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The African Customs Union, Infant Industry Protection, and Self-Centred Development

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Abstract

The authors predict that the Continental Customs Union (CCU) will injure some infant industries in smaller Member States and that, if not properly designed, the small States which have wholeheartedly embraced the African Continental Free Trade Area (AfCFTA) Agreement may actually hold little. The AfCFTA Agreement alludes to the CCU but does not specifically provide for it. Moreover, the AfCFTA provisions on infant-industry protection (IIP) remain hopelessly vague. But, if the experience with the Southern African Customs Union (SACU) is anything to go by, the CCU will end up hurting some infant industries in the CCU territory. The authors' prediction does not imply that AU Member States should not join the CCU. On the contrary, evidence from SACU shows that this customs union represents the largest source of income for most of its members. However, just like SACU, the CCU – a form of neoliberal economic integration – subverts self-centred development by stopping local industries from growing or emerging in the first place. Tentatively, this article recommends that customs unions Member States share skills, knowledge and technology if they want to avoid the moral hazard problem that IIP carries with it.

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1 INTRODUCTION

In this article, we predict the inevitable damage that the greater integration represented by the African Continental Free Trade Area (AfCFTA) will bring about in smaller States. We demonstrate that the Continental Customs Union (CCU) will injure some infant industries in smaller Member States and that, if not properly designed, the small States which have wholeheartedly embraced the AfCFTA may actually hold little. In establishing the AfCFTA, the African Union (AU) wished to "lay the foundation for the establishment of a Continental Customs Union at a later stage".[1]

To date, however, scholars have not thought much about how the CCU will impact smaller AU Members. The AfCFTA Agreement alludes to the CCU but does not specifically provide for it. If the experience with the Southern African Customs Union (SACU) is anything to go by, the CCU will end up hurting some infant industries in the CCU territory.

Our prediction does not imply that AU Member States should not join the CCU. On the contrary, receipts from SACU represent the largest source of income for three of the five SACU members (i.e., eSwatini, Lesotho, and Namibia). Rather, the dilemma is that, while SACU certainly boosts the gross domestic product (GDP) and government revenue of Member States, it also subverts self-centred development by stopping local industries from growing or emerging in the first place.

While States usually grant infant industries greater protection against imports, this article shows that such policy responses seldom reach the intended goals in the SACU region because policy makers do not properly frame the core issues. Likewise, though the AfCFTA Agreement mandates the AU to draft guidelines on infant-industry protection (IIP), its provisions on IIP remain hopelessly vague. Policy makers focus on the *time* needed to acquire or build capacity instead of addressing *the learning and knowledge gaps* necessary for infant industries to compete regionally. As a result, the industries that benefit from IIP come back to ask their governments to extend IIPs when they should have already "grown". Tentatively, this article recommends that customs unions Member States share skills, knowledge and technology if they want to avoid the moral hazard problem that IIP carries with it.

To explain what factors ground our prediction, we largely rely on "self-centred development" and we have organised this article in five parts. After discussing common understandings of "damage" and "injury" in the context of international trade, the following part of the article looks into economic theory to expound on how regional economic integration, a neoliberal offshoot, causes injury. In other words, we establish that neoliberal integration hampers self-centred development.

Next, we turn to infant industries. In international trade, an infant industry refers to a fledgling or young industry, vulnerable to competition from foreign producers and often in need of home-country government protection. This means that, if the State in which they operate liberalises trade, heightened competition may drive local producers out of business. In that section, we show how States have provided for IIP to protect infant industries from international competitors, to give them some breathing space to build the capacity necessary to compete regionally and globally.

In the fourth section, we study the experience in SACU to illustrate our point that greater integration will lead to greater injury to domestic industries. SACU, the world's oldest functioning customs union, offers an excellent case study because it has sophisticated rules that its members have developed over the decades since 1910 to regulate trade in Southern Africa.

We extrapolate from selected cases in Namibia with regard to SACU and IIP to the CCU. That experience opens a window into the future and a glimpse of how the CCU will impact smaller States or the less industrialised States on the African continent. Then, finally, drawing from the Namibian experience, we propose a way to remedy the inevitable impact of the CCU on smaller States in Africa by refining the rules on IIP.

1 Article 3(d) of the Agreement Establishing the African Continental Free Trade Area, 2018.

2 INJURY TO DOMESTIC INDUSTRIES

2 1 Damage or Injury

What kind of damage or injury do States suffer when they deeply integrate? The notion of "damage" or "injury" stands at the heart of this article. While people can employ these two terms interchangeably in several contexts, international trade lawyers use the term "injury" most often. International trade experts use "injury" when they analyse subsidies and anti-dumping, both considered unfair trade practices. They also resort to the injury concept when they assess decisions of a Member State to invoke the so-called "escape clause" when implementing safeguard measures.[2] The World Trade Organization (WTO), its agreements, and its case law expand on the concept of "injury".

2 1 1 Meaning of "injury"

Unlike the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "Anti-Dumping Agreement" or "ADA"), the Agreement on Subsidies and Countervailing Measures (SCM) defines "injury". Nonetheless, the SCM definition of "injury" can – with the necessary adjustments – serve for the purposes of anti-dumping and safeguard measures, and for the purposes of this article.

In terms of Article 15.1 of the SCM, an "injury" results from three factors, namely an increase in volume of subsidised imports; an effect of the subsidised imports on prices in the domestic markets for like products; and, consequently, an unfavourable impact of these imports on the domestic producers of such products.[3] The factors listed in Article 15.1 of the SCM do not only define "injury", they also lay out the criteria that Member States must fulfil to investigate whether or prove that subsidised imports injured domestic producers.[4]

Whether in the context of subsidies or dumping, injury manifests in three forms:[5]

1. material injury to a domestic industry,
2. threat of material injury to a domestic industry, and
3. material retardation of the establishment of such an industry.

Concerning the threat of material injury, the Appellate Body of the WTO ruled that, in spite of the "intrinsic uncertainty" of future events, establishing facts properly in determining "threat of material injury" must rest on yet-to-happen events that are "clearly foreseeable and imminent".[6] The process of determining whether imports threaten to materially injure domestic producers must show "a high degree of likelihood that projected occurrences will occur."[7] The process must also disclose the assumptions and extrapolations regarding future events and backing up that determination.[8] Moreover, the assumptions and extrapolations must stem from "positive evidence", and not from mere allegations, conjecture, or remote possibility.[9]

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2 Article XIX of the GATT and Article 2.1 of the Safeguards Agreement. These provisions entitle a WTO Member State to adopt safeguard measures when increased imports cause or threaten "serious injury" to domestic producers.

3 For more on the definition of "material injury", see WTO Appellate Body Report, "Thailand Anti-Dumping Duties on Angles, Shapes and Sections of Iron and Non-Alloy and H-Beams from Poland" ("Thailand – H-Beams") DS122, adopted 5 April 2001. See also Matsushita et al *The World Trade Organization: Law, Practice and Policy* (2017) 339.

4 Matsushita et al *World Trade Organization* 339.

5 *Ibid.* 338 and 393.

6 WTO Appellate Body Report, "Mexico Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States" ("Mexico – Corn Syrup") DS132, adopted 21 November 2001, para 85. See also Article 4.1(b) of the Safeguards Agreement (defining "threat of serious injury" as "serious injury that is clearly imminent").

7 WTO Appellate Body Report, "United States – Investigation of the International Trade Commission in Softwood Lumber from Canada" ("US – Softwood Lumber") DS277, adopted 9 May 2006, para 109. See also WTO Appellate Body Report, "United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand" ("US – Lamb") DS177, adopted 16 May 2001, para 136 ("threat of serious injury" requires "a high degree of likelihood that the anticipated serious injury will materialize in the very near future").

8 "US – Softwood Lumber" para 109.

9 *Ibid.*

2 1 2 *"Serious" versus "material" injury*

The simple fact that imports have "injured", as defined above, domestic producers does not suffice to act against those imports. Member States seeking a remedy against those imports must show that the injury is "material" (in the case of subsidies[10] and dumping[11]) or "serious" (in the case of safeguard measures[12]).

Material injury calls for a lower threshold than serious injury. The Appellate Body reasoned that the degree of injury to a domestic industry should require less for anti-dumping measures (and for countervailing duties)[13] than for safeguard measures because anti-dumping measures aim to counter "unfair" trade whereas safeguard measures aim to counter "fair" trade.[14] The serious injury standard strives to balance the interests of domestic industries in getting relief from an import surge and the interests of consumers in purchasing lower-cost imports.[15]

The Safeguards Agreement utilises the term "serious injury" to express "a significant overall impairment in the position of a domestic industry."[16] This means that the volume or market share of imports must trend upwards and that the situation of the domestic industry seeking relief must have deteriorated.[17] In *Argentina – Footwear*,[18] the Appellate Body found "serious injury" by comparing figures of imports as they stood at two points in time.

