) can be cited as example.[xl]

But it is not just the invocation of the exception that is subject of debate for its interpretation is also concerning.

Current Practice Regarding Interpretation of The Security Exceptions

The WTO dispute settlement system did not rely on previous reasoning and ruling to issue its Report in the *Russia – Measures Concerning Traffic in Transit* DS512. This because there is no previous conclusive experience as regard the interpretation of the security exceptions at the WTO level before DS512.

The novelty of the *Russia – Measures Concerning Traffic in Transit* DS512 was particularly a concern because the questions arose whether the WTO dispute settlement system has jurisdiction in a security exceptions case, and whether the exception is justiciable. In short, the main issue is concerned the interpretation of the security exceptions.

The disputant parties had a contrasting argument as regard the interpretation of the exception.

Russia argues that the mere invocation of Article XXI (b)(iii) restrains the WTO dispute settlement system for reviewing the case.[xli] In other words, the dispute system lacks jurisdiction over the case. Ukraine resists to this argument.

This position was subject to considerable debate in the *Russia- Measures Concerning Traffic in Transit* case DS512 without an actual consensus. Among the third parties, Australia submitted that the dispute settlement system cannot turn down the prerogative granted to it as set out in the dispute settlement understanding (DSU).[xlii] The European Union in this case

contended that 'the jurisdiction over the question whether a Member remained within its discretion unequivocally rests with the DSB.'[xliii]

The Panel however establishes that it has jurisdiction ratione materiae over the case and supports the argument that the security exceptions is justiciable. In the words of the panel:

> *Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is non-justiciable, to the extent that this argument also relies on the alleged totally ''self-judging'' nature of the provision.*[xliv]

The Panel addresses simultaneously the question of the jurisdiction of the dispute settlement system and the justiciability of the exception. Follow up, the Panel adopted an interpretative framework to access the measures at issue in the *Russia – Measures Concerning Traffic in Transit* case. The same interpretative framework was adopted in the *Saudi Arabia – Protection of IPR* DS567 case.

The fundamental problem is that the legal text of the security exceptions is drafted in a manner that can lead to 'debatable' interpretation.

Addressing one of the pivotal terms that is 'which it considers',[xlv] the panel refers to some notions such as obligation of good faith, test of plausibility. The panel considers that the obligation of good faith is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests.[xlvi]

Without diminishing the role of the panel, one could argue that there is no indication in the text that unequivocally condone the reasoning of the panel. As matter of fact, the result of the interpretative scheme adopted by the Panel in the *Russia – Measures Concerning Traffic in Transit* was contested altogether by the US in the *US – Certain Measures on Steel and Aluminium Products* case as follow:

> *The panel in that dispute failed to apply customary rules of interpretation and failed to interpret Article XXI as a whole, based on the ordinary meaning of its terms, in context, and in the light of the object and purpose of the GATT 1994.*[xlvii]

The underlying question here concerns the correct application of the customary rules of interpretation and how a subpar application of the rules can disrupt the effectiveness of the multilateral trading system.

The first question cannot be answered without certitudes. In fact, the legal literature had gone back and forth as far as the interpretation of the exception is concerned. But clearly, a subpar application of the rules will cause more damage for the rule-trading system. As matter of fact, it can weaken the effectiveness of the system as a whole as state will no longer deem relevant to entrust the dispute settlement system with the interpretation of the rules—this considering that the dispute system is a pillar of the multilateral system. The stakes at the international level could not be higher.

Identifying The Concerns Regarding AfCFTA's Security Exceptions

The third recital of the Preamble of the Agreement establishing the AfCFTA takes into account the need to build upon the existing rights and obligations encompassed in the Constitutive Act of the African Union, the Abuja Treaty and where applicable, the Marrakesh Agreement Establishing the World Trade Organization.[xlviii] Besides, the tenth recital values the place of the Regional Economic Communities (RECs) in the establishment of the AfCFTA.

Without diminishing the rights and obligation under the African Union Charter and the Abuja Treaty[xlix], this creates a possible de facto influence from the WTO agreements and the RECs in crafting the AfCFTA's provisions; irrespective of the conventional separation of AfCFTA and the WTO agreements on one hand and AfCFTA and the RECs on the other hand.

The main issue therefore is whether there are some deriving concerns regarding the influence of the WTO on the draft/text of the AfCFTA's security exceptions and whether there is an alternative provided by the RCEs' security exceptions provisions.

THE INFLUENCE OF THE WTO ON AfCFTA's SECURITY EXCEPTIONS AND ITS CONSEQUENCES

There is an existing link between the WTO system and the AfCFTA that is established through Articles XXIV of GATT 1994 and V of GATS.

These provisions represent the legal basis for the establishment of any type of reciprocal preferential trade agreement as spelt out under the WTO framework. AfCFTA falling within the category of preferential treatment as set out in the general[l] and specific[li] objectives of the Agreement, just illustrates the tight relationship between the WTO and AfCFTA.

The problem with this is that it can lead to a mechanistic reproduction of certain provisions from the WTO Agreements into AfCFTA without taking into account that most of the WTO's provisions are drafted years ago, and as such, there might not necessarily be adapted to the new reality.

As it stands, the Agreement establishing the AfCFTA along with the existing Protocols[lii] that form an integral part of the overall Agreement contain two security exceptions provisions.[liii] The first is couched in Article 27[liv] and located in the Protocol on Trade in Goods. The second is located in the Protocol on Trade in Service and couched in Article 16.[lv]

Article 27 of the Protocol on Trade in Goods reads:

Nothing in this Protocol shall be construed to:

(a) require any State Party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) prevent any State Party from taking any action which it considers necessary for the protection of its essential security interests:

i. relating to fissionable materials or the materials from which they are derived;
ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials taking place either directly or indirectly for the purpose of supplying a military establishment; and
iii. taken in time of war or other emergency in international relations; or

(c) prevent any State Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[lvi]

A side-by-side analysis of Articles 27 of the Protocol on Trade in Goods of the AfCFTA and Article XXI of WTO/GATT 1994 reveals no significant difference between the two provisions. The same goes with Article 16 of the Protocol on Trade in Services and Article XIV *bis* of GATS. In other words, Articles 27 and 16 of the Protocol on Trade in Goods and the Protocol on Trade in Services are almost a verbatim of Articles XXI and XIV *bis* of respectively WTO/GATT 1994 and GATS.

The worrying issue is that the invocation of these multilateral texts of the security exceptions is climbing at a rapid rate as to draw concern such as 'Can International Trade Law Recover?[lvii] One could draw from this that the security exceptions *'butchered'* already the 'international trading system'. And the concern now is whether is it possible to piece back the trading system. Let us provide some context to this worry.