2 1 3 *Parameters that determine "material injury"*

The Subsidies Agreement and the Anti-Dumping Agreement both identify similar parameters of material injury. Article 15.2 of the SCM deals with both the cause and the effect that a Member State must demonstrate to meet the "material injury" standard. The causes of the alleged material injury involve a significant increase in subsidised imports, in absolute numbers or in numbers relative to those of domestic production or consumption.[19] The effects of the imports consist in (1) "significant price undercutting", compared to the prices of competing domestic products, (2) "significant price depression", or (3) significant "prevention of price increases, which otherwise would have occurred".[20]

Article 15.4 sets down, in a non-exhaustive list, the parameters indicating material injury. Thus, investigations on the impact of subsidised imports on a domestic industry include the actual or potential decline in output, sales, market share, profits, productivity, or return on investments. It also includes the actual or potential negative effects on cash flow, inventories, employment, wages, growth, or the ability to raise capital or investments. Note that the injury analysis focuses far more on the interests of producers, as opposed to those of consumers.[21]

Analysing injury goes beyond the ambit of dumping, subsidisation, and safeguard measures; it covers other areas of international trade. In essence, the injury analysis serves as one of the paramount tools in regulating international trade.

10 Article 15 of the SCM.
11 Article 3, fn 9, of the ADA. See also Art VI:6(a) of the GATT.
12 Article 2.1 of the Safeguards Agreement. See also Art XIX:1(a) of the GATT.
13 "US – Lamb" para 124. See also Matsushita *et al* 415–416.
14 "US – Lamb" para 124.
15 Matsushita et al *World Trade Organization* 416.
16 Article 4.1(a) of the Safeguards Agreement. See also WTO Appellate Body Report, "Argentina – Safeguard Measures on Imports of Footwear" ("Argentina – Footwear") DS121, adopted 12 January 2000, para 139.
17 Matsushita et al *World Trade Organization* 416.
18 "Argentina Footwear".
19 Matsushita *et al World Trade Organization* 340.
20 *Ibid.*
21 *Ibid.* 339 and 340.

2 2 The Causation Conundrum

Experts encounter difficulties in determining which one of several factors caused injury. In the United States (US), under the Trade Act,[22] the International Trade Commission (ITC) can protect a domestic industry temporarily if increased imports have been a "substantial cause" of the injury, meaning "a cause which is important and not less than any other cause."[23]

Grossman suggested that changes in industry employment indicate whether imports have caused injury to a domestic industry.[24] In addition to employment changes, indicators comprise reduced profits and plant closings.[25] We regard these indicators not merely as possible causes of, but also as the clinical signs of, "injury" to domestic industries.

Business cycles also complicate causation analysis. Understood as the regular sequence whereby business (or the economy) expands and contracts through peaks and troughs, business cycles may mask or exaggerate injury to domestic industries.[26]

According to Pindyck and Rotemberg,[27] a State will find it relatively easy to use those indicators to determine that a domestic industry has been injured, but they will often fail to prove that *imports,* rather than other factors, constitute the substantial cause of the injury.

2 3 Do Imports Hurt Economic Development?

Many economists, such as Pindyck and Rotemberg,[28] will disagree if someone claims that increased imports can cause injury at all. Yet the bulk of international trade law assumes that imports may injure domestic industries. In countless economic models, tastes and technological possibilities fundamentally determine prices and output levels, which in turn lead to imports.[29] Welfare changes depending on whether tastes and technologies change, hinting that imports can never cause injury.[30]

However, Pindyck and Rotemberg also recognise that laws protecting domestic industries from increased imports may insulate them from changes in tastes and technologies in the exporting country, and not from corresponding changes in the domestic economy.[31] All the same, they insist that, in practice, States will likely not manage to distinguish between domestic and foreign shifts in tastes and technologies.[32] International trade law only refers to injury by imports, without distinguishing between the sources of increased imports.[33] Eventually, in keeping with the US Trade Act, Pindyck and Rotemberg settle for a perspective that views any changes in imports as probably causing the injury.[34] They then developed a framework for assessing the relative impacts of imports versus shifts in domestic demand and supply.

We really doubt that Pindyck and Rotemberg's perspective resolves the issue they have identified or succeeds in reconciling the legal approach with the economic one. For one thing, their perspective does not correct the unsound premise in international trade law that imports can "cause" injury to domestic industries. Second, despite their claims that their framework can reliably distinguish between imports and shifts in domestic demand and supply, the fact remains that, in practice, States will often fail to draw such distinctions. In particular, the Appellate Body of the WTO repeatedly found that the US (through the ITC) failed to distinguish between injury that related to imports and injury that did not.[35]

22 Trade Act of 1974, 19 U.S.C. § 201.
23 19 U.S.C. § 201 ¶ (b)(4).
24 Grossman "Imports as a Cause of Injury: The Case of the U.S. Steel Industry" *NBER Working Paper No. w1494* (1984) 37.
25 Pindyck and Rotemberg "Are Imports to Blame? Attribution of Injury under the 1974 Trade Act" *NBER Working Paper No. 1640* (1985).
26 Cannon "Material Injury and the Business Cycle in Antidumping and Countervailing Duty Cases" 1991 *Boston College International and Comparative Law Review* 53 54.
27 Pindyck and Rotemberg 1985 *NBER Working Paper* 1.
28 *Ibid.* 2.
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*
33 *Ibid.* 3.
34 *Ibid.*
35 Irwin "Causing Problems? The WTO Review of Causation and Injury Attribution in U.S. Section 201 Cases" *NBER Working Paper No. 9815* (2003). See for example WTO Appellate Body Report, "United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities" ("US – Wheat

Moreover, if changes in tastes or technologies come from abroad, focusing on import volumes as such will distract policy makers from the fact that the technological and manufacturing capacity of the exporting country fundamentally differs from its own. In our humble view, focusing on reducing those fundamental differences constitute a more practical industrialisation strategy. We further submit that, though experts are divided on whether specific imports have "caused" injury to a specific industry, trade lawyers should concentrate on "injury" as a point of departure in evaluating whether imports or factors other than imports "caused" injury to a domestic industry.

3 REGIONAL ECONOMIC INTEGRATION AND ITS CONNECTION TO INDUSTRY INJURY

Before we discuss the causal link between regional economic integration and injury, we must first unpack a few basic notions, such as "integration", "economic integration", and "regional economic integration". Unpacking these notions matter to this article because our thesis (that regional economic integration will cause injury to some infant industries in Member States) pivots on how the economic philosophies underwriting that integration work in practice.

3 1 Neoliberal Regionalism

3 1 1 Regional Economic Integration

Integration conjures up images of things or people coming closer together. In the context of international trade, economic integration refers to "integration into the world economy" exclusively.[36] Countries desiring to integrate economically, and trade more freely can establish a free-trade area or a customs union. In a free-trade area, each country can ship its goods to another without tariffs.[37] Unlike the situation in a customs union, Member States in a free-trade area can set tariffs against the outside world independently.[38]

Policy makers, including presumably those of the AU, assume that the closer the integration the better for development.[39] Since independence, African governments have concluded many regional economic arrangements and embraced regional economic integration as an important part of their development strategies.[40]

Regional economic integration makes sense in Africa – a continent characterised by "small countries, small economies, and small markets."[41] However, African countries have not effectively implemented many ambitious integration initiatives, and regional integration on the continent has recorded only a few success stories.[42]

To identify and remedy the shortcomings and internal contradictions of regional integration, we must first trace the theories that inform it. In that manner, we can single out the root causes of the shortcomings and stand in a much better position to fix any defects in the CCU.

3 1 2 A False Delinking from World Capitalism

Neoliberal economics informs and structures regional integration. Although scholars sometimes sell it as a response to the destructive neoliberalism within the existing multilateralism, regional economic integration largely springs from neoliberal hegemony. If anything, the WTO mandates[43] and encourages free-trade areas and customs unions.[44]

Gluten") DS166, adopted 19 January 2001.

36 Wade "What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of "Development Space" *Crisis States Programme Working Paper No. 31* (2003).

37 Krugman, Obstfeld, and Melitz *International Trade: Theory and Policy* 11 ed (2018) 293.

38 *Ibid.*

39 See Wade 2003 *Crisis States Programme Working Paper* 13.

40 Hartzenberg "Regional Economic Integration in Africa" *WTO Staff Working Paper No. ERSD-2011-14* (2011).

41 *Ibid.* 3. See also United Nations Conference on Trade and Development *Trade Policy Framework: Namibia* (2016) vii and 36 (noting that the small size of the Namibian economy does not make it wise for Namibia to pursue "blanket" import substitution).

42 *Ibid.* 2 and 19.

43 Article XXIV, para 8 of the GATT.

44 See August, Mayer, and Bixby *International Business Law: Text, Cases, and Readings* 6 ed (2013) 366 (stating that the GATT encourages Member States to participate in free-trade areas and customs unions).

In reality, most States in Africa who have decided to integrate economically do so because they want to make sure that ultimately they integrate into the world economy more closely, not to regionally integrate away from it.[45] Gathii contends that, together with bilateralism, regionalism in trade constitutes contemporary fads that spread neoliberal ideals in the periphery of the world trading system even though no solid evidence has established that regionalism benefits its members.[46]

3 1 3 An Inherently Neoliberal Project

Söderbaum depicts neoliberalism in Africa's regionalism as follows:[47]

> The great majority of present-day regionalist schemes in Africa are founded on the notion that the regional economic integration project should be market driven and outward looking and should remove obstacles to the free movement of goods, services, capital, and investment within the regions as well as to the rest of the world.