The origin of the security exceptions in the WTO (Article XXI of WTO/GATT) dates back to the time of the GATT 1947. Hence, though it is legitimate that the academia is currently concerned about the stakes of the international trading system, in essence the puzzle posed by the security exceptions is not recent.[lviii]

At the outset, Article XXI of WTO/GATT was intended to be under the umbrella of the International Trade Organization (ITO). The ITO was destined to form along with the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund, the big three of the Bretton Woods Institutions. The Contracting Parties did not succeed to set up the ITO. Yet, some parts of the ITO chapter have survived the setback.

Indeed, the General Agreement on Trade and Tariffs GATT 1947 was the big beneficiary of this ITO meltdown as it was applied provisionally until 1995[lix] where the so coveted trade Organization that is the World Trade Organization (WTO) was finally established.

Interestingly, the security exceptions existed at the dawn of this process of the rescue of the trading system. But (un)surprisingly, the text of the exception that existed in the Geneva draft of the ITO in 1947 is still the same in the current WTO framework.[lx]

Some critical issues were raised during the discussion that led to the craft of the text of Article XXI. It was believed that the text of the exception contains themes such as *essential security interests* and *emergencies in international relations* that could shed some doubt about their

intended meaning.[lxi] The main issue was that these terms can be used in an obscure instance facilitating an abuse of the exception.

Providing some insurance to this issue, the Chairman of the Preparatory Committee of the United Nations Conference on Trade and Employment considers that:

> *The spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse.*[lxii]

From this, one could argue that the way and manner with which Members approach the exception is paramount as to dispel any type of abuse of the exception. ***This can be reconciled with the 'Member related concern'.***

The security exceptions, Article XXI, that was initially set to be under the framework of ITO lives on under GATT 1947 until the establishment of the WTO in 1995. Yet, the operative mode of the GATT 1947 is quite different compare to that of the WTO.

For instance, GATT 1947 dispute settlement system was at an embryonic phase where the adoption of the Report of the Panel could be blocked by the disputant parties. This gap was filed at the establishment of the WTO and its Dispute Settlement System.[lxiii]

Building on this process of transformation from GATT 1947 to the WTO approached as the constitutionalizing of the world trade organization,[lxiv] the legal literature has considered that this 'constitutionalizing' of the dispute settlement system might have impacted the overall effect of the security exceptions within the international trading system.[lxv] In other words, the systemic change from GATT 1947 to the WTO might have altered the overall perception regarding the security exceptions in the new trade Organization.[lxvi] This conception can be labelled as *a system related concerns.*

From the above discussion, ***member related concern and system related concern*** can be identified as the concern regarding the security exceptions, at least at the international stage. The deriving question is the extent to which these concerns at the international stage can transcend into the AfCFTA's Regional trading environment.

As currently constructed, the AfCFTA could be the largest FTA ever negotiated; this provided that all the 55 Members of the African Union (AU)[lxvii] submit their instrument of ratification to the Chairperson of the African Union Commission (AUC).[lxviii]

State parties to the AfCFTA could roughly equal 1/3 of the WTO membership that account for 164 Members.[lxix]

164 Members within the international trading environment is not equal to 55 States Parties that could interact within the African Regional trading environment. Yet, the *'young'* African trading system is not exempt from the law of prudent 'draft'.

The diversity as regard the parties to the AfCFTA could possibly create an uproar within the African Union that can over time lead to a change of 'spirit' within the African Regional trading environment.

Need not to recall that the spirit within the international trading system has changed drastically recently.[lxx] This change is exemplified by the current state of the WTO dispute settlement system. The dispute system considered as the 'jewel in the crown' of the WTO is in agony chiefly due to the disagreement as regard the interpretation of the WTO Agreements by the Appellate Body (AB).[lxxi]

The difficulty here is that the AfCFTA is heavily structured after the model of the WTO, at least the 'jewel in the crown' of the AfCFTA seems like du déjà vu.[lxxii]

Like the WTO, the AfCFTA elaborates a Dispute Settlement Body (DSB) vested with the prerogative to establish a panel and an AB.[lxxiii] Both dispute settlement systems are established to provide security and predictability to their respective trading environment.[lxxiv] And their interpretative task should be based on or follow the customary rules of interpretation.[lxxv]

AfCFTA did not go through the process of 'constitutionalizing' operated layer by layer that the international trading system observed. AfCFTA has not experienced a period of provisional application which could lead us to say that the systemic change from for instance 'AfCFTA-1' to 'AfCFTA-2' altered the perception regarding the security exceptions within the African Regional trading environment.

Though phase II of the negotiation of the Agreement[lxxvi] is still ongoing, the Protocol on Rules and Procedures on the Settlement of Disputes is out.[lxxvii] Based on some similarity observed between the rules in the WTO and AfCFTA, one could say that AfCFTA *adapted to the evolving situation* at the international level regarding the rules on the settlement of disputes to craft its own rules. This because, instead of relying on the previous rules or practice that existed during the provisional application of GATT 1947, AfCFTA relies on the excitement that the establishment of the WTO and its Dispute Settlement Understanding (DSU) provide to craft its Protocol on Rules and Procedures of Disputes; especially the adoption of an appellate system.

If one truly considers that the system can alter the understanding about the security exceptions, and the AfCFTA's system[lxxviii] is modelled after WTO's system, perhaps *the system related concern* might be lessened. This is to say the effectiveness of the African trading system could not be at stake in the future and normally, there will not be any issues as far as the current practice regarding the invocation and the interpretation of the exception. Yet, the current international development postulates otherwise.

Besides what have been said, in absence of the system related concern, a party related concerns could still threaten the African Regional trading environment like a sword of Damocles.

To sum up, a crisis like the invocation of the security exceptions and the dispute settlement system meltdown will certainly do a disservice to the African trading environment. But is there a better alternative that the RECs could provide?

RCEs' SECURITY EXCEPTIONS AS A BUILDING BLOCK FOR AfCFTA's PROVISIONS: A MISSED OPPORTUNITY?