Neoliberal regionalism rears its head in many corners of Africa and in different guises.[48] It stands for less government and getting the prices right, rather than providing public goods and intervening in the economy to fight poverty.[49] In both developing countries and industrialised nations, neoliberal regionalism commodifies basic material needs of life, reduces poverty reduction to economic growth, and subsumes the public (interest) under the private.[50] It entails that Member States liberalise trade, better protect foreign investors, commodify social services, guarantee the rights of investors to access investment opportunities, privatise public service goods, and generally reduce the State's control over the economy.[51]

Gathii argues that, by resorting to regional trade agreements, States have increasingly embraced neoliberalism.[52] He adds that regional trade agreements (RTAs) serve to purvey neoliberal economic policies.[53]

We concur with the main drift of Gathii's argument, but we qualify his argument by affirming that modern RTAs do not so much proselytise neoliberal philosophy as much as it lineally descends from it. In that sense, the AfCFTA as well as the CCU that it envisages, both flow from neoliberal thinking. To further indicate the neoliberal foundations of regional integration,[54] consider that the foremost thinkers who developed the modern theory of regional trade prominently feature Béla Alexander Balassa,[55] a neoliberal lawyer-economist.

Commenting on the integration process in the Southern African Development Community (SADC), Evans observed that this regional bloc has increasingly espoused a free-market philosophy along the lines of neoliberal orthodoxy.[56] Because of its neoliberal outlook, some experts such as Hentz have lashed out at SADC as being developmental only in name.[57] Evans explains that, after the Cold War ended, neoliberalism emerged as a global agenda – an agenda that shaped regionalism in Southern Africa.[58]

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45 See Söderbaum "Modes of Regional Governance in Africa: Neoliberalism, Sovereignty Boosting, and Shadow Networks" 2004 *Global Governance* 419–436, 423.
46 Gathii "The Neoliberal Turn in Regional Trade Agreements" 2011 *Washington Law Review* 421–474, 449–450.
47 Söderbaum 2004 *Global Governance* 422.
48 *Ibid.* 431.
49 *Ibid.* 425.
50 *Ibid.*
51 Gathii 2011 *Washington Law Review* 422–423.
52 *Ibid.* 422.
53 *Ibid.*
54 See also Oppong *Legal Aspects of Economic Integration in Africa* (2011) 7.
55 See Balassa "Types of Economic Integration" *International Bank for Reconstruction and Development, Bank Staff Working Paper No.185* (1974); and Balassa and Stoutjesdijk "Economic Integration Among Developing Countries" 1975 *Journal of Common Market Studies* 37–55.
56 Evans "The Neoliberal Turn in the SADC" 2010 *Nokoko* 101–129, 102.
57 Hentz "South Africa and the Political Economy of Regional Cooperation in Southern Africa" 2005 *Journal of Modern African Studies* 21–51, 33.
58 Evans 2010 *Nokoko* 102–103.

3 1 4 *The Necessity of Self-centred Development*

Despite the rhetoric of "people-centred development" that it professes, the neoliberal regionalist model transforms the State from a welfare system to a gigantic investment promotion agency.[59] Because of its built-in contradictions, (neoliberal) regionalism in Africa has not convinced every government. In fact, while States and organisations frequently support such regionalism publicly, some States harbour misgivings and resist it.[60]

Samir Amin describes the centre-periphery structure that neoliberal globalisation engenders. He distinguishes the capital accumulation and socio-economic characteristics that obtain in a self-centred system (i.e., in the centre) from the model of accumulation and socio-economic characteristics in the periphery.[61] Amin defines "self-centred development" as occurring when a State produces both mass consumption goods and the capital goods needed for the production of mass consumption goods.[62] Historically, such mode of production lies at the centre of global capitalism where it feeds on States in the periphery (i.e., developing States) exporting primary commodities to the centre and importing luxury goods from the States in the centre.

Neoliberalism clips the wings of the State as the State strives to induce self-centred development. Both multilateralism and neoliberalism work to downsize or unbundle the State through neoliberal globalisation.[63] Under neoliberal regionalism, the State becomes "the disciplining representative of global economic forces", "a transmission belt for transnational capital".[64] And in countries where the State badly lacks capacity, regional integration may not necessarily take on a neoliberal character, but involves a shadow State going regional.[65] In such cases, which partly result from neoliberalism, a small number of regime actors use the formal State apparatus as a façade and band together with a number of informal or private actors, a private security company, or military leaders to plunder State or natural resources, or to otherwise bolster their private interests.[66] With either neoliberal or shadow-network regionalism, the State has much less capacity to catalyse self-centred growth and development.

To break this capitalist, exploitative cycle, Amin recommended that States in the periphery "de-link" from the international economic system.[67] However, Amin did not consider that developing countries that delinked from world capitalism could recreate the centre-periphery structure in their own region through free-trade areas or customs unions, such as the CCU. Hence, neither delinking nor neoliberal regionalism will suffice to foster self-centred development in Africa.

3 2 Economic Integration causes Damage

3 2 1 *The Advantages of Integration*

Integration carries with it a number of possible impacts. Some positive, others harmful. On the plus side, integration through the AfCFTA promises to boost intra-African trade, to diversify the region's economies, structurally reform them, alleviate poverty, and meet the important human rights goals set out in Agenda 2063 and the global Agenda 2030.[68] The AfCFTA vastly enlarges African economies to create one giant market that covers 1.2 billion consumers, a GDP of 2.5 trillion US dollars, and 55 countries – the world's largest participation for a free-trade area since the advent of the WTO.[69] And it can yield economies of scale,[70] enable national economies to become more efficient, and enhance cross-border infrastructure.

In particular, the AfCFTA will cut down on tariffs. At present, with an average tariff of 6.1%, businesses pay more when they export within Africa than when they export outside the continent.[71] By gradually decreasing those tariffs, the AfCFTA will lubricate intra-African trade.

Economic modelling shows that deepened regional integration in Africa by setting up wider free-trade areas would benefit the continent.[72] It also suggests that the larger the integration, the greater the gains.[73] Specifically, it indicates an increase in exports, real wages, and income for all categories of workers in Africa.[74] Moreover, integration can improve food

71 United Nations Economic Commission for Africa "African Continental Free Trade Area: Questions and Answers" https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf (accessed 11-06-2020).
72 UNECA *CFTA* 33.
73 *Ibid* 34.
74 *Ibid* 33–34.

security.[75] Thus, depending on how policymakers fine-tune its details and implement it, the AfCFTA offers governments in Africa a golden, unique opportunity to lift millions of Africans out of poverty.

3 2 2 The Negative Impacts

However, as revealed by policy analysis and empirical evidence, and as exemplified by the three SACU cases discussed in this article, the benefits of deepened regional trade do not accrue to all constituencies equally. For instance, experience in Africa and Latin America over the whole of the twentieth century shows that regions that integrate into the world economy as commodity suppliers – in line with their "comparative advantage" – will most probably remain stuck in their roles as commodity suppliers, with their prosperity depending on access to rich-country markets and terms of trade for commodities.[76] In addition, evidence shows that liberalising trade can overshadow how that trade adversely impacts those at the bottom of the economic ladder, such as women, informal workers, and small-scale producers.[77] Even the United Nations Conference on Trade and Development (UNCTAD) projects that, at least in the short run, the AfCFTA will create winners and losers.[78]

By augmenting economic integration, domestic producers and industries will face greater competition from producers from other countries. A free-trade area such as SADC entails that producers in Botswana will have to compete with imports from South Africa. While consumers will probably gain from the price competition that will result from these imports, that competition may force some firms in Botswana to close shop.

Thus, economic integration increases the probability that imports will hurt domestic industries. Wade singles out China's manufactured exports as depressing prices through the world economy and hurting exporters in most other developing countries.[79] Wade's example enlightens this debate because China remains a "developing" country, and as such it illustrates well our argument that developing countries like those found on the African continent can exploit or hurt with their exports the economies of fellow developing nations.

Economic integration intrudes into States' policy space, and that intrusion paves the way for imports to surge, which in turn further exposes domestic industries to injury.

3 2 3 Lowering Trade Barriers or Lowering One's Guard?

We still have to establish that it is economic integration, and not any other factor, that causes the damage to industries. Of course, in the real world, other factors can and do affect industries. But, to verify our thesis, we must isolate integration and injury to industry as variables in a causal relationship. We do so by showing that the very process of integration necessarily implies the lowering of trade barriers. Those barriers include tariffs, regulations, non-tariff barriers to trade, and quotas. They also manifest a State's sovereignty in international trade and economic relations.

75 *Ibid* 94.
76 Wade 2003 *Crisis States Programme Working Paper* 10.
77 UNECA *CFTA* 34.
78 United Nations Conference on Trade and Development (UNCTAD) *African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods* (2016) 17.
79 Wade 2003 *Crisis States Programme Working Paper* 12.

Regional economic integration proceeds precisely to reduce or remove those barriers. In other words, the process of regional economic integration has the effect of reducing a State's sovereignty and shrinking its policy space. This represents a huge cost for the State. First, the State will lose tariff revenue, which may affect governments in Africa unevenly.[80]

For Wade, proliferating regulations formulated and enforced by international organisations constrain developing countries in their national strategies more tightly.[81] They curtail the ability of developing countries to limit the options of companies operating or hoping to operate within their borders.[82] Those regulations have legitimised a level of intrusion into the economies and polities of developing countries previously frowned upon by the international community, framing the intrusion in the guise of international agreements.[83]

Although Wade referred to international organisations and trade agreements led by the US and the United Kingdom (UK), similar dynamics apply to regional organisations and agreements such as the AfCFTA. The rules contained in the AfCFTA also constrain AU Member States in their trade policies. The North-South perspective may blind analysts to the fact that more industrialised nations in Africa such as South Africa, Egypt and Nigeria can exploit less industrialised countries on the same continent as ruthlessly as Western multinationals do in poor countries. Later in this article, we illustrate those dynamics with our study of the Namibian dairy and poultry industries.

Given that governments design and raise many of those trade barriers to realise legitimate objectives, such as industrialisation, promotion of small and medium enterprises, advancement of historically disadvantaged groups and individuals, the process of regional economic integration may undermine or slow down those objectives. As a result, the "development space" for diversifying and upgrading economies in developing countries have shrunk behind the rhetorical commitment to universal liberalisation and privatisation.[84]

The rules written into multilateral and bilateral agreements actively prevent developing countries from embracing the kinds of industrial and technology policies adopted by the newly developed countries of East Asia[85] and by the older developed countries when they were still developing.[86] Wade sees these rules as shrinking not only "development space", but also "self-determination" space.[87] As a matter of fact, earlier studies have showed that newly industrialised countries developed before the advent of the WTO in 1995, and that WTO rules now constrict the developmental interventionist policies of these newly industrialised countries.[88] After 1995, countries had to withdraw, revoke or reclassify industrial policies that, in some instances, had for a long time comprised their development strategies.[89]

In sum, economic integration, either in the form of globalisation or regionalism, may facilitate injury to domestic industries and producers.

3 3 The Biggest Damage: Stemming Self-centred Development

Perhaps, the biggest damage that unbridled regional integration can inflict is the lack of self-centred development. Actually, self-centred development may matter more than liberalisation. Amin calls that self-centred development "autocentric accumulation" as opposed to "dependent accumulation".[90] For Wade, self-centred development – what he calls "internal integration" – maintains "one of the strangest silences in development thinking".[91]

Mainstream economic development theory posits that the principle of comparative advantage – whereby a country specialises in producing certain goods depending on whether it can produce them more efficiently than other countries – should dominate international trade and development policy.[92] It also discourages States from replacing some currently imported items with locally produced goods because evidence of what happens when it guides development policy has discredited these import-substitution strategies.[93]

International trade agreements can restrict the right of a government to carry through policies that favour growth and the technological upgrading of domestic industries and firms.[94] In short, there is a causal connection between economic integration and injuries to domestic producers and industries, notably infant industries.

92 Ricardo *On the Principles of Political Economy and Taxation* (1817) 12–17; Wade 2003 *Crisis States Programme Working Paper* 14; and Sykes "Comparative Advantage and the Normative Economics of International Trade Policy" 1998 *Journal of International Economic Law* 49–53.
93 Wade 2003 *Crisis States Programme Working Paper* 14.
94 *Ibid* 9.

4 INFANT INDUSTRIES

Since World War II, many developing nations have considerably protected newly established industries.[95] They have espoused such a protective attitude on the ground that new industries are "infants".[96]

Chang argues that the vast majority of the now-developed countries, especially the US and the UK, have in the past actively resorted to subsidies and infant-industry tariff protection to promote and develop their industries while trying to catch up with competitors in foreign countries.[97] When taking into account the productivity gap with the more advanced or frontier economies then, many of today's developed countries actually protected their industries more heavily than developing countries currently do.[98] They did not develop on the basis of the free-trade policy and *laissez-faire* industrial policy that they now recommend or force upon developing countries.[99]

4 1 (Domestic) Industries

4 1 1 Definition

An industry often refers to a group of producers that carry on the same trade, for example producers in the banking, poultry, dairy, mining, and tourism industries. Article 4.1 of the Anti-Dumping Agreement defines a "domestic industry" as

> the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Governments worry about their domestic industries, regardless of whether those industries are nascent or mature. They protect those industries whenever they deem it necessary for political or economic reasons, or both. Thus, many governments have intervened to protect their domestic industries no matter how long those industries have existed. Incidentally, the Treaty Establishing the African Economic Community ("the Abuja Treaty") authorises its members to protect not only their "infant" industries, but their "strategic industries" as well.[100]

The scope of the list of products that defines an "industry" affects the effectiveness of measures a government takes to assist that industry. Defining an industry in terms of a narrow list of products enables domestic firms to prove that imports have injured the industry producing those items more easily.[101] On the other hand, defining "industry" so as to include other substitute products complicates the task of proving injury.[102] However, with the narrow definition, users and foreign suppliers undermine the output-expanding effects, if any, of government protection when they shift to substitutes.[103]

4 1 2 Tools for Protecting Industries

As we noted earlier, many governments intervene in the economy to assist industries severely injured by increased imports. To protect their industries, governments deploy several tools, notably tariffs, quotas, voluntary export restraints (VERs), (production) subsidies, and adjustment assistance to workers and firms in a given industry. In addition to these policy tools, Kattel and Lember say that States can use public procurement as a tool to protect its industries.[104] But using procurement like this presupposes that a State has a high capacity to implement policies,

95 Krueger and Tuncer "An Empirical Test of the Infant Industry Argument" 1982 *The American Economic Review* 1142.
96 *Ibid.*
97 Chang *Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective* (2003). See also Wade 2003 *Crisis States Programme Working Paper* 9.
98 Chang *Kicking Away the Ladder* 28.
99 *Ibid* 21–24.
100 Article 35(4) of the Treaty Establishing the African Economy Community, 1991.
101 Baldwin and Green "The Effects of Protection on Domestic Output" in *Trade Policy Issues and Empirical Analysis* (1988) 205–224.
102 *Ibid.*
103 *Ibid.*
104 Kattel and Lember "Public Procurement as an Industrial Policy Tool: An Option for Developing Countries?" 2010 *Journal of Public Procurement* 368.

including industrial policies – a capacity that unfortunately developing countries often lack.[105]

That said, governments prefer to raise tariffs to protect industries severely injured by increased imports over alternative means of protection, such as subsidies and adjustment assistance. Contrasted with a production subsidy, IIP would never be first best.[106] But the WTO drastically curtails the power of States to use subsidies. Governments prefer to restrict imports through tariffs because the injured industry reaps most of the benefits from government protection whereas the costs usually spread thinly over many users of the protected product.[107] Moreover, unlike subsidies, restricting imports through tariffs does not involve unpopular budgetary costs; unlike adjustment assistance, it does not send the unpopular message to the firms and workers in the injured industry that the government thinks that the economy can do without them.[108]

Melitz believes that, compared to tariffs and subsidies, quotas induce higher welfare outcomes because the level of protection provided by quotas declines as learning progresses within the protected industry – a crucial attribute if a State wishes to maximise welfare.[109] However, like VERs, oftentimes quotas discriminate against the States to which they apply.

Another reason why governments choose tariffs lies in the real likelihood of increasing domestic output. A tariff may enable a domestic firm in the protected industry to push up its output and capture a larger share of the home market as the tariff raises the costs of sourcing the protected product from foreign firms or induces consumers to buy domestic substitutes.[110] Policy makers may even feel like using tariffs temporarily to jump-start a country's industrialisation. After all, waves of industrialisation have historically coincided with relatively high tariffs.[111]

However, governments should refrain from following such misguided protectionist policies. If they adopt them, other governments will reciprocate, making everybody lose. The tariff wars that brought about the worst economic crisis in human history, the Great Depression in the 1930s, bear this out. Plus, empirical research by Baldwin and Green on five US industries has discredited the view that tariffs expand domestic output.[112] They show that the way users and producers of the protected product react to the tariffs tend to offset the tariffs' output-expanding effects.[113]

4 2 Protection of Infant Industries

4 2 1 Core Meaning

Infant-industry protection (IIP) constitutes one major form of protectionism. It typically consists in a State imposing or restoring tariffs, quotas or (production) subsidies to protect one or more of its domestic infant industries. IIP thus aims to temporarily replace imports with domestic substitutes. In so doing, the IPP (or "import substitution")[114] gives the protected industries enough breathing space to "grow" and build the capacity until they can compete with foreign firms without their State's assistance. The State therefore "taxes itself" to support an infant industry.[115]

105 Kattel and Lember 2010 *Journal of Public Procurement*. Wade 2003 *Crisis States Programme Working Paper* 13.
106 Krueger and Tuncer 1982 *The American Economic Review* 1143.
107 Baldwin and Green *Trade Policy Issues and Empirical Analysis* 205.
108 *Ibid.*
109 Melitz "When and How should Infant Industries be Protected?" 2005 *Journal of International Economics* 177 177–181.
110 Baldwin and Green *Trade Policy Issues and Empirical Analysis* 205.
111 Amsden "Industrialization Under New WTO Law" in *Trade and Development: Directions For the 21st Century* (2003) 82–96.
112 Baldwin and Green *Trade Policy Issues and Empirical Analysis* 223–224.
113 *Ibid.*
114 Import substitution relates to the idea that barring imports of goods manufactured abroad helps an economy to push up the demand for goods produced domestically. Although the two concepts intersect, import substitution differs from infant-industry protection (IIP). Import substitution, the larger concept, comprises IIP and encompasses several other methods of increasing the demand for domestically produced goods, such as quantitative restrictions.
115 Kemp "The Mill-Bastable Infant-industry Dogma" 1960 Journal of Political Economy 65–67.