Reference to RECs as a building block for the AfCFTA is expressly confirmed as a principle in Article 5 of the Agreement establishing the AfCFTA.[lxxix] Furthermore, the same Article supports that AfCFTA should be governed by the best practices developed in the RECs.[lxxx] However, not all Africans' RCEs form part of the said block.[lxxxi]

RCEs that are considered are listed in Paragraph (t) of Article 1. They comprise the Economic Community of West African States (ECOWAS); the Economic Community of Central African

States (ECCAS); the Common Market for the Eastern and Southern Africa (COMESA); the East African Community (EAC); the Southern African Development Community (SADC); the Arab Maghreb Union (UMA); the Intergovernmental Authority on Development (IGAD); and the Community of Sahel-Saharan States (CEN-SAD).[lxxxii]

Security exceptions is hardly a 'best practice' as literally set out in Article 5 of the Agreement establishing the AfCFTA. But the way the exception is crafted in RECs can be a *'brick'* used to build the '*house*' AfCFTA's security exceptions provisions.

Hence, the main concern is whether the understanding that, in theory, the RECs -*as a building block*- can help design different AfCFTA's security exceptions is truly applied in practice. In other words, do the drafters refer in practice to RECs as to lay down a workable security exceptions foundation that could upheld the effectiveness of the regional trading system.

Practically, the security exceptions[lxxxiii] is expressly referred to in the ECOWAS Supplementary Act on Investments,[lxxxiv] albeit under the title 'national security' instead of 'security exceptions.' Article 37 is the legal basis for the protection of security concerns under the Supplementary Act on Investments.[lxxxv]

At first sight, one could say that neither Article 27 of the Protocol on Trade in Goods nor Article 16 of the Protocol on Trade in Service of the AfCFTA are built after Article 37 of the ECOWAS Supplementary Act on Investment.

Article 37 did renew paragraph (a) of Article 27 of the Protocol on Trade in Goods. Paragraph (a) concerns the possibility granted to States to withhold information that it considers essential to its security interests.[lxxxvi] However, the rest of Article 37 raises more concerns than the exception in the AfCFTA.

Paragraph (b) of Article 37 ensures that nothing will prevent Member State from taking action to fulfill their United Nations obligations regarding international peace and security.

The alarming issue is that Paragraph (b) further provides that a Member State can apply action that it considers necessary for the protection of its essential security interests, without any indication regarding what that could entail. So, how one could determine the reach and the limit of the 'essential security interests' in this paragraph.

The AfCFTA did not miss anything by not relying on Paragraph (b) of Article 37 to build its own security exceptions. Given that the paragraph did not give any indication as regards the scope of the 'essential security interests', one could argue that anything summons up by Member State can fall within the scope of application of Article 37 of the ECOWAS Supplementary Act on Investments.[lxxxvii]

The exception in the ECOWAS Energy Protocol that is Article 24 did not make a distinction between 'general exception'[lxxxviii] and 'national or security exception'.[lxxxix] But it is clear that only Paragraph 3 of Article 24 of the Protocol addresses security concerns.

Paragraph 3 covers range of actions such as among other things, those relating to the supply of energy materials or those taken in time of war, *armed conflict* or other emergency in international relations.

The African Continent has suffered some situations of 'armed conflict'.[xc] Besides, at the time of writing, coups d'état has become the buzz word in Africa.[xci] Coup d'états threaten peace and security in Africa. Yet, it happens because the people were allegedly unhappy with their governor for among other things 'major security threats' they are facing.[xcii]

The other side of the coin is that AfCFTA states parties could potentially take some measures, especially the neighboring countries-but not limited to them, for purpose of protecting their territory against some security threats. For instance, in the case *Russia – Traffic in Transit* (DS512), Russia limits some transit from Ukraine to some countries via its territory on the ground of security concerns. Though the situation is not the same, the neighboring countries of the given countries subject to the coup in Africa could also limit the traffic in transit through their territories—this depending on whether such transit exist in the first place—in an attempt to curtain the dominos effect; or say limit a potential transit of arm from one country to the other.

Other African countries could also take measures. But this could merely be for the purpose of maintaining peace and security in Africa. For instance, the measures taking by Saudi Arabia in the case *Saudi Arabia – Protection of IPR* (DS567) were, in some instance, taking to maintain peace and security in the MENA region under the auspices of the Gulf Cooperation Council (GCC).[xciii] The point here is that the security exceptions are more likely to be raised under

AfCFTA and there is no certainty that the invoking states will not divert the purpose of the exception for hidden grounds.

It is imperative for African states to avoid falling into laxity. There are better ways towards the identification of the root of conflict and their prevention in Africa. These ways have been put forwards in the joint framework for enhanced collaboration in peace and security between the United Nations and the African Union.[xciv]

AfCFTA could have built on this momentum to probe how situation of armed conflict could be covered under its security exceptions. Perhaps the AfCFTA's security exceptions missed an opportunity to consider the inception of a critical concern that the African Region can relate to.

However, the most interesting part in Paragraph 3 reads: *'Such measure shall not constitute a disguised restriction on Transit'.*

If the prohibition of a disguise restriction is merely on transit here, the AfCFTA's security exceptions could broaden this by contextualizing the circumstances chiefly by flipping transit to trade for the exception in the Protocols on Trade in Goods or transit to services in the Protocols on Trade in Service. Having such prohibition will certainly do a service to the African Regional trading system.

Article 41 of the Revised Treaty of the ECOWAS contained a paragraph similar to the one incorporated in Article 27 of the Protocol on Trade in Goods of the AfCFTA.[xcv] Though the provision is not title 'security exception' per se.

Article 41 is concerned Quantitative Restrictions on Community Goods. Yet Paragraph 3 (b) grants some leeway to Member State to introduce restriction concerning the control of arms, ammunition and other war equipment and military.[xcvi] This sub-paragraph is article 27 (b)(iii) of the Protocol on Trade in Goods of the AfCFTA *in fine*.

The difference is that unlike article 27 of the AfCFTA, Article 41 of the Revised Treaty of the ECOWAS establishes that a Member State has to notify the Executive Secretary and other Member States before introducing the said restrictions.

Article 16 of the Protocol on Trade in Service of the AfCFTA is the only provisions that have something close to a duty of notification in the AfCFTA.[xcvii] This is to say that Article 27 of

the Protocol on Trade in Goods missed this opportunity to add a requirement that might compel State Party to provide information on the measures taken pursuant the protection of one essential security interests.

Similar paragraph on the control of arms is incorporated in Article 34 which deals with the Exception[xcviii] in the EECAS.[xcix] Paragraph 1(b) of Article 34 governs this aspect. **Interestingly, Paragraph 2 provides that the prohibition shall not be a means of arbitrary discrimination nor a disguise restriction on trade between Member States.[c] Likely, Paragraph 6 provides that the Council shall keep under review any prohibition imposed.[ci]**

Clearly, neither Article 27 of the Protocol on Trade in Goods nor Article 16 of the Protocol in Trade in Service have made any reference to the discriminatory treatment. This requirement could have benefited the AfCFTA's provisions especially in this international development regarding the use of the exception.