4 2 2 The Mill-Bastable Test

Traditionally, IIP must satisfy certain conditions, known as the "Mill-Bastable test". First, as recommended by John Stuart Mill, States can extend IIP only for a limited duration; infant industries must then mature and become viable without the assistance of the State.[116] Like IIP provisions at the level of the WTO[117] and SADC,[118] SACU also limits the duration of IIP: The protective measure may not last more than eight years.[119]

Second, Charles Francis Bastable added another condition: The cumulative net benefits brought by the protected industry must exceed the cumulative costs of protection. However, economists and policy makers struggle to determine whether a certain IIP measure meets the Bastable condition. As Chang reminds them,[120] they cannot easily predict how long an industry will take to acquire the necessary technological capabilities and how much return such acquisition will bring in the end.

Another criticism against IIP challenges the role of the State in deciding whether to protect an infant industry. Those critics contend that the private sector would have promoted an industry if it were genuinely worth promoting.[121] They argue that, given that government officials know less about business than businesspeople, they will not make decisions as effectively as businesspeople do about which industries need protection.[122]

We believe that policy makers can use their country's comparative advantage to measure the costs of IIP and see if they meet the Bastable condition. Chang suggests that the extent to which a country deviates from comparative advantage indicates how much it sacrifices by protecting its infant industries.[123] The more a country deviates from its comparative advantage, the more it pays in order to acquire capabilities in new industries.[124]

4 4 The Necessity to Protect Infant Industries

Is the debate on IIP theoretical or empirical? Baldwin observed that economists have not disagreed on how to analyse IIP as much as they debate about its empirical aspects.[125] Some economists maintain that the case for IIP rests on empirical conditions that apply to most manufacturing industries in developing countries whereas other economists doubt that those conditions pervade developing countries and they insist on the high costs of making incorrect decisions about IIP.[126]

Contrary to what Baldwin observed, Krueger and Tuncer see the debate on IIP as "entirely theoretical" and as lacking any "systematic examination of the empirical relevance of the infant industry argument."[127]

4 4 1 Theoretical Justifications

Economists have long regarded IIP as the oldest and main "theoretically valid" exception to worldwide free trade.[128] Many scholars credit UK Prime Minister, Robert Walpole, with launching the earliest comprehensive IIP program in 1721. Walpole then influenced Alexander Hamilton (the first US Treasury Secretary) and Friedrich List, who first formulated the theory of infant-industry protection in 1791 and 1856, respectively. Today, States recognise and accept the necessity to take IIP measures.

The challenge, however, is how States should structure IIP provisions. Factors unique to

116 Melitz 2005 *Journal of International Economics* 177; Kemp 1960 *Journal of Political Economy* 65.
117 Article XVIII of the General Agreement on Tariffs and Trade, 1994.
118 Article 21 of the Treaty of the Southern African Development Community, 1992, as amended.
119 Article 26(2) –(3) of the Southern African Customs Union Agreement, 2002, as amended. Nonetheless, the SACU Agreement empowers the SACU Council of Ministers to authorise an IIP lasting more than eight years.
120 Lin and Chang "Should Industrial Policy in Developing Countries Conform to Comparative Advantage or Defy It? A Debate between Justin Lin and Ha-Joon Chang" 2009 *Development Policy Review* 483 491.
121 Chang "Industrial Policy: Can we go Beyond an Unproductive Confrontation?" *Turkish Economic Association, Discussion Paper No. 1* (2010) 15.
122 *Ibid.*
123 Lin and Chang 2009 *Development Policy Review* 491.
124 *Ibid.*
125 Baldwin "The Case against Infant-industry Tariff Protection" 1969 *The Journal of Political Economy* 295.
126 *Ibid.*
127 Krueger and Tuncer 1982 *The American Economic Review* 1142.
128 Melitz 2005 *Journal of International Economics* 177. Krueger and Tuncer 1982 *The American Economic Review* 1142. Baldwin 1969 *The Journal of Political Economy* 295.

infant industries may justify that the State intervenes in the market to achieve a socially efficient allocation of scarce resources, but scholars such as Baldwin doubt whether IIP can achieve that outcome effectively.[129] Baldwin argues that some of the conditions cited to justify IIP may either decrease social welfare or at least fail to allocate productive resources in the socially optimal fashion that forms the rationale of IIP.[130]

From a theoretical vantage point, scholars have justified IIP in at least two respects. First, they have stressed that newly established industries within a country face higher production costs than those of well-established foreign producers of the same line, who have longer experience and higher skill levels.[131] They argue that, during the temporary period when domestic costs exceed a product's import price, a tariff constitutes a socially desirable method of financing the investment in human resources needed to compete with foreign producers.[132]

One of the high costs incurred by producers in infant industries relates to on-the-job training. IIP advocates say that, in a free market, firms cannot always retain the employees they have trained as other firms can hire them by offering them better wages. Unless the State intervenes to protect firms in infant industries, the firms will not incur the costs of training and recoup them after the training.[133] It does not pay any entrepreneur to enter an infant industry at free-trade prices.[134]

Positive externalities also justify IIP. While costs decline, they must do so in a way that entrepreneurs initially starting the activity do not earn profits fully.[135] Otherwise, States would have no reason to protect their infant industries: If start-up costs are high, but the activity is economic, it pays the entrepreneur to incur those costs and reap full rewards later.[136] In other words, to warrant State's protection or assistance, the activity must have positive externalities that accrue to persons other than those undertaking the activity initially.[137]

4 4 2 Empirical Justifications

For Krueger and Tuncer, the empirical aspects of IIP matter more because any defence of IIP must stand on empirical grounds: Do the long-term benefits justify the short-term costs of starting up an initially high-cost infant?[138] Critics have questioned the empirical likelihood of the economic conditions put forth to justify IIP.[139] Krueger and Tuncer remark that, even if dynamic factors and externalities in an infant industry might warrant that the State intervenes, debaters have not proved that actual infant industries have in fact met those conditions.[140] Indeed, it makes sense to forbid States from adopting IIP measures unless they can produce evidence that foreign competition prevents domestic producers from emerging or establishing themselves.

Krueger and Tuncer devised a simple empirical test for IIP. The test says that costs in (temporarily) assisted or protected industries must at least fall over time faster than costs in non-protected or less-assisted industries.[141] In 1981, a World Bank study affirmed that empirical evidence does not disprove the efficacy of high levels of selective IIP.[142]

Nevertheless, empirical studies on whether and how IIP improves a nation's welfare have failed in the sense that they yield mixed results.[143] They fail because of poor data on the role of IIP and because they run into difficulties in interpreting those data.[144]

129 Baldwin 1969 *The Journal of Political Economy* 295–296.
130 *Ibid* 296.
131 *Ibid.*
132 *Ibid* 296–297.
133 *Ibid* 300.
134 Krueger and Tuncer 1982 *The American Economic Review* 1143.
135 *Ibid.*
136 *Ibid.*
137 *Ibid.*
138 *Ibid* 1142.
139 *Ibid.*
140 *Ibid.*
141 *Ibid* 1143–1144.
142 Westphal "Empirical Justification for Infant Industry Protection" *World Bank Staff Working Paper No. 445* (1981).
143 Harrison "An Empirical Test of the Infant Industry Argument: Comment" 1994 *The American Economic Review* 1090.
144 *Ibid.*

5 CUSTOMS UNIONS, SACU, AND NAMIBIA

5 1 Customs Unions and their Impact

Except when the States deploy IIP through tariffs, customs unions encompass States that have undertaken as a group to eliminate or reduce trade barriers, particularly customs duties, among themselves and to establish a common external tariff. Likewise, Article 29 of the Abuja Treaty provides for a continental Customs Union that erects a common external tariff and that eliminates customs duties, quota restrictions, and other barriers.[145] And, through the CCU, the AfCFTA Agreement seeks to implement the continent-wide customs union envisaged by Article 29 of the Abuja Treaty.[146]

The WTO General Agreement on Tariffs and Trade (GATT) expressly provides for customs unions.[147] Like free-trade areas, customs unions depart from the general regime of WTO law. In terms of the GATT,[148] customs unions constitute an exception to the well-entrenched most-favoured nation rule.[149]

Customs unions primarily aim at shifting sources of supply. They can shift supply to either lower-cost or higher-cost sources, depending on the circumstances.[150]

Most commentators on customs unions speak well of them, and only a few economists, usually with free-trade tendencies, view them with scepticism. Customs unions stand out as a "strange" phenomenon which unites free-traders and protectionists.[151] In fact, the theory of customs union will confuse most people mainly because it combines elements of freer trade with greater protection.[152] This confusion may explain why both free-traders and protectionists advocate for customs unions.[153]

Free-traders and protectionists believe, for different reasons, that customs unions members benefit far more than what they lose in revenues from customs duties. Still, a country may join a customs union and yet become worse off.[154] Viner, who pioneered the theory of customs unions in 1950, said that a customs union benefits its member countries depending on whether the customs union creates or diverts trade.[155] Trade creation shifts supply sources from a high-cost domestic producer to a low-cost producer in a member country; trade diversion shifts supply sources from the lowest-cost producer in a non-member country to a higher-cost producer in a member country. For Viner, creating trade raises the home country's welfare whereas diverting trade lowers it.[156]

For Cooper and Massell, reducing tariffs represents the only source of gains in consumers' welfare that might result from a customs union.[157] They criticise Viner's "free trade" viewpoint as failing to explain why a government would ever prefer a customs union to a non-preferential tariff policy.[158]