Onto the question of the discriminatory treatment, it was reported that one of the challenges faced by ECOWAS, one of the building blocks of the AfCFTA concerns its ability to restrain Member states from using national technical standards as a mean of protectionism of their local industries.[cii] The inability of the ECOWAS to prohibit protectionism actions should be put into the broader context of the AfCFTA; this given the international development at the WTO level.

For instance, prior to the WTO, the Swedish Government attempted to impose import quota on specific product for purpose of protecting the domestic production prescribed for the State economic defense.[ciii] In the *US – Certain Measures on Steel and Alumium* cases of the WTO era, the United States takes some measures to ensure the economic viability of the Steel[civ] and Aluminium[cv] industries.

In both the Swedish situation and the United States cases, the measures at issue were labelled as a protectionism action. And the inordinate use of the exception or say the use of the exception for an alleged protectionists action or hidden purpose is one of the reasons sustaining the current uproar at the international level.

Though, not a security exceptions case per se, the unilateral decision of Nigeria to close its land border with Niger under the powerless eyes of ECOWAS and its free movement of goods and people principle should raise the red flag on what might come with an ''unchecked' 'African

super power. Nigeria is a one of the 'superpowers' in ECOWAS but also in Africa and if it can go around ECOWAS without any check one might wonder what could happen if there is a provision at the regional level such as the security exceptions that can be used in obscure instance.

Going back to the provision per se, one can spot that the COMESA Investment treaty also supplies a provision regarding the protection of security concerns.[cvi]

Like Article 37 of the ECOWAS Supplementary Act on Investments, Paragraph 3 of Article 22 of the COMESA Investment Treaty confirms the right of Member State to withhold essential information. It also follows the worrying trend adopted in the ECOWAS Supplementary Act by mentioning that Member State can apply action that it considers necessary for the protection of its essential security interests.[cvii]

Unlike Article 37 of ECOWAS, the security exceptions is part of a broader 'general exception.' Yet, Paragraph 1 (a) allows Member State to take measures pursuant the ***protection of national security*** concerns. Noting that Article 22 (1) have a chapeau similar to the one provided in Article XX of WTO/GATT. The chapeau of Article XX of GATT is a model of a text that enshrines an obligation of good faith.[cviii]

Though, Article 22 (3) did not provide a chapeau laying down an obligation of good faith, Paragraph 1 of Article 22 set out an obligation of good faith. Paragraph 1 (a) of Article 22 grants some leeway to Member State to act pursuant the protection of 'national security' concerns. Since the chapeau applies to Paragraph 1(a), one could argue that the obligation of good faith applies also to national security concerns.

It was noted that the ECOWAS Supplementary Act on Investment uses 'national security' instead of 'security exceptions.' Hence, one could argue that the chapeau that applied to the 'national security' concerns in paragraph 1(a) of Article 22 of the COMESA Investment Treaty could also apply to a separate security exceptions. In other words, these requirements can be a ***'brick'*** contributing to the building that the AfCFTA's security exceptions constitutes.

The Security and Other Restrictions to Trade'[cix] provision in the COMESA treaty incorporates the kind of Paragraph seen in Article 41 of the Revised Treaty of ECOWAS. Both Paragraph 3(b) of Article 41 of the ECOWAS treaty and Paragraph 1(b) of Article 50 of the COMESA

treaty concerns measures related to the controls of arms, ammunition and other war equipment and military items.

In summary, in term of the content, the possibility of invoking the exception in time of armed conflict, available in REC's security exceptions, were left out in the AfCFTA's security exceptions provisions. Furthermore, a chapeau laying down an obligation of good faith or the insistence on the fact that the measures shall not constitute a disguise restriction are missed out in the AfCFTA's security exceptions provision. A requirement to inform the council or the secretary is non-available except for Article 16 of the Protocol on Trade in Service.

ADAPTING AfCFTA's SECURITY EXCEPTIONS TO EVOLVING INTERNATIONAL DEVELOPMENT

Where does the above discussion lead us? It is a fact that the establishment of the AfCFTA came with a great excitement. State parties can now trade under the 'brand new' Agreement and ultimately submit their disputes before the dispute settlement system when everything is set and done. In each security exceptions disputes, the disputant parties will put all the resources together to make their case. The parties that have access to a specialized legal advice on security issues will try to upheld their case by providing the best argument ever. The required legal expertise in trade dispute could be provided by the Advisory Centre on WTO Law (ACWL).

The advisory Centre on WTO Law can assist African states to have the best training regarding the rules; albeit this assistance concerns the multilateral rules, it cannot blur the existent link between the WTO rules and that of FTAs, especially given the mechanistic reproduction of certain WTO's provision such as the security exceptions into the AfCFTA environment.

The core business of this article is to ring the 'awareness' bell so that AfCFTA's State Parties could anticipate that the unresolved question regarding the security exceptions that are causing havoc today would not hamper the effectiveness of the African trading system tomorrow. In short, it is concerned the adaptation scheme available.

Adaptation can be defined as the process of fitting or suiting one thing or form to another. It can also be defined as the process of adjusting oneself or something to new conditions.[cx]

Previous sections have shed light on the new conditions. The general understanding is that there is no uniform agreement that is unequivocally accepted by States. Therefore, it is not the aim of this Article to provide a one-stop answer to the issue raised by the security exceptions or to propose one adaptation mechanism. Rather, this Article explores the range of adaptation mechanism available that African states might consider when the five years of operation of AfCFTA will be up. This will allow the researcher to point out where African States should exercise caution.

Essentially, the following examine the extent to which the new jurisprudence at the WTO level can fit into the AfCFTA system, whether is it possible to add some *'bricks'* to the building AfCFTA's security exceptions, and if African can adjust a forum for the invocation of the security exceptions.

FITTING THE WTO's JURISPRUDENCE ON THE SECURITY EXCEPTIONS TO THE NEW AfCFTA TRADE DISPUTE SYSTEM

The second sentence of Article 4 of the Protocol on Rules and Procedures on the Settlement of Disputes of the AfCFTA provides that the dispute system shall clarify the *'existing provisions of the Agreement in accordance with customary rules of interpretation of public international law.'*[cxi] Likely, the second sentence of Paragraph 2 of Article 3 of the WTO Dispute Settlement Understanding also establishes that dispute system should *'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.'*[cxii]

Clearly, both AfCFTA dispute settlement system and that of the WTO draw some similarities for there are entitled to apply the same *customary rules of interpretation of public international law.* So far, the interpretation of a WTO-type security exceptions in trade dispute has been undertaken by the WTO dispute settlement system in the *Russia – Traffic in Transit* (DS512) and the *Saudi Arabia – Protection of IPR* case (DS567).