145 See also Articles 6(2)(c) – (d) and 78(1) of the Abuja Treaty.
146 See Article 1 of the AfCFTA Agreement (defining "Continental Customs Union" as "the Customs Union at the continental level by means of adopting a common external tariff, as provided by the Treaty Establishing the African Economic Community of 1991").
147 Article XXIV, para 8(a), of the GATT.
148 Article XXIV, para 8, of the GATT.
149 See also Article 78(1) of the Treaty Establishing the African Economic Community (recognising "the exceptional situation of Botswana, Lesotho, Namibia and Swaziland within the [African Economic] Community and their member in the Southern African Customs Union" and agreeing to grant those countries temporary exemption from the full application of certain provisions of the AEC Treaty).
150 Viner *The Customs Union Issue* (2014) [1950] 54.
151 Viner *The Customs Union Issue* xxix.
152 Johnson *The Economic Theory of Customs Union, in: International Economic Integration: Theory and Measurement* (1998) 184–199.
153 *Ibid.*
154 See Krugman, Obstfeld, and Melitz *International Trade* 294-295.
155 Viner *The Customs Union Issue* 53-54.
156 *Ibid.*
157 Cooper and Massell "A New Look at Customs Union Theory" 1965 *Economic Journal* 742–747.
158 *Ibid.*

Some may question the truth of Viner's vista. For one thing, domestic producers also benefit from the levying of customs duties as this practice provides them with the protection they may need against imports from other States. Second, as in Namibia, revenues from SACU may represent the largest source of income, but at the same time the price to pay may be a lack of industrialisation, if not de-industrialisation, in the face of stiff competition from world-class South African exporters.

5 2 Customs Unions cause Greater Damage

The African continent has adopted a four-step linear model of market integration. This model starts from (1) a free trade area, followed by (2) a customs union and (3) a common market, ending with (4) an economic union.[159] It reflects the integration of goods, capital and labour markets as well as monetary and fiscal matters.[160] African States have focused on liberalising tariffs at the level of individual regional economic communities (RECs).[161]

However, this model wrongly assumes that most, if not all, RECs will go through these four stages in that sequence. Actually, in Southern Africa, Namibia, Lesotho, and eSwatini, and South Africa, had a monetary union, and customs union before they all joined SADC.

The logic of that linear model operates in such a manner that States in a free-trade area shoulder less burden or costs than States trading with one another outside of any free-trade agreement or area. It, nonetheless, remains that the deeper the level of economic integration the greater the damage to the domestic producers and industries.

In that logic, customs unions such as SACU harm domestic industries more than a free-trade area. However, Krueger argues that, on welfare grounds, customs unions are Pareto-superior (i.e., better from an economic perspective) than free-trade agreements.[162] But Krueger's argument holds true only if a given customs union "creates trade" as opposed to "diverting it".

Anyway, little doubt exists that a customs union, a monetary union, and a common or single market imply that States relinquish much of their sovereignty and policy space on questions of movement of people, capital and goods; and on issues of international trade, including customs duties. This voluntary loss of sovereignty is a cost in itself, a cost that increases the deeper States integrate economically.

5 3 The Protection of Infant Industries in SACU

SACU stands out as the world's oldest functioning customs union. Established in 1910 and rooted in British colonisation of Southern Africa, SACU offers a wealth of experience in terms of how States can form and manage a customs union. For all those reasons, we surmise that the AU will rely on SACU to shape and mould the CCU. Ironically, however, the AU does not recognise SACU as one of the eight RECs identified as building blocks of the African Economic Community.[163]

SACU protects infant industries. Article 26(1) lays down that Botswana, Lesotho, Namibia, and Swaziland (eSwatini) may, as a temporary measure, levy additional duties on imports from the SACU area to enable their infant industries to "meet competition" from other producers and manufacturers in the SACU area. Bear in mind that, unlike the WTO rules on subsidies, dumping and safeguards measures, the SACU Agreement does not require Member States to prove injury to a domestic industry before they can invoke IIP to shield that industry from foreign competition within the region. Neither do the Abuja Treaty and the AfCFTA Agreement require such proof.[164]

159 See Hartzenberg 2011 *WTO Staff Working Paper* 2. By contrast, Balassa, widely credited with originating this linear model, identified five stages of regional economic integration, namely a free-trade area, a customs union, a common market, an economic union, and complete economic integration. See Balassa *The Theory of Economic Integration* (1962) 2.

160 Hartzenberg 2011 *WTO Staff Working Paper* 2.

161 See *ibid* 20.

162 Krueger "Free Trade Agreements versus Customs Unions" *NBER Working Paper No. 5084* (1995) 4.

163 Hartzenberg 2011 *WTO Staff Working Paper* 2–3. See, however, Article 78(1) of the Abuja Treaty (acknowledging "the exceptional situation" of SACU members within the African Economic Community).

164 See Article 24 of the AfCFTA Agreement and Article 35(4) of the Abuja Treaty.

5 4 Selected Industries in Namibia

It does make sense for Namibia to use tools such as IIP provisions in order to spur self-centred development. On the other hand, Lin argues that IIP must conform to a country's comparative advantage; otherwise the country risks becoming a "long-run nursemaid to sickly infant industries that never mature."[165] Chang disagrees with Lin on this score by countering that a backward economy can simply not acquire new capabilities in a new industry without bucking comparative advantage and actually enter an industry before it has the "right" factor(s) of production.[166]

Three recent cases that came to the fore in Namibia's Supreme Court unveil the impact of SACU and deeper regional integration in the poultry, dairy and insurance industries in Namibia. These cases show that customs unions, even among African countries, can reproduce the negative effects of neoliberal and capitalist policies championed in Western industrialised nations.

5 4 1 Matador: The Dairy Industry

Before the year 2000, Namibia did not restrict dairy imports from South Africa, which cost less than dairy products from Namibia. In 2000, by virtue of Article 26 of the 2002 SACU Agreement, the Namibian government granted IIP to domestic dairy producers by imposing a levy of 42.5 cents per litre on ultra-high temperature (UHT) milk imported into Namibia. In 2007, the government extended the IIP until 2012 when it lapsed.[167]

After the IIP expired, Namibia Dairies – then the only processor of UHT milk in Namibia – could no longer compete with the cheaper South African dairy imports. Thus, in April 2013, the Dairy Producers Association of Namibia (DPA) and Namibia Dairies applied to the Namibian Trade Ministry for another IIP. In the High Court, Clover and Matador – two Namibian dairy importers – objected to the DPA and Namibia Dairies' application on the ground that it violated Article 26 of the SACU Agreement.[168] The matter eventually landed in the Supreme Court of Namibia.[169]

In *Matador*, the High Court ruled in favour of the imports and against the Namibian Trade Ministry. But the judge did not lean on the SACU Agreement (i.e., international law) but on the rules of administrative law (i.e., municipal law): the duty to provide reasons for administrative acts, the rule against bias, the duty to consult, and the duty to apply one's mind to the matter at hand.[170] Besides, after enjoying IIP for eight years, the dairy industry in Namibia has – by definition[171] – matured; and the State could no longer grant any IIP to that industry. In March 2020, the Supreme Court upheld the High Court's decision.

This case illustrates the injury that customs unions can inflict on domestic industries. In particular, Namibia Dairies claimed that it accounted for 50% of the domestic dairy industry,[172] a market share that underlines the injury that industry suffered. As we explained earlier, the impact of imports on market share and prices count among the parameters that determine injury to domestic industry. Furthermore, no parties to the case disputed that imports of South African UHT milk injured Namibia's dairy industry. The *Matador* case also shows that foreign producers can force States to comply with their commitments to SACU by approaching domestic courts under administrative law (domestic law), rather than international law.

5 4 2 SAPA: The Poultry Industry

On 5 April 2013, the Namibian Minister of Trade and Industry imposed IIP measures to protect the nascent poultry industry. The South African Poultry Association (SAPA) and five of its South African members (the applicants) took the Namibian Trade Minister to court, asking the court

165 Lin and Chang 2009 *Development Policy Review* 487.
166 *Ibid* 491.
167 See Republic of Namibia, Government Notice No 245 of 2013.
168 *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry and Others* 2015 (2) NR 477 (HC). Hereinafter "*Matador*".
169 *Minister of Trade and Industry and Others v Matador Enterprises (Pty) Ltd and Others and a Similar Matter* 2020 (2) NR 362 (SC).
170 Zongwe *International Law in Namibia* (2019) 382–383.
171 Article 26(2) of the Southern African Customs Union Agreement, 2002.
172 *Matador* [12].

to set aside the IIP measure on the ground that it violates the SACU Agreement and the 1992 SADC Treaty.

The High Court rejected the case on the basis that the applicants unduly delayed in lodging the application to review the Minister's IIP measure. On appeal, the Supreme Court of Namibia condoned the applicant's late filing.[173] Though the High Court is yet to decide on the merits of the case, the case exemplifies the tensions that arise from customs unions, in this case, the difficulties associated with foreign competition when the State can no longer levy customs duties on imports.

5 4 3 Hollard: Insurance Industry

In June 2018, the Namibian Finance Minister took measures authorising him to compel every registered insurer and reinsurer to cede a percentage of their business to the State-owned reinsurance company. He justified those measures on the basis that they will assist Namibia in building a sustainable reinsurance industry and minimise the extent to which those insurers and reinsurers export reinsurance premiums out of Namibia.