In a broader picture, both AfCFTA and WTO framework are part of international trade law. Besides, they address the same subject matter. Substantially, there is no significance difference

between Article 27 of the Protocol on Trade in Goods and Article 16 of the Protocol in Trade in Services and respectively Article XXI of the WTO/GATT 1994 and Article XIV *bis* of the GATS. In other words, the security exceptions are clearly based on analogous WTO provisions. This all suggests that the AfCFTA drafters intended them to have the same meaning. And when confronting with the same task, AfCFTA's dispute settlement system might be tempted to use the ready-made WTO interpretative framework developed in these disputes.

The WTO dispute settlement system adopted in both *Russia – Traffic in Transit* (DS512) and the *Saudi Arabia – Protection of IPR* case (DS567) a test of plausibility that is not grounded in the test of the exception.[cxiii] Even if the parties accept at last the application of this test, the mere fact that there is no record of such exigence in the legal text can cause an uproar that might led to a *'change of spirit'* from AfCFTA parties.

Though African states are yet to be a party to any WTO's security exceptions dispute be it as a principal party of third party, reference to the WTO jurisprudence in the AfCFTA context in a potential security exceptions dispute might be quite appropriate because of the similarity of the security exceptions texts in the WTO and AfCFTA. Yet, this is not a license to automatically extrapolate the WTO jurisprudence or say, the WTO interpretative framework into the AfCFTA without a thorough investigation of the issues that were overlooked at the outset during the draft of the text – this giving the international development regarding the use of the exception.

One of the hottest issues at the international level regarding the security exceptions concerns the question of the justiciability of the exception. Clearly, the AfCFTA's drafters did not take on this question.

The major lacunae regarding the security exceptions at the multilateral level is the inception of the term *'which it considers'*[cxiv] into the legal text of the exception. This lacuna was exploited as it was believed that the term expresses the self-judging nature of the exception; which also is one of the reasons the exception is considered 'non-justiciable'. The difficulty is that there is no indication be it in the text of the exception or the dispute settlement rules that address the question of the justiciability of the exception.

For countries such as the United States in the *US – Certain Measures on Steel and Aluminium* or *Saudi Arabia in the Saudi Arabia – Protection of IPR* case (DS567) the application of the authentic elements of interpretation set out in Articles 31 and 32 of the Vienna Convention of the Law of the Treaty confirms the self-judging nature and ultimately the non-justiciability of the exception.

AfCFTA's state parties would do a service to the African trading environment if they could address this issue as has been done by the parties for one of the security exceptions provisions in one of the most recent Agreement that is the Regional Comprehensive Economic Partnership Agreement.[cxv]

Chapter 12 of the Agreement dealing with 'Electronic Commerce' has a provision governing security concerns. In its paragraph 12.15(3)(b), the drafters anticipated any potential misunderstanding by expressly stating that any measures taken to protect one essential security concerns shall not be challenged by the parties.[cxvi] Though this exception is concerned with Cross-border Transfer of Information by Electronic Means, it shows a great care from the parties for ensuring a predictable relationship among them as far as the electronic chapter is concerned.

A similar position can be found in the United States – Colombia Trade Promotion Agreement,[cxvii] or the United States – KORUS Agreement.[cxviii] The footnote of the provision dealing with security in the US - Colombia provides expressly that:

> *If a Party invokes Article 22.2 in a n arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.*[cxix]

Like AfCFTA, the above-mentioned FTAs have also a link with the WTO that is established through Article XXIV of GATT and V of GATS, as both of them are FTAs. Yet, they do approach the invocation of the exception carefully.

The WTO framework has been and would always be a model in international trade law. But it does not mean that its substantive rules should be systematically replicated by Free Trade Agreement (FTA). At least, FTAs drafters should take into account the evolving international development and adapt the provisions accordingly.

AfCFTA's drafters cannot overlook the cacophony regarding what the exception stands for in international trade law; and adapting a WTO jurisprudence in an AfCFTA's security exceptions dispute can only be lazy assumptions from the AFCFTA's dispute settlement panelists because the context surrounding the draft of the multilateral text are totally different from the one of the AfCFTA's provisions.

In sum, instead of adopting blindly the WTO jurisprudence, state parties should tackle the puzzling issue of the justiciability of the exception.

SUITING THE MISSING RCEs' SECURITY EXCEPTIONS *'BRICKS'* INTO THE *'BUILDING'* AfCFTA's SECURITY EXCEPTIONS

RCEs occupy a place of choice in the establishment of the AfCFTA. Yet, there are some valuable aspects as regard the security exceptions that are considered by RECs but overlooked in the AfCFTA's provision on the security exceptions. For instance, while RECs allow the possibility to invoke the security exceptions in time of armed conflict, AfCFTA did not consider that option. Furthermore, none of the AfCFTA's legal text on the security exceptions did not address the question of a chapeau that could possibly lay down an obligation of good faith regarding how the exception could be invoked. With the international development as regards the use of the exception, the inception of an obligation of good faith in the form of a chapeau in the legal text of the exception will certainly diffuse some tension as regard the way and manner the exception operates. Interestingly, some RCEs such as Article 24 of the ECOWAS Energy Protocol or Article 34 of the EECAS have consider that the measures imposed should not constitute a disguise restriction or not be a means of arbitrary discrimination. The state Parties could update AfCFTA's security exceptions provisions by incorporating these missing bricks or pieces.

One the other hand, State parties could consider other international development in related FTAs. For instance, the RCEP provides room for the protection of security concerns such as critical infrastructure.[cxx] It also allows state parties to take action in time of national emergency.[cxxi] Though this development is not a 'regional development' in the context of the

RCEs per se, one might put it into the canvas of international development. In light of this, they fall within the adaptation scope that this paper is referring to.

ADJUSTING A FORUM FOR THE INVOCATION OF THE AfCFTA's SECURITY EXCEPTION

Giving the inordinate use of the security exceptions at the international level, it might be important to probe the possibility of adjusting a forum for the invocation of the exception for African States in the context of the AfCFTA. Two options could be considered from an African perspective. One could explore whether there is a valid option available under the existing AfCFTA's rules. One could also explore whether there is an established African 'security-driven' organ that can be elected as the forum for the invocation of the exception.

AfCFTA's SECRETARY TO OVERSEE THE INVOCATION OF THE SECURITY EXCEPTIONS

Under the existing rules, the AfCFTA's provision on the security exceptions, especially Paragraph 2 of Article 16 of the Protocol on Trade in Services provides that the Secretariat should be informed of the measures taken regarding the protection of one essential security interests and their termination. State Parties to the AfCFTA could build on this role of the secretary in the context of the Trade in Services as to made the Secretariat a forum for the invocation of the exception. To reach that outcome, an additional training could be provided to the secretary staff. This could help them to be well aware of the security related questions. Another option that State parties could explore is to consider the established African Union Peace and Security Council due to its mandate. It might be the better option.

AFRICAN UNION PEACE AND SECURITY COUNCIL AS A BETTER OPTION

Adopted in July 2002, the Protocol setting the African Peace and Security Council entered into force in December 2003. Among the objectives set out in Article 3 of the Protocol, one could

notice that the Council aims at promoting peace, security and stability in Africa; anticipate and prevent conflicts; co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism.[cxxii]

Clearly, the Council was established to address security-related matters in Africa. As such, the availability of technical expertise on security related matter is not an issue. Indeed, the Council aims at doctoring African solutions for African conflicts. Yet, when necessary, the Council can seek the assistance of the United Nations under the Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security.[cxxiii] African are willing to control peace on their continent.[cxxiv] The same is true with security related matters.

CONCLUSION

Considerable efforts have been made toward assuring the strengthening of the economic relationship among African countries. Indeed, on 1st January 2021, African countries that already submitted their instrument of ratification to the Chairperson of the African Union Commission started trading under the brand new AfCFTA. In other words, trade under the AfCFTA is now a reality. Though it is an exciting news, state parties should ensure the effectiveness of the agreement by promoting a predictable trading relationship across the board.

One of the most important substantive rules in international trade is concerned the security exceptions. At this stage, there is no clear consensus as regard how this exception should operate.

Interestingly, AfCFTA incorporates Articles 27 and 16 in respectively the protocol on Trade in Goods and the protocol on Trade in Service that deal with the protection of security concerns.

Surprisingly, these provisions are a verbatim of a 'debatable' multilateral text. Given the tension that the use of the exception is causing at the international level, one could have expected that the drafters could have learned from this experience and fix the issues or the lacunae that slip into the texts of the security exceptions during the draft of the AfCFTA. Hopefully, the failure to address the issues at the outset cannot be considered as the bottom line as AfCFTA still gives the states parties the possibility to adapt the agreement to evolving

regional and international developments; this after five years as to ensure inter alia its effectiveness.

This article considers that state parties should use this opportunity to anticipate the international uproar regarding the use of the security exceptions.

This paper has endeavor to confront the issues that could hamper the effectiveness of the AfCFTA through the review of the current practice regarding both invocation and interpretation of the security exceptions and the identification of the concerns regarding AfCFTA's security exceptions. The article considers that the question of the justiciability of the security exceptions across the AfCFTA need to be addressed. AfCFTA's state parties can incorporate a chapeau laying down an obligation of good faith into the legal text of the exception as has been done by some Regional Economic Communities (RECs). They can take account of security concerns such as 'armed conflict', 'national emergency', 'critical infrastructure'. State parties could also consider the establishment of a forum for the invocation of the exception.

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ENDNOTES

[i] The author is grateful to Professor Matthew Kennedy and Dr Charles Okeke for commenting on an earlier version of this paper.

[ii] The first phase of the negotiation leading to the establishment of the AfCFTA comprises the Protocol on Trade in Goods, the Protocol on Trade in Services, the Protocol on Rules and Procedures on the settlement of disputes. The second phase encompassing the Protocol on Intellectual Property Rights, the Protocol on Investment and the Protocol Competition Policy is yet to be completed. See Article 7 of the Agreement establishing the AfCFTA.

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[iv] See African Union website available at << https://au.int/en/treaties/1161>> accessed 02 March 2022.

[v] See Johannesburg Declaration on the Start of Trading under the Agreement establishing the African Continental Free Trade Area, 'Assembly of the Union 13th Extraordinary Session on the African Continental Free Trade Area (AfCFTA)' 5 December 2020 Para 15.

[vi] Ibid available at << https://afcfta.au.int/fr/node/293>> accessed 22 February 2022. See also African Continental Free Trade Agreement (AfCFTA) Comparative analysis of tariff offers available at << https://www.tralac.org/documents/resources/infographics/4276-afcfta-comparative-tariff-offer-analysis-march-2021/file.html>> accessed 22 February 2022.

[vii] The Article uses the term international level to refer to the multilateral agreement under the WTO framework.

[viii] This statement takes into account the period starting from the establishment of the WTO in 1995 to this day. Noting that in 1961, Ghana had imposed an import ban on Portuguese goods: See Group of Negotiations on Goods (GATT), Negotiating Group on GATT Articles, Restricted MTN.GNG/NG7/W/16 18 August 1987 Para 18 available at << https://www.wto.org/gatt_docs/English/SULPDF/92020251.pdf>> accessed 24 February 2022.

[ix] See Ji Yeong Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?' (2016) 19 Journal of International Economic Law 417 21.

[x] See Simon Lester and Huan Zhu, 'Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade' (2019) Cato Institute 7.

[xi] Ibid 9.

[xii] See Gaurav C, Himanshu Singh R, 'Revisiting the Security Exception Under GATT in light of Russia – Traffic in Transit Case' (2020) Regulating for Globalization available at << http://regulatingforglobalization.com/2020/03/17/revisiting-the-security-exception-under-gatt-in-light-of-russia-traffic-in-transit-case/>> Accessed 30 January 2022.

[xiii] Ibid.

[xiv] James Bacchus and Simon Lester, 'The Rule of Precedent and the Role of Appellate Body', (2020) Journal of World Trade 54:2 183 2.

[xv] For instance, there is the *Russia – Measures Concerning Traffic in Transit* WT/512; *US – Certain Measures on Steel and Aluminium*, WT/DS544, DS547, DS548, DS552, DS554, DS556, DS564; *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567; *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade – Related Aspects of Intellectual Property*, WT/DS526.

[xvi] See WTO Dispute settlement, *United States – The Cuban Liberty and Democratic Solidarity Act* DS38, accessed 25 January 2022.

[xvii] See Communication from the Chairman of the Panel in the *United States – The Cuban Liberty and Democratic Solidarity Act* DS38 WT/DS38/5 25 April 1997 (97-1791).

[xviii] See WTO Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO/DS512/R, 5 April 2019.