Several major insurance companies challenged the Finance Minister's measures in court, arguing that the impugned measures violate provisions of the Constitution, including the right to administrative justice; the right to property; and the right to carry on any occupation, trade or business.[174] The High Court has not yet decided its merits, but the case offers yet another piece of evidence that deeper integration may injure domestic industries.

The Minister's measures do not expressly constitute IIP, but in their effects they protect the domestic insurance industry and aim at "building a sustainable reinsurance industry" while preventing huge capital flight. To understand the Minister's reasoning, one must keep in mind that, for historical reasons, South African firms (for example, Hollard, Sanlam, Outsurance, and Old Mutual) dominate the insurance industry in Namibia. Consequently, they export their reinsurance premiums to South Africa, depriving Namibia of badly needed capital.

The above three cases, especially *Matador* and *SAPA*, show how foreign producers can use international trade law to force States to comply with their obligations under customs union law and how that customs union law can leave its members defenceless against injuries caused by deeper regional economic integration. These cases also illustrate the uneven developments fostered by neoliberal orthodoxy, through customs union law. Specifically, the cases typify how the benefits of a customs union flow to the industrial centre within that union, just like in those cases they flowed to South Africa within SACU.

6 THE INEVITABILITY OF THE DOMESTIC INJURY BY AfCFTA

6 1 Logical Generalisation

The three cases of *Matador, SAPA,* and *Hollard* show that customs unions and, more generally, deeper regional economic integration can harm domestic industries. But how does the experience involving Namibia and South Africa tell us about the future of the AfCFTA and CCU? Strategists and government officers can make projections from past situations or present circumstances to the future. Seen in this manner, projections amount to some form of generalisations. These generalisations are reinforced by the mechanisms of deep regional integration we described earlier in this article, and not simply by the small sample of cases consisting of *Matador, SAPA,* and *Hollard*. We do not say that these three cases represent the experiences of trading blocs in Africa statistically, but we do affirm that they faithfully portray how SACU affects self-centred development in practice.

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173 *South African Poultry Association and Others v Minister of Trade and Industry and Others* (SA 37/2016) [2018] NASC (17 January 2018).

174 See *Minister of Finance and Another v Hollard Insurance Company of Namibia Limited and 15 Others* (P8-2018) [2019] NASC (28 May 2019).

To buttress the proposition that protecting infant industries boosts self-centred development, evidence from history abounds. Chang adduced such evidence when his research found that, contrary to what they coach developing countries to do today, the now-developed countries such as the UK, the US, and the Netherlands prospered by protecting their infant industries,[175] thus "kicking away the ladder" that they climbed on their way up and preventing other countries from tracing their footsteps. Srinivasan, for his part, narrates how the US steel industry became the world's largest after the US Congress imposed tariffs on the then cheaper British steel.[176] This evidence amply demonstrates that to straightjacket the power of a country to nurture its infant industries – regardless of whether they assume the form of a customs union, a free-trade area, or other forms of international trade – do injure some of those industries and retard the country's self-centred development.

6 2 AfCFTA and IIP

A flagship project of Agenda 2063,[177] the AfCFTA is most probably the next best thing in terms of economic benefits (for example, huge trade volumes and larger financial flows) since States on the continent created the AU itself, but it poses certain dangers. To begin with, the bigger trading nations and the more industrialised countries on the continent will benefit more than smaller AU Member States, who may see their industrialisation efforts set back and their domestic industries hurt. Unless the AfCFTA conceives and formulates a good IIP policy.

Regrettably, though industrialisation and economic development rely on IIP, very few lawyers have delved into that issue. Like most trade-law academics, the AfCFTA Agreement pays scant attention to IIP:[178]

> For the purposes of protecting an infant industry having strategic importance at the national level, a State Party may, provided that it has taken reasonable steps to overcome the difficulties related to such infant industry, impose measures to protect such an industry.

These provisions of Article 24 of the AfCFTA Protocol on Trade in Goods are vague. And vagueness may spell doom for development as it can benefit richer countries.[179] Unlike the SACU Agreement,[180] the AfCFTA does not define "infant industry". Lawyers and policy makers will not know in what circumstances Article 24 does or does not apply.

Nonetheless, the IIP clause empowers the AU to adopt guidelines on how to implement the IIP clause "as an integral part of this Protocol". Hopefully, the framers of the AfCFTA Agreement will remedy the shortcomings of the IIP clause by proposing key guidelines (drawing on the rich IIP literature and the pointers we put forward in this article) and a method to interpret them to overcome the non-binding nature of 'guidelines".

Perhaps, the drafters kept the wording of Article 24 vague on purpose. Member States could view such strategic vagueness as a flexibility designed to afford them policy space to tailor their trade policies to their unique situations. If they approach Article 24 in this fashion, they may object to our critique of the IIP clause as premature and invite us to wait until AU drafters enact those guidelines before we can assess them or predict with certainty that the CCU will fail.

All the same, this objection will not carry the day. First, the thrust of our thesis does not entirely hinge on the IIP clause. Rather, it relies on how neoliberal regionalism impinges on self-centred development. In fact, even as it currently stands, the IIP clause already frames the guidelines by subjecting them to "strategic importance at the national level" and to "reasonable steps to overcome the difficulties" of an infant industry in a manner that curtails the ability of Member States to protect their infant industries and promote self-centred development. Even more, in the unlikely event that the general consensus of opinion held that this article passed judgment on the IIP clause too quickly, that judgment could nevertheless assist AU drafters in

177 See UNECA *CFTA* 3.

178 Article 24(1) of the Protocol on Trade in Goods, AfCFTA. See also Article 35(4), read together with Sub-Article 35(1)(g), of the Abuja Treaty (providing for IIP as follows: "For the purpose of protecting an infant or strategic industry, a Member State may be allowed by the competent organ of the Community, provided it has taken all appropriate reasonable steps to protect such industry, to impose, for the sole purpose of protecting such industry, quantitative or similar restrictions or prohibitions, on similar goods originating in the other Member States for such period as shall be determined by the competent organ of the Community.").

179 Wade 2003 Crisis States Programme Working Paper 9.

180 Article 26(2) of the Southern African Customs Union Agreement, 2002.

crafting the IIP guidelines.

Moreover, even though it qualifies IIP in the sense that the infant industry that a State seeks to protect must "have strategic importance at the national level", Article 24 does not meet the Bastable condition. This omission suggests that IIP enacted in the context of the AfCFTA may decrease welfare in the country enacting it. And, from the wording of its IIP provisions, the AfCFTA Agreement appears to have poorly mixed free-trade and infant-industry protection.

6 3 The CCU will Injure some Domestic Industries in Africa

6 3 1 Crystallising a Centre-periphery Regional Economic Structure

The AfCFTA Agreement paves the way for the CCU. The CCU will serve as the continental customs union. The CCU will injure the domestic industries of certain African countries or Member States. While regional behemoths such as Nigeria, Egypt, South Africa, Ethiopia, Kenya and Angola stand to gain a lot from the CCU, smaller trading nations such as Benin, Namibia, Seychelles, and Lesotho, may not necessarily reap the same fruits from the AfCTA tree.

Generally speaking, the more industrialised a nation the greater the benefit it will derive from the AfCFTA. And the disparities in industrialisation levels in among African countries can be quite stark. Some of the differences in manufacturing performance originate in history. The superiority of one country over others in one branch of production does not inhere in that country's make-up but often only arises from having begun it sooner.[181]

Hopefully, the African Export-Import Bank (Afreximbank) announced in July 2019 a facility worth 1 billion US dollars to assist countries in adjusting to the AfCFTA in an orderly fashion.[182] Concretely, this facility intends to help countries when they suddenly lose significant tariff revenues following their accession to the AfCFTA.[183]

With good reason, many experts have touted the advantages of the AfCFTA for economies on the continent, but they have seemingly not considered that even an African regional economic community can reproduce a centre and a periphery even among African nations,[184] just like capitalism does on the global stage. This omission to consider these effects of the AfCFTA indicates that some experts have not yet realised that the AfCFTA embodies a neoliberal, capitalist project.