[xix] See 100 Global Conflict Tracker, available at << https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>> accessed 26 January 2022.

[xx] See WTO Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO/DS512/R, 5 April 2019 Para 7.1.

[xxi] Ibid Para 7.2.

[xxii] Ibid Para 7.4.

[xxiii] Ibid.

[xxiv] WTO Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO/DS512/R, 5 April 2019 Para 7.136.

[xxv] Ibid Para 7.118-7.119.

[xxvi] Proclamation, *Presidential Proclamation on Adjusting Imports of Steel into the United States*, March 8, 2018 available at << https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-4/>> Para 8 accessed 2 March 2022; see also A Proclamation on Adjusting Import of Steel into the United States December 27, 2021 available at << https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/27/a-proclamation-on-adjusting-imports-of-steel-into-the-united-states/>> accessed 2 March 2022.

[xxvii] Proclamation, *Presidential Proclamation on Adjusting Imports of Aluminium into the United States*, March 8, 2018 available at << https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-adjusting-imports-aluminum-united-states-080620/>> Para 7 accessed 2 March 2022; see also A Proclamation on Adjusting Imports of Aluminium into the United States December 27, 2021 available at << https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/27/a-proclamation-on-adjusting-imports-of-aluminum-into-the-united-states-2/>> accessed 2 March 2022.

[xxviii] *Presidential Proclamation on Adjusting Imports of Steel into the United States* and Proclamation Para 11.

[xxix] *Presidential Proclamation on Adjusting Imports of Aluminium into the United States* Para 10.

[xxx] See for instance EU First Written Submission, US – Steel and Aluminium Products DS548, May 2019 Para 141-193. See also Switzerland First Written Submission, US – Steel and Aluminium Products DS556, May 2019 Para 111-177.

[xxxi] See Public Law No. 87-794, October 11, 1962, Trade Expansion Act of 1962.

[xxxii] See US Responses of the United States of America to the Panel's First Set of Questions to the Parties, United States – Certain Measures on Steel and Aluminium Products DS544, February 14, 2020 Para 19.

[xxxiii] See US First Written Submission, *United States -Certain Measures on Steel and Aluminium Products* DS544, June 2019 Para 83-87.

[xxxiv] See EU First Written Submission, *US – Steel and Aluminium Products* DS548, May 2019 Para 554-556.

[xxxv] See WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020.

[xxxvi] WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 Para 2.29.

[xxxvii] WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 Para 7.275.

[xxxviii] See WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 Para 7.275-7.276.

[xxxix] The text of the security exceptions is reproduced in Section III (A).

[xl] See Ukraine Invokes National Security Exceptions at WTO: Complete Embargo and WTO Agreements No Longer Applied to Russia available at << https://ielp.worldtradelaw.net/2022/03/ukraine-invokes-national-security-exceptions-at-wto.html>> accessed 5 March 2022.

[xli] Ibid.

[xlii] See WTO Panel Report Addendum, *Russia - Measures Concerning Traffic in Transit*, WTO/DS512/R, 5 April 2019 Para 26.

[xliii] Ibid Annex D – 5, Executive Summary of the Arguments of the European Union Para 6.

[xliv] Ibid Para 7.103.

[xlv] See the text of Article XXI in the next section.

[xlvi] See WTO Analytic Index GATT 1994 – Article XXI (Jurisprudence) available at << https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_jur.pdf>> accessed 25 February 2022.

[xlvii] See US First Written Submission, *United States – Certain Measures on Steel and Aluminium Products* DS544, June 2019 Para 12.

[xlviii] The Marrakesh Agreement with its annexes form an integral part of the Agreements. See Paragraph 2 and 3 Article II of the Marrakesh Agreement.

[xlix] The Abuja Treaty sets out in Article 4 the importance of the RECs in establishing the African Economic Community. Article 28 notes the strengthening of the Regional Economic Communities.

[l] See AfCFTA Agreement, Article 3.

[li] Ibid Article 4.

[lii] This Article uses the term 'existing Protocol' to refer to the package of the phase 1 of the negotiation that encompasses the Agreement establishing the AfCFTA, the Protocol on Trade in Goods, the Protocol on Trade in Service, the Protocol on Rules and Procedures on the Settlement of Disputes.

[liii] A potential security exception in the protocol on Intellectual Property Rights is yet to be available.

[liv] Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 March 2019) available at << https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>> accessed 20 February 2022 29.

[lv] Ibid 47.

[lvi] Ibid 29.

[lvii] See Tania voon, 'Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45.

[lviii] Debate as regards the stance of the security exception in international trade law has taken during the provisional application of GATT 1947. See for instance an article written in 1991, way before the establishment of the WTO, regarding the security exception: Michael J. Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Mich J Int'L 558.

[lix] See Marrakesh Agreement Establishing the World Trade Organization (concluded 15 April 1994, entered into force 1 January 1995) 1867 UNTS 75.

[lx] See Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment adopted 22 August 1947, E/PC/T/186 10 September 1947, United Nations Publications Sales Number 1947.11.4 available at <https://www.wto.org/gatt_docs/English/SULPDF/92290240.pdf> accessed 30 Janvier 2022 54.

[lxi] See the point of view of the delegate of the Netherlands in the Report of the Second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/A/SR/33 24 July 1947 available at <https://www.wto.org/gatt_docs/English/SULPDF/90250049.pdf> accessed 30 Janvier 2022.

[lxii] See Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/A/SR/33 24 July 1947 available at <https://www.wto.org/gatt_docs/English/SULPDF/90250049.pdf> accessed 30 Janvier 2022 3.

[lxiii] See Annex 2 WTO framework concerning Dispute Settlement Understanding (DSU), among other things see art. 2, art. 16 concerning consensus as guiding principle for the decision making in the trading system.

[lxiv] See for instance, Deborah Z Cass, *The Constitutionalization of the World Trade Organization Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press 2005).

[lxv] See Antonio F Perez, 'WTO and U.N. Law: Institutional Comity in National Security' (1998) 23 Yale J Int'L 301 31.

[lxvi] Ibid 36.

[lxvii] See the list of the Member States of the AU at << https://au.int/en/member_states/countryprofiles2>> accessed 2 March 2022.

[lxviii] Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 March 2019) available at << https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.>> accessed 20 February 2022 Article 24(1).

[lxix] See list of Members and Observers of the WTO at << https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>> accessed 3 March 2022.

[lxx] The invocation of the security exception is causing havoc at the multilateral level. And the appellate body of the DSU considered as the biggest achievement of the trading system is paralyzed.

[lxxi] USTR, *Report on the Appellate Body of the World Trade Organization*, February 2020 10.

[lxxii] This analysis did not take into account the overall issues the functioning of the AfCFTA's dispute settlement can create in term of time taking to issue its report. See an interesting article on this issue at the multilateral level: Matthew Kennedy, 'Why are WTO Panels taking longer? And What Can Be Done About it?' Journal of World Trade Law 221.

[lxxiii] See AfCFTA, Protocol on Rules and Procedures on the Settlement of Disputes Article 5. See also DSU Article 2(1).

[lxxiv] Ibid Article 4(1). See also DSU Article 3(2).

[lxxv] Ibid.

[lxxvi] See Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 March 2019) Article 7.

[lxxvii] Ibid Protocol on Rules and Procedures on the Settlement of Disputes 55.

[lxxviii] The use of system here refers to the dispute settlement system.

[lxxix] Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 March 2019) Article 5 (b).

[lxxx] Ibid Article 5 (i).

[lxxxi] For instance, the West African Economic and Monetary Union (WAEMU) are not part of that building block referred to here.

[lxxxii] See Article 1 (t) of the Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 March 2019).

[lxxxiii] We were not able to identify a security exception in the UMA; IGAD and CEN-SAD.

[lxxxiv] ECOWAS Supplementary Act on Investments (signed 19 December 2008, entered into force 19 January 2009)

[lxxxv] Ibid 23.

[lxxxvi] See Article 27 (a) of the Protocol on Trade in Goods; See also Article 16(1)(a) of the Protocol on Trade in Service; See also Article XXI (a) of the GATT 1994.

[lxxxvii] A similar provision can be seen in Article 32.2 of the Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) available at << https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32_Exceptions_and_General_Provisions.pdf>>. Accessed 22 February 2022.

[lxxxviii] See article 24 (2)(b)(i) regarding the protection of human, animal or plant life or health that literally is a part of the corpus of the General Exception of Article XX of WTO/GATT.

[lxxxix] Noting that at the outset, Article XX of WTO/GATT and Article XXI were melted into one big provision. See for instance Article XX of the Draft of the General Agreement on Tariffs and Trade in the Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 5March 1947 Part III Art XX 79.

[xc] The war in Darfur, Sudan can be cited as example in this regard. See 'Understanding Darfur Conflict', Govt. Sudan available at << https://reliefweb.int/report/sudan/understanding-darfur-conflict>> accessed 22 February 2022.

[xci] See Five African Countries. Six Coups. Why Now? available at <https://www.nytimes.com/article/burkina-faso-africa-coup.html> accessed 22 February 2022.

[xcii] Ibid.

[xciii] WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 Para 2.20.

[xciv] See Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security, 'United Nations – African Union Conference New York 19 April 2017 available at <https://unoau.unmissions.org/sites/default/files/01_un-au_joint-framework_a5-booklet_en.pdf> accessed 25 Janvier 2022.

[xcv] See the Revised Treaty of the Economic Community of West African States (signed 24 July 1993, entered into force 23 August 1995).

[xcvi] Ibid Article 41 (3)(b).

[xcvii] Paragraph 2 of Article 16 reads: the Secretariat shall be informed, to the fullest extent possible, of measures taken under paragraphs 1(b) and 1(c) of this Article, and of their termination.

[xcviii] The provision is just named as 'Exception'.

[xcix] See Treaty Establishing the Economic Community of Central African States (signed 18 October 1983, entered into force 18 December 1984) Article 34.

[c] Ibid Article 34 (2).

[ci] Ibid Article 34 (6).

[cii] Abdullahi Muhammad Maigari and al, 'Geopolitics of Land Borders Closure in West Africa' (2020) Journal of Culture, Politics and Innovation 14.

[ciii] See GATT 1947, Sweden – Import Restrictions on Certain Footwear, Restricted L/4250, 17 November 1975.

[civ] *Presidential Proclamation on Adjusting Imports of Steel into the United States* and Proclamation Para 11.

[cv] *Presidential Proclamation on Adjusting Imports of Aluminium into the United States* Para 10.

[cvi] See Investment Agreement for the COMESA Investment Area (Signed 23 May 2007, not yet in force) Article 22.

[cvii] Ibid Article 22 (3).

[cviii] The chapeau of Article XX reads: 'Subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade […].

[cix] See Common Market for Eastern and Southern Africa (signed 5 November 1993, entered into force 8 December 1994) Article 50.

[cx] See Bryan A G, *Black's Law Dictionary* (10th ed, 2014) 44.

[cxi] See AfCFTA, Protocol on Rules and Procedures on the Settlement of Disputes Article 4.

[cxii] See Annex 2 WTO framework concerning Dispute Settlement Understanding (DSU), Article 3(2).

[cxiii] See UAE opinion regarding this issue in the WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020 Para 7.255.

[cxiv] See Articles XXI (b) WTO/GATT 1994; XIV (1)(b) *bis* WTO; 73(b) TRIPS; 27(b) Trade in Goods AfCFTA; 16(1)(b) Trade in Services AfCFTA.

[cxv] See Regional Comprehensive Economic Partnership Agreement between ASEAN, Australia, China, Japan, Korea, Republic of New Zealand (Signed 15 November 2020, entered into force 1 January 2022).

[cxvi] Ibid 430.

[cxvii] See United States – Colombia Trade Promotion Agreement (Signed 22 November 2006, entered into force 15 May 2012 available at << https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file770_10193.pdf>> accessed 5 March 2022.

[cxviii] See United States – Korea Free Trade Agreement (1 January 2019) available at << https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file476_12722.pdf>> accessed 5 March 2022 Footnote Article 23.2.

[cxix] United States – Colombia Trade Promotion Agreement (Signed 22 November 2006, entered into force 15 May 2012 Footnote Article 22.2.

[cxx] See Regional Comprehensive Economic Partnership Agreement between ASEAN, Australia, China, Japan, Korea, Republic of New Zealand (Signed 15 November 2020, entered into force 1 January 2022) Article 17.13 (b)(iii).

[cxxi] Ibid Article 17.13(b)(iv).

[cxxii] See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, (adopted 9 July 2002, entered into force 26 December 2003) available at << https://au.int/en/treaties/1158>> accessed 20 January 2022.

[cxxiii] See Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security, United Nations -African Union Annual Conference New York, 19 April 2017 available at <<United Nations - African Union Annual Conference>> accessed 25 January 2022.

[cxxiv] See Wane available at <https://www.ipinst.org/2016/05/au-un-strategic-partnership-for-peace-security#2> accessed 27 January 2022.