6 3 2 The Consequences of Neoliberal Regionalism

As an instance of world capitalism, neoliberal regionalism tends to spawn distinct economic structures, social outcomes, and politics. Most importantly, it sabotages self-centred development. It tends to produce unemployment, underdevelopment, and marginalisation in the periphery.[185]

Driven to some extent through structural adjustment policies (SAPs) and backing from Western donor countries and agencies,[186] neoliberal regionalism hollowed and weakened the ability of States to provide for their population and prompted governments to freeze wages and retrench workers in the public sector.[187] Unsurprisingly, unemployment ensued, forcing many people to fall back on informal-sector strategies for surviving economic hardship.[188]

Evans notes that SADC's neoliberalism exacerbates existing asymmetries and inequalities.[189] In addition, instead of homogenising the economies of Member States, neoliberalism produces

181 Kemp 1960 *Journal of Political Economy* 65.
182 African Export-Import Bank, "Afreximbank Announces $1-Billion Adjustment Facility, Other AfCFTA Support Measures as African Leaders Meet" https://www.afreximbank.com/afreximbank-announces-1-billion-adjustment-facility-other-afcfta-support-measures-as-african-leaders-meet/ (accessed 11-06-2020).
183 *Ibid.*
184 See for example Gathii 2011 *Washington Law Review* 469–470 and 471–472. He praised SACU for resisting the one-sided neoliberal FTA model proposed by the US when, from 2001 and 2004, the two sides were negotiating an FTA.
185 Amin 1974 *Review of African Political Economy* 9–10.
186 For an account that underlines the importance of ideas – as opposed to coercion through SAPs, donor conditionalities, and other mechanisms – for diffusing neoliberal ideas, see Gathii 2011 *Washington Law Review* 424.
187 Evans 2010 *Nokoko* 103 and 113; Söderdaum 2004 *Global Governance* 422–423.
188 Evans 2010 *Nokoko* 103.
189 *Ibid* 102.

uneven development within the region.[190] Söderbaum faults the neoliberal regionalist system for failing to accommodate the interests of the poor, the disadvantaged, and the unemployed who lack the means to compete on a global market.[191]

Gathii explains some of the consequences suffered by developing States engaged in neoliberal regionalism. Those Member States commit to increasing the protections of foreign capital, playing a role that creates tensions with their responsibility as guardians of their citizens' interests.[192] Furthermore, by adopting elements of the so-called "Washington Consensus", RTAs open the markets of developing countries to transnational corporations that proceed to provide and commoditise social services, such as health, education, water, electricity, and waste management.[193] Lastly, because the market, as opposed to the State, provides those services, people in those developing countries become less able to hold the State to account for the quality, affordability, and accessibility of those services.[194]

6 3 3 On the Inevitability of the Industry Injury

According to Rodrik, economists rank second only to astrologers in predicting future events.[195] We do not claim that our prediction will necessarily fare better than those of economists. The "inevitability" of our prediction rests on the past failures of neoliberalism in the field of economic integration.

African countries have a record of implementing regional economic integration initiatives that does not demonstrate that they have seriously committed to integrate economically – a record characterised by "grand schemes" but "weak legal and institutional foundations" for a rules-based application of regional integration.[196] That, in itself, signals that our prediction may have missed the mark.

However, assuming that this time around Member States scrupulously apply the AfCFTA, our point in this article (that the CCU will harm some domestic industries in smaller or less industrialised States) is not merely probable, it is inevitable. Hence, the most sensible question becomes not how seriously the CCU will harm those industries, but how States should prepare for it and organise their response to it.

7 REMEDYING THE REMEDY

Wade says that the experience of the fast-growing economies of China and India exposes policy makers' little understanding of the root causes of economic growth.[197] Today's fast growers began to grow their economies faster well before they grew their trade and even longer before they liberalised it.[198] They have limited their trade liberalisation considering the capacities of domestic firms to compete against imports.[199]

The AfCFTA Agreement's approach to IIP reveals the same sort of superficial economic understanding that Wade laments – an approach wrongly premised on increased imports, rather than shifts in tastes and technological possibilities. Consequently, policy makers unduly stress the necessity to give infant industries a break from imports, instead of carefully planning for those industries to acquire the necessary learning and technology.

7 1 How to Protect Infant Industries Better

Wade also argues that developing countries should replace imports better, not less.[200] Chang[201] and Wade[202] recommend that global rules should allow developing countries to use IIP and subsidies more actively in accordance with their development strategies. Chang commented

190 Harvey *Spaces of Global Capitalism: A Theory of Uneven Geographical Development* (2006) 77.
191 Söderbaum 2004 *Global Governance* 425.
192 Gathii 2011 *Washington Law Review* 425.
193 *Ibid.*
194 *Ibid* 425–426.
195 Rodrik "How Far Will International Economic Integration Go?" 2000 *Journal of Economic Perspectives* 177.
196 Hartzenberg 2011 *WTO Staff Working Paper* 20.
197 Wade 2003 *Crisis States Programme Working Paper* 10.
198 *Ibid.*
199 *Ibid.*
200 *Ibid* 13.
201 Chang *Kicking Away the Ladder* 29.
202 Wade 2003 *Crisis States Programme Working Paper* 15.

that allowing the developing nations to adopt the policies (and institutions) that suit better their conditions and stages of development would enable them to grow faster, as they did in the 1960s and the 1970s.[203]

Wade hits the nail right on the head when he says that protecting domestic industries does not suffice and that developing countries must make protection part of a larger industrial strategy to nurture the capabilities of domestic firms and the rate of domestic investments, in the context of a private sector, market-based economy.[204]

7 2 Infant-Industry Protection 2.0

So how can African States protect their infant industries better? Here again, we agree with Wade when he asserts that trade protection need not be "anti-trade".[205] For Wade,[206] developing-country governments should combine comparative advantage with import substitution, which may include IIP, in a way that generates pressure to upgrade and diversify national production. Whether governments should use import-substitution options (for example, production subsidies and IIP), options based on comparative advantage (for example, deeper involvement with free trade), or combine them will depend on a country's economic circumstances and level of industrialisation.

However, a major shortcoming of the solutions proposed by many scholars of international economic law such as DiCaprio and Gallagher[207] and Wade[208] remains that they mostly conceive them as a response to North-South dynamics. They do not highlight that even developing countries can hurt other developing countries, from the same or different continents, and arrest self-centred development. The AfCFTA and deeper forms of regional integration can indeed result in greater injury to the domestic industries of their Member States by replicating the centre-periphery relationships that typify North-South exchanges.

We recommend that States and policy makers revise their IIP policies along the following lines. First, they must make provisions for the transfer of technology, knowledge, and skills. In actual fact, during their catch-up phase, the now-advanced economies used to resort to IIP to absorb and assimilate modern technology.[209] Melitz argues that the Mill-Bastable test (i.e., IIP) could succeed depending on an industry's learning potential, the speed of learning, and the extent to which States can substitute foreign goods for domestic ones.[210] IIP assumes that practice makes perfect and that a firm can learn from its own experience and that of other firms in the same industry.[211] This recommendation suggests encouraging foreign direct investments (FDIs) and other means of acquiring foreign knowledge as part of their policy to industrialise and allow their industries to become globally competitive.

In the course of technological learning, a protected industry must secure industrial knowledge abroad (in many ways, from licensing, mergers and acquisitions to copying) or come up with its own, which proves costly, time-consuming and often fruitless.[212] For Ozawa, China has demonstrated that attracting FDIs is a more effective and much quicker (virtually instant) means of acquiring modern technology, access to export markets, and export competitiveness than IIP.[213] To jump-start industrialisation, that strategy heavily relies on multinational enterprises (MNEs) – either wholly or jointly foreign-owned – in export-driven and labour-intensive industries.[214]

FDIs can fast-track the protracted three-stage sequence of imports, domestic production, and exports, with technological spillovers flowing to the rest of the domestic economy.[215] By contrast, a protective duty does not guarantee that individual entrepreneurs will invest more

203 Chang *Kicking Away the Ladder* 29.
204 See Wade 2003 *Crisis States Programme Working Paper* 13.
205 See *ibid*.
206 Wade 2003 *Crisis States Programme Working Paper* 14.
207 DiCaprio and Gallagher 2006 *The Journal of World Investment and Trade*.
208 Wade 2003 *Crisis States Programme Working Paper*.
209 Ozawa "The Role of Multinationals in Sparking Industrialization: From 'Infant Industry Protection' to 'FDI-led Industrial Take-off'." 2011 *Columbia FDI Perspectives*.
210 Melitz 2005 *Journal of International Economics* 178–179.
211 Kemp 1960 *Journal of Political Economy* 65.
212 Ozawa 2011 *Columbia FDI Perspectives*.
213 *Ibid*.
214 *Ibid*.
215 *Ibid*.

in acquiring technological knowledge.[216] And many protected industries remained stuck in the import-substitution phase without ever becoming competitive in terms of exports.[217] In fact, Ozawa goes as far as claiming that FDI-based industrial take-off, as practiced by China, renders IIP "obsolete".[218] "The days of infant industry protection are clearly over in the annals of catch-up doctrines," he concludes.[219]

However, given the view we have taken in this article on dependent accumulation, such strategy cannot replace IIP or surpass the quality of IIP in fuelling economic development. Moreover, the Namibian precedent shows that such FDIs do not necessarily lead to domestic ownership of productive assets, as evidenced by the "Namibian" financial industry and by the recent case pitting the Finance Minister against big (mostly South African-based) insurance firms. Last, but not least, not all developing countries have the same institutional capacity as China to absorb and copy industrial knowledge.

Second, policy makers should devise plans to ensure that protected domestic industries do not fall victims to moral hazard. They can ensure this by limiting IIP and tailoring it based on the periodic and measurable results of firms in the protected industries. In fact, governments should condition IIP on the firms meeting improved results.[220]

Only in that manner can the IIP clause of the AfCFTA Agreement form part of a strategy to credibly prop up domestic industries and reap the benefits of customs unions and other deeper forms of regional economic integration. And only in the manner we suggested above, will customs unions and the CCU lay the groundwork for a veritable African economic community through AfCFTA and, eventually, the one Africa that the pioneers of pan-Africanism dreamed of.

216 Baldwin 1969 Journal of Political Economy 298.
217 Ozawa 2011 *Columbia FDI Perspectives*.
218 *Ibid.*
219 *Ibid.*
220 Wade 2003 *Crisis States Programme Working Paper* 15.